Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File Nos. PR-2014-016 and PR-2014-021

CGI Information Systems and Management Consultants Inc.

v.

Canada Post Corporation and Innovapost Inc.

Determination issued
Tuesday, October 14, 2014

Reasons issued
Thursday, October 30, 2014

Corrigenda issued
Wednesday, December 03, 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., amend its debriefing practices and policies to be consistent with the principles identified by the Canadian International Trade Tribunal in the reasons for its determination in File No. PR-2014-006. In addition, the Canadian International Trade Tribunal recommends that Canada Post Corporation 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*.

Further, the Canadian International Trade Tribunal recommends, as a remedy, that Canada Post Corporation and Innovapost Inc. re-evalaute all technical proposals that were submitted by the six pre-qualified bidders, so as to eliminate, as much as possible, all consequences of the evaluators potentially ignoring relevant information in conducting the first evaluation. The Canadian International Trade Tribunal further recommends that such re-evaluation be conducted, to the extent possible, by a new team of evaluators. The Canadian International Trade Tribunal also recommends that the current contracts remain with Accenture Inc., Infosys Public Services Inc. and Deloitte Inc. until such time as the re-evaluation is complete. After the re-evaluation is complete, if the relative rankings of the bidders changes, the Canadian International Trade Tribunal recommends that Canada Post Corporation and Innovapost Inc. either cancel the existing contracts and award contracts in accordance with the results of the re-evaluation or award additional non-exclusive contracts to any bidders ranking in the top three following the re-evaluation.

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 12, 2014
Tribunal Member:	Jean Bédard, Presiding Member
Counsel for the Tribunal:	Elysia Van Zeyl Alexandra Pietrzak
Procurement Case Officer:	Josée B. Leblanc
Acting Senior Registrar Officer:	Haley Raynor
Registrar Officers:	Ekaterina Pavlova Alexis Chénier
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:	Accenture Inc.
Counsel for the Intervener:	Riaz Dattu Patrick Welsh

WITNESSES:

Binu Vijayasankar
Vice-President, Consulting Services
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François Bureau
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STATEMENT OF REASONS

INTRODUCTION

1. This inquiry concerns a Request for Proposal (Solicitation No. 2013-SDL-007) (the RFP) issued by Innovapost Inc. (Innovapost), a subsidiary of Canada Post Corporation (together, Canada Post), on behalf of the Canada Post Group of Companies, for the provision of application development services. The purpose of the solicitation was to enter into a master services agreement with up to three qualified service providers, one of whom would be designated as the agent of record for development factory and testing factory services.

2. This inquiry deals with two complaints made in respect of the same RFP, filed on May 29 (File No. PR-2014-016) and July 10, 2014 (File No. PR-2014-021), 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.*[1]

3. CGI alleged that Canada Post breached Articles 1013(1) and 1015(4) of the *North American Free Trade Agreement*[2] by conducting an unreasonable and biased evaluation of CGI's proposal, breached Article 1015(6) by refusing to provide certain information during the debriefing process and breached Article 1017(1)(p) by destroying certain documents relating to the RFP.

4. As remedies, CGI requested the disclosure of previously undisclosed documents, the cancellation of contracts awarded to Accenture Inc. (Accenture), Infosys Public Services Inc. (Infosys) and Deloitte Inc. (Deloitte) and the re-issuance of the solicitation. CGI proposed a number of remedies in the alternative, such as the re-evaluation of the bids by a new evaluation team in accordance with instructions from the Tribunal, compensation for lost profit and lost opportunity, bid preparation costs, the costs of preparing and filing the complaint and such other relief as appropriate. At the conclusion of his representations at the hearing, counsel for CGI told the Tribunal that he viewed a re-evaluation of the bids as being the appropriate remedy in the circumstances.[3]

5. 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]

6. Accenture was one of the contract awardees in this solicitation, having been designated as the agent of record as a result of the procurement process, and was granted intervener status, on motion, in both complaints.

7. 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. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. *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*].
3. *Transcript of Public Hearing*, 12 September 2014, at 122.
4. S.O.R./93-602 [*Regulations*].

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

9. 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 the relevant material facts and to hear argument, and so informed the parties on July 29, 2014.

10. A public hearing and *in camera* hearings were held on September 12, 2014, in Ottawa, Ontario. CGI called two witnesses: Mr. François Bureau, Director of Consulting Services at CGI, and Mr. Binu Vijayasankar, Vice-President of Consulting Services at 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, as Director, Sourcing Management, for the purposes of the solicitation in issue, Ms. Laura McBride, currently the owner of Lambri Consulting Services but formerly a director at Innovapost and who acted as an evaluator in respect of the RFP, and Mr. Steve Johnston, Managing Director of RFP Solutions Inc., who was retained to act as fairness monitor in this solicitation.

11. 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

12. In order to achieve efficiencies in its operations, Canada Post, on behalf of the Canada Post Group of Companies and with the assistance of Innovapost, embarked on a multi-year transformation project to enter into new market-based contracts to deliver certain services. Innovapost initiated three separate solicitations in accordance with this transformation initiative, including the one at issue in this complaint, which is for application development services. Application development services have been described as services related to the development of software to enable an organization to perform specific IT tasks related to its operations.

13. The intent of this solicitation was to give Canada Post the option to enter into master service agreements with bidders receiving the highest scores, each of whom would be considered a qualified service provider. The top-ranked bidder would be designated as the agent of record. Neither the agent of record nor

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5. The written submissions include CGI's complaint, filed on May 29, 2014, Exhibit PR-2014-016-01, Vol. 1 and Exhibit PR-2014-016-01A (protected), Vol. 2; Canada Post's Government Institution Report (GIR), filed on June 30, 2014, Exhibit PR-2014-016-26A, Vol. 1E and Exhibit PR-2014-016-26B (protected), Vol. 2L; Exhibit PR-2014-016-26C (protected), Vol. 2P; Exhibit PR-2014-016-26D (protected), Vol. 2AA; Accenture's comments on the complaint and GIR, filed on July 18, 2014, Exhibit PR-2014-016-37, Vol. 1G; CGI's comments on the GIR and Accenture's comments, filed on July 28, 2014, Exhibit PR-2014-016-38, Vol. 1G and Exhibit PR-2014-016-38A (protected), Vol. 2AB; Canada Post's additional reply submissions, filed on August 5, 2014, Exhibit PR-2014-016-45B, Vol. 1J and Exhibit PR-2014-016-45A (protected), Vol. 2AB; CGI's reply to Canada Post's additional reply submissions, filed on August 8, 2014, Exhibit PR-2014-016-50, Vol. 1P and Exhibit PR-2014-016-50A (protected), Vol. 2AB; CGI's complaint filed on July 10, 2014, Exhibit PR-2014-021-01, Vol. 1 and Exhibit PR-2014-021-01A (protected), Vol. 2; Canada Post's GIR, filed on August 11, 2014, Exhibit PR-2014-021-17, Vol. 1A and Exhibit PR-2014-020-17A (protected), Vol. 2A; CGI's comments on the GIR, filed on August 27, 2014, Exhibit PR-2014-021-25, Vol. 1B; Canada Post's comments on its revised position, filed on September 9, 2014, Exhibit PR-2014-021-28, Vol. 1C.

6. S.O.R./91-499 [*Rules*].

the qualified service providers would be guaranteed an exclusive contract or a particular volume of work; however, they would be permitted the opportunity to bid on further services, as required by Canada Post. CGI estimated that the master service agreement has an annual value of between $20 million and $35 million for the agent of record and between $5 million and $10 million for the other qualified service providers.

14. Six potential suppliers, including CGI, were qualified and eligible to bid on the RFP. In April 2013, a draft of the RFP was distributed through MERX[7] as a "Request for Comment" to the six pre-qualified bidders. Between April and May 2013, Canada Post held four separate meetings with each of the six pre-qualified bidders to solicit their feedback on (i) the statement of requirements, transition and service delivery model; (ii) the pricing/evaluation and selection process; (iii) governance/service level requirements; and (iv) the master service agreement.

15. Canada Post indicated that it took into account the feedback that it received from each of the pre-qualified bidders and issued the RFP on June 28, 2013.[8]

16. After the issuance of the RFP, each of the six pre-qualified bidders participated in additional meetings with Canada Post, at which time they were given a further opportunity to provide comments and ask questions on a range of topics, including assumptions, additional information needed for the preparation of bids, provisions in the RFP that seemed ambiguous or inconsistent or that otherwise required clarification. Canada Post indicated that it revised the RFP on the basis of these meetings.[9]

17. A final version of the RFP was published on July 31, 2013.[10] The closing date for the RFP was August 23, 2013.

18. After bids were received, the evaluation process involved the following stages:[11]

- Stage 1: Evaluation of mandatory requirements
- Stage 2: Evaluation of rated requirements
- Stage 3: Evaluation of oral presentations and potential shortlisting of proponents
- Stage 4: Due diligence and site visits
- Stage 5: Evaluation of pricing response
- Stage 6: Overall ranking and final selection

19. Each proposal was first reviewed for compliance with the mandatory requirements. If it met the mandatory requirements, the proposal was then subjected to the evaluation of rated requirements. The only elements of the RFP that were scored were the technical proposals, the strategic oral presentations and the tactical oral presentations. Together, the technical proposal and the oral presentations accounted for 60 out of 100 total possible points. The pricing proposal accounted for the remaining 40 possible points.[12]

7. Canada's electronic tendering service.
8. Exhibit PR-2014-016-01A (protected), exhibit 1, Vol. 2A at 136.
9. Exhibit PR-2014-016-26A at para. 38, Vol. 1E at 138.
10. *Ibid.*
11. Exhibit PR-2014-016-26B (protected), Vol. 2L at 274.
12. Exhibit PR-2014-016-26A at para. 16, Vol. 1E at 133.

20. Only proposals scoring at least 40 of the total possible 60 points for the technical proposal and the presentations would be evaluated at Stage 4 and following. Only three bidders achieved the minimum 40 points; therefore, Innovapost exercised its right, which is provided for in subsection 4.4.3.2 of the RFP, to reduce the pass/fail threshold by 5 points. After doing so, five of the six bidders progressed to the subsequent evaluation stages.[13]

21. Following the technical evaluation, bidders were required to make tactical oral presentations and strategic oral presentations, following which site visits were made by Canada Post officials as part of the due diligence process.

22. After the site visits, Innovapost made what it characterized as "minor adjustments" to the scores of two bidders,[14] on the basis of subsection 4.4.4.2 of the RFP.[15] After the evaluation of the technical proposals, the oral presentations and the site visits, the pricing proposals were then considered.

23. Canada Post retained the services of a consultant, Mr. Johnston, to act as a third-party fairness monitor throughout this procurement process.[16] Mr. Johnston 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 . . . ."[17]

Contract Award and Debriefing

24. On the basis of the evaluation as a whole, the top three bidders (Accenture, Deloitte and Infosys) were recommended for contracts, and an agent of record (Accenture) was selected.[18] CGI was informed on February 20, 2014, that it had not scored high enough to be one of the three recommended bidders.[19]

25. On March 4, 2014, CGI sent an e-mail to Canada Post requesting a debriefing, in response to which it was informed that debriefings would be arranged towards the end of March.[20]

26. A follow-up letter was sent by CGI to Canada Post on March 13, 2014, indicating that it sought to know, among other things, ". . . the relevant characteristics, advantages and disadvantages of both CGI's proposal and the proposals that were ultimately selected, the evaluation criteria and methodology employed and the price and technical score of the winning bids."[21] This letter also stated CGI's position that it was entitled to ". . . a clear indication of the reasons for which CGI did not obtain the maximum points needed for all evaluation criteria."[22] Canada Post responded on March 18, 2014, that CGI would be provided with ". . . information that is pertinent to the reasons for not selecting [its] bid and the relevant characteristics and advantages of the selected bids . . . in accordance with Article 1015(6)(b) of Chapter 10 of NAFTA"[23] and

13. *Ibid.* at para. 41, Vol. 1E at 138.
14. *Ibid.* at para. 42, Vol. 1E at 138-39.
15. Exhibit PR-2014-016-45B at para. 23, Vol. 1J at 15-16.
16. Exhibit PR-2014-016-26B (protected) at paras. 65-76, Vol. 2L at 22-27.
17. *Ibid.*, tab 3A, Vol. 2N at 29.
18. Exhibit PR-2014-016-01, exhibit 6, Vol. 1 at 155.
19. *Ibid.*, exhibit 8, Vol. 1 at 158.
20. *Ibid.*, exhibit 9, Vol. 1 at 160.
21. *Ibid.*, exhibit 10, Vol. 1 at 162.
22. *Ibid.*, exhibit 10, Vol. 1 at 162.
23. *Ibid.*, exhibit 11, Vol. 1 at 166.

that "[a]s you are no doubt aware, this requirement, though, is subject to the provisions of Article 1015(8) of Chapter 10 of NAFTA."[24]

27. Officials from Canada Post and Innovapost met with officials from CGI on April 28, 2014.[25] At this debriefing, Canada Post officials read from prepared notes and provided a high-level summary of CGI's scoring, but did not provide CGI's scoring on a requirement-by-requirement basis. When Canada Post was asked why it had not provided the requirement-level scoring to CGI, Canada Post indicated that it was "not pertinent" to CGI's understanding of the result.[26]

CGI's Objection and Complaints

28. On May 9, 2014, CGI sent a letter to Canada Post outlining its objection. In this letter, CGI took issue with the limited amount of information that was disclosed by Canada Post at the debriefing, alleging that this constituted a breach of Article 1015(6) of *NAFTA*. CGI also alleged violations of Articles 1013 and 1015 in regard to what, it claimed, was a flawed evaluation of its proposal. In particular, CGI stated that "Canada Post evaluators did not apply themselves in evaluating CGI's bid, ignored vital information provided in CGI's bid, wrongly interpreted the scope of requirements that were to be taken into consideration with respect to the evaluation criteria, based their evaluation on undisclosed criteria and have otherwise not conducted the evaluation in a procedurally fair way."[27]

29. On May 14, 2014, Canada Post informed CGI of its decision not to re-evaluate the proposals.

30. On May 29, 2014, CGI filed its complaint with the Tribunal, alleging the following breaches: Article 1015(6)(b) of *NAFTA* due to Canada Post's failure to disclose certain documents or information as part of the debriefing process; and Articles 1013(1) and 1015(4) in respect of the evaluation of CGI's proposal. CGI claimed that the evidence shows a systemic failure on the part of Canada Post to follow the published evaluation plan, including a pattern of improper application and misapplication of the evaluation criteria. CGI has pointed to a number of specific sections of the RFP where, it claims, it should have been awarded full points and alleges that, in failing to award full points, Canada Post has misapplied the evaluation criteria, based its evaluation on undisclosed criteria or unreasonably interpreted the contents of CGI's bid. CGI also requested the production of certain documents relating to the scoring and evaluation of CGI's bid responses (the motion for production).

31. On June 5, 2014, the Tribunal informed the parties that the complaint had been accepted for inquiry, pursuant to subsection 30.13(1) of the *CITT Act*, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Regulations*.

32. On June 18, 2014, Accenture sought leave of the Tribunal for intervener status. On June 20, 2014, Canada Post informed the Tribunal that Accenture, Deloitte and Infosys had entered into contracts. Accenture's request for intervener status was granted by the Tribunal on June 24, 2014.

33. On June 24, 2014, after receiving and considering submissions from both parties, the Tribunal granted the motion for production in part.[28]

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24. *Ibid.*, exhibit 11, Vol. 1 at 166.
25. *Ibid.* at paras. 81-82, Vol. 1 at 29-30.
26. *Ibid.* at para. 86, Vol. 1 at 30-31.
27. *Ibid.*, exhibit 4, Vol. 1 at 146.
28. Exhibit PR-2014-016-022, Vol. 1E at 86.

34. On June 30, 2014, Canada Post filed a GIR with the Tribunal in accordance with rule 103 of the *Rules*. Also on June 30, 2014, Canada Post produced most of the documents that were required under the production order; however, Canada Post also notified the Tribunal that certain documents, including the evaluators' individual scoring sheets, no longer existed, as they had been destroyed in accordance with a Canada Post policy.

35. CGI filed a motion on July 9, 2014, requesting particulars on the destroyed documents and alleged a breach of Article 1017(1)(p) of *NAFTA*. Canada Post provided the requested information and, on July 15, 2014, the motion was withdrawn by CGI.

36. On July 18, 2014, Accenture filed comments on the complaint and the GIR.

37. On July 28, 2014, CGI filed its comments on the GIR and Accenture's comments.

38. The Tribunal received a request on August 5, 2014, from Canada Post for an opportunity to reply to CGI's comments on the GIR. While the Tribunal does not usually grant a government institution the opportunity to reply to comments on a GIR, the Tribunal was of the view that it was warranted in this case, given the new issues and arguments raised by CGI in its response to the GIR. Canada Post filed its reply to the comments on the GIR on August 5, 2014. In the interest of fairness, CGI was given a final opportunity to reply; it submitted its comments on August 8, 2014.

39. On July 10, 2014, CGI filed another complaint in respect of this solicitation, alleging that Canada Post breached its obligations under Article 1017(1)(p) of *NAFTA* by destroying the evaluators' individual scoring sheets, which Canada Post admitted doing in the context of File No. PR-2014-016.

40. On July 15, 2014, the Tribunal informed the parties that it had accepted the complaint for inquiry as File No. PR-2014-021. On July 25, 2014, Accenture requested that it be afforded intervener status in the new complaint proceedings; its request was granted on July 25, 2014. Canada Post filed a GIR in relation to the new complaint on August 11, 2014.

41. The Tribunal decided to join the proceedings in File Nos. PR-2014-016 and PR-2014-021 on August 22, 2014.

42. On August 27, 2014, CGI filed its comments on the GIR in File No. PR-2014-021.

43. An oral hearing took place in these matters on September 12, 2014.

PRELIMINARY MATTER REGARDING THE "DESIGNATED CONTRACT" UNDER NAFTA

44. While all parties appeared to agree that *NAFTA* applies to this solicitation and that the Tribunal has jurisdiction to inquire into the complaint, a few comments in this regard are justified, given Canada Post's contention that the Tribunal would be warranted in dismissing the complaint because Innovapost is not a "government institution."

45. Subsection 30.11(1) of the *CITT Act* provides that a potential supplier may file a complaint concerning any aspect of the procurement process that relates to a "designated contract". In turn, pursuant to section 30.1 of the *CITT Act* and subsection 3(1) of the *Regulations*, a "designated contract" is defined, in relevant part, as any contract or class of contract concerning a procurement of services as described in, *inter alia*, Article 1001 of *NAFTA* that has been awarded by a "government institution" designated by the *Regulations*.

46. The Tribunal is satisfied that these conditions are met. In particular, in addition to the complaint clearly concerning an aspect of the procurement process, and the procured services being of a type described in Article 1001 of *NAFTA*, the Tribunal finds that the contract was awarded by a "government institution" within the meaning of subsection 3(2) of the *Regulations*.

47. Innovapost issued the solicitation and was to enter into contracts with the chosen service providers.[29] Innovapost is not listed in the Schedules of Canada under *NAFTA*, whereas Canada Post Corporation is listed.[30]

48. For the purposes of the *CITT Act* and *NAFTA*, the Tribunal is satisfied that the contract was awarded by Canada Post Corporation.

49. Innovapost is a subsidiary of Canada Post Corporation and forms part of the Canada Post Group of Companies. Its responsibilities at present include ". . . the development, maintenance and operation of the computing and information systems required by the [Canada Post Group of Companies]"[31] and, according to the GIR, it ". . . is an important part of [Canada Post Corporation's] corporate strategy . . . ."[32] Canada Post Corporation holds an 80 percent ownership share in Innovapost (the remainder being held by another subsidiary of Canada Post Corporation).

50. The RFP expressly indicated that the solicitation was conducted on behalf of the Canada Post Group of Companies, which consists of Canada Post Corporation and its three subsidiaries.[33] The procured services were to benefit the Canada Post Group of Companies.[34]

51. The position of "Contracting Authority" with respect to the RFP was held by Ms. Walker, who holds the position of Director, Procurement, at Canada Post Corporation.[35] In addition, personnel from Canada Post Corporation and Innovapost and several subject matter experts were involved in carrying out different aspects of this procurement.[36]

52. The nature of Canada Post Corporation's relationship with Innovapost, its involvement in this procurement process and the fact that it was to be a recipient of services under the resulting contracts support the conclusion that, for the purposes of section 3 of the *Regulations* and subsection 30.11(1) of the *CITT Act*, the solicitation was conducted by Canada Post Corporation. On this basis, the resulting contracts were awarded by a designated government institution under *NAFTA*.[37] This conclusion is consistent with

29. Exhibit PR-2014-016-26B (protected), tab 1, Vol. 2L at 248.
30. Canada Post Corporation is a Canadian government enterprise designated in the Schedule of Canada in Annex 1001.1a-2 of *NAFTA*.
31. Exhibit PR-2014-016-26A at para. 11, Vol. 1E at 132.
32. *Ibid.* at para. 12.
33. Exhibit PR-2014-016-26B (protected), tab 1-A, Vol. 2L at 248.
34. *Ibid.*, tab 1-A, Vol. 2L at 248-51.
35. *Ibid.*, tab 2, Vol. 2L at 324.
36. Exhibit PR-2014-016-26A at para. 45, Vol. 1E at 140.
37. The parties did not make submissions on the applicability of any other trade agreements. In the circumstances, given the Tribunal's established jurisdiction under *NAFTA* and the substantive issues at stake, it is not necessary to decide whether any other trade agreements apply.

the Tribunal's finding in *Canada (Attorney General) v. Symtron Systems Inc.*[38] which was upheld by the Federal Court of Appeal.[39]

53. In the Tribunal's view, a contrary conclusion would require too narrow a view of the obligations of Canada and its various listed institutions under *NAFTA*, particularly in light of Article 1001(4), which provides that "[n]o Party may prepare, design or otherwise structure any procurement contract in order to avoid the obligations of this Chapter." The Tribunal is of the view that, while federal government entities and enterprises must be able to structure their organizations in order to best serve the Canadian public (e.g. by establishing organizations that specialize in establishing and maintaining contracts for various services), the ability to do so in the procurement context must be reconciled with Canada's international obligations, including those that arise from *NAFTA*.

PRELIMINARY MATTER REGARDING THE TIMELINESS OF THE COMPLAINT IN FILE NO. PR-2014-016

54. On May 9, 2014, nine days after meeting with Canada Post for a debriefing, CGI sent Canada Post a letter outlining various problems that it saw with the procurement process and with its particular evaluation (the objection letter).[40]

55. In particular, CGI raised concerns in the objection letter about the level of information that it was provided at the debriefing on April 28, 2014. CGI had requested a wide range of documents as part of this debriefing (including scoring tables, internal criteria, evaluation guidelines, individual scoring sheets, individual scoring notes, etc.) that Canada Post refused to provide. Of particular note, CGI indicated that Canada Post refused to provide CGI with its scoring on a requirement-by-requirement basis, instead providing only overall scores for the various stages of the evaluation. While CGI acknowledged that it had been provided some of the information that it requested during the debriefing process, it specifically alleged that Canada Post failed to meet its obligations under Article 1015(6) of *NAFTA* in failing to provide the information that CGI requested in relation to the evaluation of CGI's proposals, as well as in relation to the proposals of the winning bidders.

56. CGI also used the objection letter to express its position that the evaluation was flawed. In particular, the letter stated that Canada Post's evaluation of sections 6.2, 6.3, 6.4, 6.5 and 6.6 of the RFP in relation to CGI's proposal violated Articles 1013 and 1015 of *NAFTA*. The letter also indicated that ". . . evaluators did not apply themselves in evaluating CGI's bid, ignored vital information provided in CGI's bid, wrongly interpreted the scope of requirements that were to be taken into consideration with respect to the evaluation criteria, based their evaluation on undisclosed criteria and have otherwise not conducted the evaluation in a procedurally fair way."[41] 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.[42] They are not merely a "litany".

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38. [1999] 2 FCR 514.
39. The Federal Court of Appeal held that "[u]nder NAFTA, parties may not design contracts so as to hide them from compliance . . ." and that this requires that "the CITT . . . be able to decide . . . the true contracting agent . . ." on the facts of a case.
40. Exhibit PR-2014-016-01, exhibit 4, Vol. 1 at 143.
41. *Ibid.*, exhibit 4, Vol. 1 at 146.
42. 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.

57. 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 made on a timely basis. In essence, Canada Post argued that it was not sufficient for the objection letter to take issue with almost everything about the procurement process. 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 for filing a complaint with the Tribunal. As such, since CGI had knowledge of its grounds of complaint as of April 28, 2014, or earlier, its complaint filed on May 29, 2014, was time barred.

58. CGI's position was that its complaint was timely. In response to Canada Post's arguments on timeliness and the contents of the objection letter, CGI was of the view that its 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 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. Finally, CGI urged the Tribunal not to define the content of an objection letter in an overly formalistic way.

59. 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.

60. 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.

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

62. In *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)*,[43] 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 . . . ."[44] The Federal Court of Appeal also

43. 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.
44. *Cougar Aviation* at para. 74.

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."[45]

63. 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)*,[46] stated that ". . . the Tribunal should not be formalistic in determining what constitutes an objection . . . ."[47] 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.

64. 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.

65. By way of preliminary comment before analyzing the content of the objection letter, the Tribunal is of the view that Canada Post is correct 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.

66. Furthermore, the Tribunal in its recent determination in File No. PR-2014-006, referring to *Ecosfera v. Department of the Environment*,[48] 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*"[49] [emphasis added].

67. The Tribunal cannot ignore the context in which this objection letter was sent. In particular, the quality of the post-bid debriefing is a factor that should be taken into consideration in assessing the content of the objection letter in regard to this complaint. This is particularly true because the quality of the debriefing is one of the subject matters of this complaint to the Tribunal, and the Tribunal finds, at this stage, that CGI has made credible allegations and shown a strong *prima facie* case in support of its allegations regarding the deficient debriefing, the merits of which will be examined later in these reasons.

68. 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, Canada Post cannot here take issue with the amount of detail in the objection letter because the level of detail known to CGI at the time at which it sent the objection letter, and indeed at the time at which it filed the complaint, was limited because of Canada Post's own actions in refusing to disclose further detail and providing only a high-level summary of CGI's evaluation.

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45. *Ibid.*
46. 2005 FCA 177 (CanLII) [*Flag Connection*].
47. *Flag Connection* at para. 9.
48. (11 July 2007), PR-2007-004 (CITT) [*Ecosfera*].
49. *Ecosfera* at para. 32.

69. 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. The objection process is indeed intended to trigger an informal dispute settlement mechanism between the parties, and one would have expected Canada Post to have taken a more engaged approach in addressing CGI's concerns, which 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 an objection must be meaningful in order for the informal dispute resolution process to work effectively.

70. On the facts of this particular case and for the reasons that follow, the Tribunal finds 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.

71. Upon examination of the objection letter, there is no question that CGI provided a meaningful objection to the level of information that it was provided during the debriefing. CGI's discussion and arguments on this issue were several pages long, provided factual specifics about the information to which CGI believed it was entitled, the legal reasoning underlying its position and pinpointed the provision of *NAFTA* that it believed had been breached.

72. The objection letter clearly shows that CGI took issue with how its proposal was evaluated in respect of sections 6.2, 6.3, 6.4, 6.5 and 6.6 of the RFP. Canada Post pointed out, in argument at the hearing, that this list contains every section of the technical evaluation that was scored and submitted that it is not enough for a bidder to object to everything in a wholesale manner.[50] 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*. For this reason, it is difficult to envision what further specifics CGI could reasonably have been expected to provide in its objection letter.

73. Moreover, there is no reason to doubt the testimony of Mr. Bureau who indicated that, "[e]ven though we attended a two-hour session, when we came out of the debriefing session, we still felt left – we were left with question marks in terms of where and how we lost points in terms of the descriptive material that we received verbally and then in writing at the end of the session. In order for us to, in our minds, answer those question marks, we felt that we needed more detail in terms of the basis for taking points away."[51] To this, Mr. Vijayasankar added "... the debrief ... caused us to think there's a disconnect between the way it was presented and the way it was evaluated ...."[52] Given the circumstances, the Tribunal is of the view that this aspect of the objection letter was sufficiently detailed to enable Canada Post to deal with it.

50. *Transcript of Public Hearing*, 12 September 2014, at 127.
51. *Ibid.* at 16.
52. *Ibid.* at 16-17.

74. While the information provided to CGI at the debriefing[53] identified various bases upon which CGI's points were not maximized in the evaluation of its proposal, it provides very little indication of how many points were lost and why or how those lost points factored into the overall high-level scoring of CGI's technical proposal. Moreover, as became evident after the GIR was filed, a number of the shortfalls that were identified during the debriefing as being reasons for which CGI's proposal did not receive maximum points were factually incorrect; in fact, CGI had not actually lost points for various of the reasons that had been given at the debriefing.[54] 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 with a greater level of precision; however, that is not the situation in this case.

75. The final portion of the objection letter that the Tribunal seeks to address reads as follows:

> . . . evaluators did not apply themselves in evaluating CGI's bid, ignored vital information provided in CGI's bid, wrongly interpreted the scope of requirements that were to be taken into consideration with respect to the evaluation criteria, based their evaluation on undisclosed criteria and have otherwise not conducted the evaluation in a procedurally fair way.[55]

76. In this regard, it is also 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. 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.

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

78. 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 apprehension of bias, in this case, CGI also asked a number of targeted questions about who was involved in the evaluation of its bid. 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 all proposals?
>
> (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 CPC or outside consultants?
>
> (h) Did any have any past employment or any other involvement at any time with the winning bidder or their partners?[56]

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53. Exhibit PR-2014-016-01A (protected), exhibits 7, 15, Vol. 2H at 3, 17 respectively.
54. Exhibit PR-2014-016-38A (protected) at paras. 133, 136, 165, 169, 176, 224, 234, 237, Vol. 2AB at 43, 44, 55, 56, 58, 74-75, 80, 81.
55. Exhibit PR-2014-016-01, exhibit 4, Vol. 1 at 146.
56. *Ibid.*, exhibit 4, Vol. 1 at 148.

79. Leaving aside the merits of CGI's allegations or whether Canada Post was actually required to provide this information to CGI, the Tribunal is of the view that there was enough information in the objection letter, particularly considering the language in (g) and (h) above, 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 technical proposal.

80. 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.

81. In essence, while CGI could not be overly specific, given 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 objection letter was sufficient to constitute a valid objection and, thus, the complaint was filed in a timely manner pursuant to subsection 6(2) of the *Regulations.*

ANALYSIS

82. 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, which, in this instance, is *NAFTA.*

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

- Whether the debriefing received by CGI was in compliance with Article 1015(6);
- Whether the destruction of individual scoring sheets used in this solicitation was a breach of Article 1017(1)(p);
- Whether Canada Post's evaluation of CGI's bid complied with Articles 1013(1) and 1014(4).

84. 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.

Whether the Destruction of Individual Scoring Sheets Amounted to Spoliation

85. 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 the 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.[57]

86. 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. CGI submitted that 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.[58] CGI also pointed to the fact that Canada Post had not been forthcoming about the fact that the scoring sheets had been destroyed.[59]

87. Canada Post denied that the pre-conditions for spoliation were met in this case, 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 had been rebutted by witness testimony and other facts.[60]

88. The parties agree that the leading case on spoliation is the Alberta Court of Appeal's decision in *McDougall v. Black& Decker Canada Inc.*,[61] 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.[62]

89. 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.[63]

90. 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 whether it is reasonable to infer in the circumstances

57. Exhibit PR-2014-016-38 at paras. 86-112, Vol. 1G at 89-97; *Transcript of Public Hearing*, 12 September 2014, at 109-113.
58. *Transcript of Public Hearing*, 12 September 2014, at 109-115.
59. Exhibit PR-2014-016-50 at para. 59, Vol. 1P at 29.
60. Exhibit PR-2014-016-45B at paras. 97-108, Vol. 1J at 35-38; *Transcript of Public Hearing*, 12 September 2014, at 132-35.
61. 2008 ABCA 353 (CanLII) [*McDougall*].
62. *McDougall* at paras. 18, 29.
63. This arises 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.

that it did so in order to affect the litigation.[64] 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

91. CGI specifically requested the individual evaluators' scoring sheets, along with other documents, on May 9, 2014; however, Canada Post refused to provide these documents.[65] CGI reiterated its request in its complaint 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.[66]

92. 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.[67] At the same time, it produced the "RFP Procurement Evaluator Guide",[68] 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.
>
> 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.[69]

93. Following a motion by CGI on July 9, 2014,[70] Canada Post provided details of the destruction of the individual scoring sheets. It reiterated that the individual evaluation notes and scoring sheets were discarded in accordance with its procurement policy. It also stated that the policy does not address how or when the destruction of evaluation notes and scoring sheets should occur. Ms. Walker completed this task when she had available time, which she thought would have been ". . . on a date early in the New Year, *i.e.*, in January 2014."[71] Canada Post also stated that, immediately upon becoming aware of CGI's

64. 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*., 2013 ONSC 3354 (CanLII) at paras. 57-60; *Gutbir v. University Health Network*, 2010 ONSC 6752 (CanLII), at paras. 13-14.
65. The Tribunal notes that the documents provided to CGI were Ms. Walker's and Mr. Johnston's speaking notes from the debriefing and documents with a high-level breakdown of CGI's scores. Exhibit PR-2014-016-01A (protected), exhibits 7, 13, 15, Vol. 2H at 2, 10, 16.
66. Exhibit PR-2014-016-08, Vol. 1E at 22-25.
67. Exhibit PR-2014-016-026, Vol. 1E at 120.
68. Exhibit PR-2014-016-26A, tab 2, exhibit C, Vol. 1E at 399.
69. *Ibid.*, Vol. 1E at 405.
70. Exhibit PR-2014-016-030, Vol. 1G at 14.
71. Exhibit PR-2014-016-032, Vol. 1G at 24.

complaint in respect of a related RFP, on April 24, 2014, in-house legal counsel advised the document custodians of their obligation to protect documents from destruction.[72]

94. The destruction of evidence was 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.[73] The February 2013 date on the document reflected the date of an update to the document.[74] 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* obligation and that she had spoken about the policy to others at Canada Post who were also unaware of any inconsistency.[75]

95. Ms. Walker confirmed that she applied the policy in this case. She characterized this task as being related to the "administrative clean-up" that she performs when she has some downtime and confirmed that she destroyed the scoring sheets around January 2014.[76] She stated that, at that time, she also disposed of any other notes and transitory-type information.[77] Ms. Walker explained at the hearing that, when the consensus scoring methodology is used, the consensus scoring, not the individual evaluations, is considered the final evaluation record.[78]

96. Ms. Walker testified that no complaint was filed by CGI, nor was one expected at the time when she discarded the individual scoring sheets.[79] She further testified that, with any procurement, there is the potential for any bidder to complain to the Tribunal, but that it was not a common occurrence in the sense that it moved from a mere possibility into an actual expectation.[80] Moreover, she testified that she did not expect that an unsuccessful bidder would want individual scoring sheets as part of a debriefing, as she has never been asked for these in the past.[81]

97. Ms. Walker also confirmed that, when Canada Post became aware that a complaint in respect of a related procurement had been filed with the Tribunal, steps were taken to maintain all documentation related to the "transformation RFPs".[82] She testified that Canada Post is contemplating how to change its policy and practices to better meet its obligations further to the Tribunal's recommendation in File No. PR-2014-006.[83]

98. Mr. Johnston testified that he was aware of this policy when he was involved in the procurement and that, in his view, the policy of disposing of individual score sheets did not affect the fairness of the procurement process.[84]

72. *Ibid.*, Vol. 1G at 25.
73. *Transcript of Public Hearing*, 12 September 2014 at 48-49.
74. *Ibid.* at 49.
75. *Ibid.* at 50.
76. *Ibid.* at 51-52.
77. *Ibid.* at 49, 52.
78. *Ibid.* at 50.
79. *Ibid.* at 52-53.
80. *Ibid.* at 52.
81. *Ibid.* at 53-54.
82. *Ibid.* at 54.
83. *Ibid.* at 51.
84. *Ibid.* at 55.

Analysis Regarding Spoliation

99. For the following reasons, the Tribunal finds that spoliation has not been established in this case, on a balance of probabilities.

100. There is no question that the documents were destroyed intentionally and not as the result of an 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.

101. 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 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.

102. 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 the rationale for Canada Post's destruction of documents was based on a view that has now been found to be inconsistent with its *NAFTA* obligations, there is no reason to believe that this was an intentional attempt to influence litigation.

103. In this regard, the Tribunal recognizes that Ms. Walker was not involved in the adoption of the impugned policy and that she only testified to her own understanding of the policy, as the individual 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 surreptitious purpose unbeknownst to Ms. Walker or other employees of Canada Post.

104. 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 failure to Canada Post's unjustifiably restrictive view of the transparency owed to bidders as part of a *NAFTA* debriefing. Nevertheless, however important transparency may be in the procurement context, there is an important difference 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), and nothing in the evidence establishes that the line was crossed in this case.

105. 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 Failure to Disclose Documents During the Debriefing Process is a Breach of Article 1015(6) of NAFTA

106. It is alleged that Canada Post's failure to disclose certain documents to CGI in the context of the debriefing process amounts to a breach of Article 1015(6) of the *NAFTA*. Article 1015(6) requires a procuring entity to provide a supplier whose bid was not selected for a contract award with "... pertinent information ... concerning the reasons for not selecting its tender, the relevant characteristics and advantages of the tender selected and the name of the winning supplier."

107. At the outset of this proceeding, Canada Post took the position that the debriefing that it provided to CGI complied with Article 1015(6) of *NAFTA*; however, subsequent to the issuance of the Tribunal's determination and reasons in File No. PR-2014-006, Canada Post notified the Tribunal by way of letter dated September 8, 2014, that it would provide CGI with the various information that it had requested as part of the debriefing (e.g. its technical evaluation, consensus scoring sheets, briefing notes for the evaluators, etc.). Canada Post also indicated in that letter that it would not be maintaining its position with respect to the production of the documents identified.

108. Canada Post did not expressly admit that there has been a breach of Article 1015(6) of *NAFTA* in regard to the debriefing, instead arguing that the Tribunal needs to consider the fact that the information provided to CGI at this debriefing was somewhat more detailed than what was provided to CGI in the context of File No. PR-2014-006.

109. Although Canada Post backed away somewhat from its initial position on this issue and thus it is not strictly necessary to address this issue in great detail, the Tribunal wishes to highlight a few important points. Because it bears repeating, as was stated in File No. PR-2014-006, the purpose of the obligation under Article 1015(6) of *NAFTA*, particularly in regard to the reasons for not selecting a tender, is as follows:

> ... 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.[85]

110. Thus, for the same reasoning as was expressed by the Tribunal in File No. PR-2014-006, the Tribunal finds that Canada Post breached Article 1015(6) of *NAFTA* in its refusal to disclose information during the debriefing process. While the information disclosed at the debriefing to CGI in this case is somewhat more detailed than what was disclosed in the context of File No. PR-2014-006, it was still not sufficient to provide CGI with a meaningful understanding of where its technical proposal scored lower and why and, in this sense, Canada Post failed to provide the required transparency as to the reasons for not selecting CGI's proposal.

111. Accordingly, CGI's complaint on this basis is valid.

85. *Ecosfera* at para. 32.

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

112. 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*.

113. 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.[86]

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

115. In light of the foregoing, the Tribunal need not provide its analysis of the ground of complaint at issue in File No. PR-2014-021. 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*. Accordingly, Canada Post's failure to do so in this instance constitutes a breach of Article 1017(1)(p) of *NAFTA*. As the Tribunal has explained in previous cases, individual scoring sheets constitute a check that may allow it to verify that the procurement was conducted in compliance with *NAFTA*, and they may provide unsuccessful bidders more insight into the evaluation process and thereby support their confidence that the procurement was carried out with integrity.[87]

116. 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.[88] 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.

117. In these circumstances, the testimonial evidence regarding the evaluation satisfies the Tribunal that the consensus evaluation represents the unanimous view of the evaluators, superseding individual considerations that may have been raised initially by evaluators following their individual review of the technical proposals. While it would have been important to preserve the individual scoring sheets for verification purposes and in order to fully comply with the record-keeping obligations under Article 1017(1)(p) of *NAFTA*, in this particular case, the Tribunal is satisfied that the absence of this documentary evidence is not determinative in assessing the reasonableness of the evaluation as a whole since these records were only the first step in the discussion. Accordingly, the Tribunal also finds that the individual evaluators' scoring sheets would have contributed little to the Tribunal's own after-the-fact assessment of the reasonableness of the evaluation in light of CGI's grounds of complaint. In particular, this

86. Exhibit PR-2014-021-027, Vol. 1C at 132.
87. File No. PR-2014-006 at paras. 62-65.
88. By analogy, see *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 (CanLII) [*Almon*] at paras. 47-49.

means that, even if it were presumed that the individual scoring sheets contained some information unfavourable to Canada Post, such evidence would have been of little probative value overall to the reasonableness of the final consensus evaluation.

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

118. *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.[89] 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 essential requirements specified in the tender documentation.[90] *NAFTA* also prohibits all forms of discrimination in tendering procedures.[91]

119. As it has stated in the past, the Tribunal is of the view that, 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, have based their evaluation on undisclosed criteria, or otherwise have not conducted the evaluation in a procedurally fair way, the Tribunal will generally not substitute its judgement for that of the evaluators.[92]

120. CGI has alleged that evaluators have made all of the above errors in evaluating its proposal, the particulars of which are described below.

Whether Post-site-visit Scoring Adjustments Were in Accordance With the RFP

121. Following the Tribunal's order for the production of documents, CGI's counsel noted some anomalies in the scoring of technical proposals. In order to preserve the confidentiality of these bidders' information, the Tribunal intends to discuss the anomalies in a general way. Of particular concern to the Tribunal is the fact that these bidders were not participants in the inquiry process and may not be aware of the adjustments that were made during the evaluation process.

122. In essence, it became apparent in reviewing the consensus score sheets that the scores for the technical proposal of one bidder (Bidder A) had been adjusted upwards following a visit to its site by Canada Post officials; in another case, another bidder's (Bidder B) score had been subject to a downward adjustment following a site visit.

123. Of particular concern was the fact that Bidder A received relatively low scores on certain sections of its technical proposal, both by individual evaluators and following the consensus evaluation process.

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89. 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 . . . ."
90. 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 . . . ."
91. Article 1008(1) of *NAFTA* provides that "[e]each 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."
92. *Excel Human Resources Inc. (operating as excelITR) v. Department of Public Works and Government Services* (25 August 2006), PR-2005-058 (CITT) at para. 30.

Following site visits, Bidder A's scores were adjusted such that, in some cases, it went from almost no marks to almost full marks on various subsections of its technical proposal.

124. CGI argued that Bidder A received favourable treatment during Canada Post's visit to its off-shore site, allowing the information in its technical proposal to be supplemented with the information obtained by Canada Post officials at the site visit, thus achieving a higher technical score. CGI submitted that its score would have been higher than Bidder A's score in the absence of these adjustments.[93]

125. In Canada Post's written submissions, it argued that adjustments to the scores of technical proposals were expressly permitted under the terms of subsection 4.4.4.2. of the RFP which allowed Canada Post to revisit the scoring of technical proposals on the basis of contradictory information learned during site visits. On this basis, Canada Post argued that the adjustments to scores were not improper bid repair.

126. It is noted that bid repair was not specifically alleged in CGI's complaint. That said, the Tribunal is of the view that it must be addressed as it has important implications to the transparency and fairness of the process as a whole. It also raises concerns about whether the evaluators unreasonably interpreted the terms of the RFP, particularly subsection 4.4.4.2.

Whether Canada Post Engaged in Bid Repair

127. As has been stated by the Tribunal previously, bid repair involves "... the improper alteration or modification of a bid either by the bidder or by the procuring entity after the deadline for the receipt of bids has passed."[94] The prohibition against bid repair is intended to ensure that all bidders are given a fair and equal opportunity in the bid evaluation process.

128. In this case, the Tribunal does not have the benefit of Bidder A's bid, nor does it have a way to determine for itself whether Bidder A's technical proposal actually contained the information that it was said to contain when the adjustments were made. What the Tribunal does have is Ms. McBride's undisputed testimony that, at the site visit, Bidder A did not provide any additional information, beyond what was in the bid that it originally submitted.[95] Accordingly, the Tribunal cannot conclude that Canada Post engaged in bid repair insofar as Bidder A is concerned.

129. This, however, does not mean that the process was without serious defects, as addressed below. Even if the Tribunal were to accept Ms. McBride's explanation of why these scores needed to be adjusted, in order to rectify an earlier error by the evaluators, the Tribunal still has concerns stemming from how this error happened in the first place and the process that unfolded for rectifying it.

Were Adjustments to Technical Scores Expressly Permitted by the RFP?

130. As indicated above, Canada Post argues that it was clear from the RFP that evaluators could revisit the scoring of technical proposals following site visits. It points to subsection 4.4.4.2 of the RFP which provides as follows:

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93. Exhibit PR-2014-016-38A (protected), Vol. 2AB at 16-20.
94. *Raymond Chabot Grant Thornton Consulting Inc. and PriceWaterhouseCoopers LLP v. Department of Public Works and Government Services* (25 October 2013), PR-2013-005 and PR-2013-008 (CITT) at para. 45, citing *Secure Computing LLC v. Department of Public Works and Government Services* (23 October 2012), PR-2012-006 (CITT) at para. 55.
95. *Transcript of In Camera Hearing*, 12 September 2014, at 30.

> 4.4.4.2 Site Visits
>
> For each proposal that has progressed to Stage 4, Innovapost may require, in its sole discretion, a site visit to the Proponent's proposed delivery site or sites.
>
> The purpose of such a visit is to ensure a solid understanding of the Proponent's capabilities. The visit will be coordinated by Innovapost's Contract Authority identified in this RFP. Innovapost reserves the right to amend Section 2.4 RFP Timetable based on availability and scheduled Site Visits.
>
> *Following any such Site Visit, Innovapost reserves the right to revisit the Proposal Response evaluated in Stage 2 and the Oral Presentation response evaluated in Stage 3 based on contradictory information learned during the Site Visit in this Stage 4 (i.e. responses up to, and including, Stage 3 do not match the information gathered during the visit). This may result in an adjustment to the Proponent's Stage 2 and Stage 3 scores and as such could result in elimination*.
>
> If, in its sole discretion, Innovapost decides to cancel this RFP, or issue a new RFP, then there will be no Site Visit.[96]
>
> [Emphasis added, underlining in original]

131. While it is clear that the RFP indicates that the scoring of technical proposals, evaluated at Stage 2 of the RFP process, may be revisited and potentially adjusted following site visits, the Tribunal notes that the ability of Canada Post to make adjustments is limited by the phrase ". . . based on contradictory information learned during the Site Visit . . . ." In addition, the fact that this provision specifically refers to the possibility of elimination from the competition as a result of information revealed during the site visits further suggests that the site visits were intended to be part of the due diligence process, following which downward adjustments could be made to scores where information given during the site visit differed from information in the technical proposal.

132. In regard to Bidder B's proposal, Mr. Johnston testified at the hearing that a downward adjustment to its technical proposal score was based on evaluators' observations at the site visit that ". . . didn't match what they wrote, to the negative."[97] The Tribunal is satisfied that subsection 4.4.4.2 of the RFP expressly permits scores to be revised in such circumstances.

133. At the hearing, Ms. McBride offered an explanation of the reasons underlying the adjustments to Bidder A's scores. In particular, Ms. McBride testified that the information, following the site visit, for which Bidder A was later awarded higher scores was actually contained in Bidder A's technical proposal, but, in essence, the evaluators had not believed it. In fact, she made comments to the effect that it was discounted by evaluators because it seemed like "brochure-ware" that had not been tailored to Innovapost and because it seemed too good to be true.[98]

134. However, Ms. McBride testified that, during the site visit, evaluators' understanding of the content of Bidder A's proposal changed.[99] Ms. McBride indicated that, on the basis of the site visits, evaluators realized that the way in which they initially evaluated Bidder A's technical proposal had led them to a score that was not appropriate based on its actual contents. Accordingly, on the basis of this changed understanding, evaluators revisited the scores that they had awarded to Bidder A and, upon a re-examination

96. Exhibit PR-2014-016-45B at para. 23, Vol. 1J at 15-16.
97. *Transcript of In Camera Hearing*, 12 September 2014, at 37.
98. *Ibid.* at 29-30; *Transcript of Public Hearing*, 12 September 2014 at 136-37.
99. *Transcript of In Camera Hearing*, 12 September 2014, at 31.

of its original technical proposal, awarded the higher marks that it arguably should have achieved in the first instance.

135. Unlike the situation with respect to Bidder B, it is clear from Ms. McBride's testimony that what was learned during the site visit was not information that *contradicted* that which was contained in Bidder A's technical proposal. Rather, it is more accurate to characterize this as information that *confirmed* Bidder A's proposal. Accordingly, subsection 4.4.4.2 of the RFP, as drafted, cannot be relied upon as authority to adjust Bidder A's score.

136. Counsel for Canada Post indicated that the purpose of subsection 4.4.4.2 of the RFP was not to audit the bidders but to gain an understanding.[100] In his remarks, counsel for Canada Post was clearly alluding to the sentence in subsection 4.4.4.2 which provides that "[t]he purpose of such a visit is to ensure a solid understanding of the Proponent's capabilities." This sentence, however, cannot be read in isolation. It must be read within the context of the entire subsection. A more restrictive interpretation is also justified by the fact that, in a "stage" evaluation process, not all bidders get the benefit (such as it is) of a site visit. They never get the possibility of providing the picture that may be worth a thousand words to the evaluators and that could make a significant difference in the evaluators' understanding of the technical proposal. When read in the whole context of subsection 4.4.4.2, the words "solid understanding" are akin to "audit", particularly when they are applied to an evaluation where not all the bidders qualify for a site visit.

137. That said, evaluators must be encouraged to correct errors that they discover during the procurement process.[101] Doing otherwise would impact negatively on the integrity of the public procurement system. These corrections, however, must be made within the confines of the terms of the procurement and in a manner that preserves the integrity of the public procurement system. This may mean that, in certain circumstances, such as this one, there is no quick and simple fix available to resolve the issue that arises. Each situation is different and must be analyzed on its own facts and circumstances.

138. Although the adjustment made to Bidder A's score reflects the correction of an error that Canada Post discovered during the process, this situation highlights a flaw in Canada Post's initial evaluation process. Furthermore, the manner in which the correction was made departs from the normal procedure used in this procurement for consensus scoring. This also raises another serious issue, as it can no longer be said that the evaluation was conducted on the basis of the robust and vigorous consensus process that had been described to the Tribunal at the hearing.

139. Evaluators, in the first instance and prior to the site visits, appear to have come to baseless conclusions as to the content of Bidder A's bid. In the Tribunal's view, this fell short of the standard expected of evaluators.

140. To the extent that information contained in Bidder A's bid seemed unbelievable or too good to be true, the Tribunal would have expected evaluators to have either sought clarification from the bidder before assessing the content of its bid, as could have been permissible under subsection 3.1.4 of the RFP, or in the alternative, given more consideration to the information actually provided in the bid and scored it accordingly, keeping in mind that, to the extent that the evaluators' observations during the site visit turned out to contradict the information contained in the proposal, scores could be adjusted downwards on the basis of subsection 4.4.4.2.

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100. *Transcript of Public Hearing*, 12 September 2014, at 136.
101. *Virtual Wave Inc.* (23 October 2003), PR-2003-035 (CITT). See, also, *Kildonan Associates Inc.* (20 July 2000), PR-2000-004 (CITT).

141. In *Canadian Computer Rentals*, the Tribunal described the standard expected of evaluators as follows:

> . . . suppliers' proposals must also be reviewed with diligence and thoroughness. After all, potential suppliers invest a significant amount of their own corporate resources to try to offer the government the best possible proposals under risky competitive conditions. This, in the Tribunal's opinion, must be recognized by procuring authorities and, as a minimum, be reflected in their review of proposals.[102]

142. Although mistakes do happen sometimes, the fact that the error in this case was admittedly based on assumptions about the bid rather than the bid's actual contents brings into question the integrity of the evaluation process as a whole.

143. As indicated above, the evaluators took steps to correct the error once discovered. On the basis of the evidence heard at the hearing, the Tribunal believes that the persons involved acted in good faith and with a sincere desire to correct what they perceived as an injustice and to do what, in their minds, was the "right thing". The way that they chose to go about it, however, was misguided.

144. The Tribunal has concerns about the fact that Bidder A's scores were changed on the basis of a series of individual discussions, rather than via the full consensus process. It is not reasonable that a score that was unanimously agreed upon after what was described as a robust process for discussion and debate would be modified with a process of any less rigour. This is even more concerning in view of the fact that this truncated procedure resulted in a change to the final ranking and impacted the award of the contracts.

145. Bidder A is somewhat fortunate that this error was discovered and an honest attempt was made by evaluators to rectify it, but other bidders may not have been so fortunate. At least one bidder was eliminated from further consideration after the initial evaluation of its technical proposal. Simply put, this results in the Tribunal having no way of knowing in this case whether evaluators had taken a similar approach to the initial evaluation of other bids,[103] with more or less favourable results for each bidder.

146. Moreover, the Tribunal cannot assess how pervasive the evaluators' attitudes may have been in respect of other aspects of their work, nor what consequences this would have had, if any.[104]

147. Canada Post presented a set of calculations to show how the bidders would have scored with and without the various adjustments to the technical scores.[105] In doing so, it demonstrated that CGI would not have ranked among the top three bidders even if one considered the scores prior to the site visits, the scores after the downward adjustment to Bidder B's bid, or the scores taking into account both upward and downward adjustments.

148. When one considers how the scoring would have played out taking into account only the downward adjustment to Bidder B's score and no upward adjustment to Bidder A's score, Canada Post's calculations indicated that Bidder A would not have ranked among the top three bidders and would not have been awarded a contract. Instead, Bidder B would have ranked among the top three rather than Bidder A.

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102. (3 August 2000), PR-2000-003 (CITT) at 5.
103. For example, one in which they discounted information in the technical proposal that seemed incredible or too good to be true, reflecting an error which could only possibly have been discovered and rectified following a site visit.
104. Given this admitted error in the initial evaluation of technical proposals, the Tribunal is concerned that evaluators may have discounted information contained in other technical proposals that could not have been identified during the site visits and later rectified. Such an error could affect all bidders' scores.
105. Exhibit PR-2014-016-45A (protected), Vol. 2AB at 171-72.

149. The adjustments to bidders' scores created a domino effect that had impacts extending beyond the immediate parties to this inquiry. The fact that CGI's ranking would not have placed it amongst the top three bidders under any of the scenarios presented by Canada Post does little to restore bidders' confidence in the fairness, transparency and integrity of the procurement system. This is an important consideration, particularly in respect of the Tribunal's remedy.

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

150. CGI submitted that Canada Post's evaluation of its technical proposal was not in accordance with the terms of the RFP. In its allegation that the evaluation of its bid was improper in this respect, CGI claimed that the common theme that emerged from the evaluation of the various sub-components of CGI's proposal was that unreasonable deductions were applied in many instances where it did not obtain full marks.

151. The Tribunal agrees with Canada Post that CGI is essentially requesting the Tribunal to re-evaluate the content of its bid.

152. The Tribunal typically accords a large measure of deference to evaluators in their evaluation of proposals. In *Excel Human Resources*,[106] 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."

153. Moreover, in *Joint Venture of BMT Fleet Technology Limited. and NOTRA Inc. v. Department of Public Works and Government Services*,[107] 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".[108]

154. 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.[109]

155. 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 criteria with which CGI took issue, namely, sections 6.2, 6.3, 6.4, 6.5 and 6.6 of the RFP and the various subcomponents of those sections. In many circumstances, Canada Post explained that deductions resulted from a lack of specific details or explanations in CGI's technical proposal. In some situations, it appears that CGI did not understand that Canada Post was looking for a solution that included a certain amount of tailoring to Canada Post and the other companies involved in the procurement.

156. In yet other circumstances, CGI was of the impression when it filed its complaint that points had been deducted for various reasons, based on the information that it was provided at the debriefing. In fact,

106. At para. 33.
107. (5 November 2008), PR-2008-023 (CITT) [*BMT*].
108. *BMT* at para. 25; see, also, *Northern Lights Aerobatic Team, Inc. v. Department of Public Works and Government Services* (7 September 2005), PR-2005-004 (CITT).
109. *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.

points had not actually been deducted for the reasons that had been given, which only became apparent with the explanations provided by Canada Post when the GIR was filed.

157. 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 the various reasons for which CGI did not obtain maximum scores on the rated criteria.[110] Overall, the Tribunal finds that the assessments made were within the evaluators' discretion; indeed, they were based, at times, on long discussions, involving differing opinions, among professionals.[111] Accordingly, the Tribunal finds no basis to interfere with the duly exercised professional judgment of the evaluators.

158. Aside from the findings made in connection with the correction of the evaluation error involving another bidder, the Tribunal is satisfied that there is no direct evidence that the evaluators have breached the criteria set out in *Excel Human Resources*[112] in connection with the specific issues raised by CGI. Therefore, this ground of complaint is not valid.

Whether CGI's Scoring was Tainted by Bias

159. At the outset of this inquiry process, CGI alleged that previous arbitrations and a subsequent divestiture of shares in Innovapost 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. CGI also argued that Canada Post was biased against CGI, based on several observations that it made following the disclosure of documents required by the Tribunal's production order, including that certain evaluators had previously been employed by Accenture and that there seemed to be unusual trends in the consensus scoring process, including one that appeared to favour other bidders and disadvantage CGI.

160. Throughout, Canada Post has denied the existence of any bias, whether on the part of individual evaluators or at an institutional level.

161. There is no question that a duty of fairness applies to the tendering process for federal government procurement contracts. As held by the Federal Court of Appeal in *Cougar Aviation*, this duty of fairness includes a duty of impartiality on the part of the decision-maker.[113] Moreover, although there was some confusion at the hearing in regard to whether the allegations on CGI's part were of actual bias or of reasonable apprehension of bias, the Tribunal notes that the law normally only requires a litigant to establish a reasonable apprehension of bias in order to impugn the validity of administrative action to which a duty of fairness applies, such that a decision may be set aside. As was stated in *Cougar Aviation*, "[a]n insistence on this more demanding standard serves to enhance public confidence in, and thus the legitimacy of, public decision-making."[114] On this basis, the Tribunal will consider whether there is a reasonable apprehension of bias in this case.

110. Exhibit PR-2014-016-26B (protected), Vol. 2L at 54-95.
111. *Transcript of Public Hearing*, 12 September 2014, at 66.
112. *Excel Human Resources* at para. 33.
113. *Cougar Aviation* at paras. 28-30.
114. *Ibid.* at para. 30.

162. In order to determine whether a reasonable apprehension of bias exists, the Tribunal considers the following test:

> [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.[115]

163. The Tribunal also notes that what constitutes a reasonable apprehension of bias will vary depending on the individual facts and circumstances under consideration.[116]

164. CGI points to several factors that indicate a bias against CGI and in favour of other bidders; in particular, Canada Post's transition strategy, the identity of the individual evaluators and certain trends apparent in the consensus scoring, each of which will be assessed in turn.

Canada Post's Transition Strategy

165. In the complaint, CGI alleged that Canada Post adopted a policy of transitioning IT services away from CGI. In support of this assertion, CGI pointed to the following statement made by Canada Post in its annual report:

> 2013 objective
>
> Shift the information technology delivery model to a gain a competitive advantage.
>
> 2013 results
>
> - Following the Group of Companies' 2012 purchase of the remaining shares of Innovapost from CGI and the creation of a shared services delivery organization, the IT transformation initiative focused on the renewal/re-procurement of the IT supply chain.[117]

166. CGI argued that the pervasive and systemic problems identified in its complaint with respect to Canada Post's evaluation of its bid suggested that Canada Post's renewal/transformation initiative was used to exclude CGI as a service provider.

167. In response, Canada Post noted that the statement relied on by CGI makes no reference to an intention to move away from CGI as a supplier or to adopt a policy against CGI. Instead, Canada Post's view was that the passage, when read in context, simply described a desire to gain a competitive advantage through renewal and a competitive procurement process, and summarizes the costs savings that were achieved through that process.[118]

168. In refusing to order Canada Post to produce documents specifically related to the transformation initiative, the Tribunal found that the above-noted passage in the annual report cannot reasonably be construed, in and of itself, to indicate a bias or an apprehension of bias against CGI.[119]

169. Moreover, as was noted in *Almon*, one of the purposes of the procurement process is to enable the government to obtain "... quality goods and services at minimum expense."[120] Nothing prevents a

115. *Prudential Relocation Canada Ltd.* (30 July 2003), PR-2002-070 (CITT).
116. *Cougar Aviation* at para. 31.
117. Exhibit PR-2014-016-01, exhibit 17, Vol. 1 at 192.
118. Exhibit PR-2014-016-26B (protected) at paras. 107-109, Vol. 2L at 34-35.
119. Exhibit PR-2014-016-022 at para. 7, Vol. 1E at 91-92.
120. *Almon* at para. 23.

government entity in this context from re-organizing its services, or its service delivery model, so as to maximize efficiencies.

170. As to whether this corporate strategy was intended to exclude CGI, the Tribunal notes that CGI was not precluded from participating in the competitive process. Moreover, on this point, it is relevant to note that Canada Post exercised an option clause in the RFP to reduce the pass score by 5 marks so that CGI could be included in next stage of the evaluation process, which included consideration of the price proposals.[121] To the extent that a strategy existed on the part of Canada Post to oust CGI as a supplier, one would not have expected Canada Post to exercise this option.

171. Moreover, the uncontroverted testimony of Ms. McBride was that CGI was a "preferred partner" of Canada Post and that work was directed towards CGI on a regular basis.[122]

172. On the issue of whether a past arbitration has influenced Canada Post to steer its business away from CGI, the Tribunal notes that CGI and Canada Post have an ongoing contractual relationship in regard to multi-channel print insertion and stationery that began in 2011, after conclusion of the arbitration, and that continues at least until the end of 2016.[123]

173. Accordingly, the Tribunal finds that there is no evidence to support CGI's contention that Canada Post's pre-determined strategy was to transition services away from CGI.

Identities of Evaluators

174. CGI alleged that the scoring of its technical proposal may have been improperly influenced by the fact that a number of the evaluators had, at some point in their professional careers, worked for Accenture.

175. The Tribunal notes that no positive evidence was presented in support of this assertion that the evaluators' past employment influenced their evaluation of CGI's or any other bidder's proposal. In fact, this allegation was directly refuted with the testimony of Ms. McBride who stated that her former employment with Accenture did not affect her approach to the RFP or her evaluation of the technical proposals.[124] She was not cross-examined on this point.

176. Indeed, CGI's own witness testified that he had also worked for Accenture at one point in his career and that this previous employment relationship in no way influenced his loyalty to his present employer.[125]

177. In addition, as Accenture pointed out in its closing submissions, the individuals who were formerly employed by Accenture were casualties of layoffs. For this reason, it argued that a reasonable person would not be of the view that evaluators would favour Accenture in the evaluation process.[126]

178. Moreover, the Tribunal is satisfied that a reasonable amount of time has elapsed since any of these individuals have worked for Accenture[127] and that, accordingly, this factor alone does not give the Tribunal reason to question their ability to carry out an unbiased evaluation.

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121. *Transcript of Public Hearing*, 12 September 2014, at 132; Exhibit PR-2014-016-01 at para. 34, Vol. 1 at 14; Exhibit PR-2014-016-26B (protected) at para. 114, Vol. 2L at 36.
122. *Transcript of Public Hearing*, 12 September 2014, at 72.
123. Exhibit PR-2014-016-26B (protected) at para. 111, Vol. 2L at 35.
124. *Transcript of Public Hearing*, 12 September 2014, at 72.
125. *Ibid.* at 25-26, 29-30.
126. *Ibid.* at 152.
127. The most recent departure from Accenture was identified by CGI as being in 2008, as per Exhibit PR-2014-016-38A (protected) at para. 46, Vol. 2AB at 16.

179. Furthermore, the Tribunal also heard witness testimony regarding Canada Post's conflict of interest policies and procedures, which appear to have been followed in this procurement.[128] The importance of avoiding conflicts of interest was specifically addressed in the evaluator's guide, which all evaluators were required to read. Evaluators were also required to attend a workshop in which conflict of interest matters were discussed. Where a conflict or potential conflict of interest was identified, the individual was required to complete a form that was sent to Human Resources which was then reviewed by departmental officials.

180. Accordingly, the Tribunal is not persuaded that the identity of the evaluators or their previous employment had any impact on the solicitation at issue and finds accordingly.

Differential Between Average and Consensus Scores

181. CGI claimed that the GIR and documents provided by Canada Post with the GIR, including consensus scoring sheets, disclosed prejudice against CGI. In particular, CGI remarked that there was a downward trend in CGI's consensus scoring and an upward trend in other bidders' consensus scoring, when compared to the averages for individual scores, and argued that this was evidence of prejudice.

182. 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. Instead, 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 a 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 other bidders' scores tended to be higher was not reflective of any prejudice against CGI or in favour of other bidders.

183. The Tribunal accepts Canada Post's explanation of this differential between the individual scores and the consensus scores. Although it may have been helpful to have the individual worksheets of evaluators in order to more fully assess this issue, the Tribunal recognizes that these are but one part of the evaluation picture. Although the Tribunal emphasizes that it is important that individual evaluation worksheets and notes be kept, and although they may have provided some insight into the process as a whole and into the evaluation of CGI's bid in particular, the Tribunal acknowledges that, in this procurement, these are a starting point for further discussions. It is reasonable that these further discussions and the scores that result from these further discussions will not always reflect the averages, or medians for that matter, of individual scores.[129]

184. Accordingly, the Tribunal finds that the variance between the individual scores and consensus scores is not, in this case, indicative of any prejudice against CGI.

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128. *Transcript of Public Hearing*, 12 September 2014, at 43-47.

129. 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."

Conclusion on Reasonable Apprehension of Bias

185. 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. However, the evidence cited by CGI in support of its allegation of a reasonable apprehension of bias can appropriately be described as sparse and largely speculative.

186. Tenable explanations have been provided by Canada Post in regard to the reasons for which CGI achieved the scores that it did. Likewise, reasonable explanations were provided by Canada Post in regard to purported trends in the consensus scoring exercise. It is not enough that some of the evaluators, at one point in their careers, were employees of one of the winning bidders, nor is it sufficient to base allegations of reasonable apprehension of bias on the simple fact that Canada Post wanted to re-procure certain services in order to maximize efficiencies.

187. After reviewing both parties' submissions and the evidence, the Tribunal finds that an informed person, viewing the matter realistically and practically and having thought the matter through, is unlikely to conclude that Canada Post and the evaluators selected by Canada Post would not be capable of evaluating the bids fairly. Accordingly, the Tribunal finds that the test for reasonable apprehension of bias has not been met in the present circumstances.

Whether the RFP Required the Use of a Single Evaluation Team

188. CGI argued that Canada Post's use of different evaluation teams was a breach of the terms of the RFP and thus in contravention of Article 1015(4) of *NAFTA*. It argues that section 4.2 of the RFP contemplates there being a single evaluation team that will evaluate all aspects of the bids. CGI also argues this is problematic because other sections of the RFP contemplate a revisiting of these scores at later stages of the evaluation process (in particular, following oral presentations and site visits).

189. In response, Canada Post argued that there was nothing in the RFP preventing its use of different subgroups of the evaluation team in the evaluations of the technical proposals, the oral presentations and the site visits. Furthermore, Canada Post claims that it selected the members of the evaluation team carefully in order to ensure the continuity required to comply with the evaluation plan disclosed in the RFP.

190. At the hearing, Ms. Walker testified as to the importance of selecting a large evaluation team that included individuals with the right expertise, such as subject matter experts in particular areas.[130] For certain sections, it "made sense" to have particular people involved (such as, for example, a testing expert if the matter was related to the testing requirements), although not all people from the larger group necessarily needed to be involved in every aspect of the evaluation. She also confirmed that the same sub-groups of evaluators were used for the evaluation of all bidders' proposals.[131]

191. The Tribunal finds that Canada Post's approach to the structure of its evaluation team was permissible and reasonable.

192. Section 4.2 of the RFP reads as follows: "[a]n evaluation team will evaluate the Proposals". Although, on one hand, the RFP does state "evaluation team" in the singular, the Tribunal is not willing to read in a prohibition on using individual sub-groups who are part of this team for certain specific aspects of the evaluation process.

130. *Transcript of Public Hearing*, 12 September 2014, at 61-62.
131. *Ibid.* at 63.

193. In the Tribunal's view, neither this section nor any of the other provisions in the RFP spoke to the composition of the evaluation team, nor did they necessarily imply that the same evaluators would form that team. The Tribunal does not find unreasonable Canada Post's view—that the composition of the evaluation team could vary at different steps of the process—in light of these provisions.

194. To interpret the phrase "evaluation team" as CGI suggests would require Canada Post to use the same large team for all areas of the evaluation and subject matter experts for all areas of the evaluation, even those areas falling outside the subject matter expert's expertise. There is no indication in the RFP that this restriction was envisioned. Moreover, this would be both impractical and costly.

195. Accordingly, this ground of CGI's complaint is not valid.

REMEDY AND COSTS

Remedy

196. In summary, CGI's complaint is valid in part. Specifically, Canada Post breached Article 1015(6)(b) of *NAFTA* due to its failure to disclose certain documents or information as part of the debriefing process and Article 1017(1)(p) by destroying documents relevant to this procurement process. Moreover, the Tribunal has found that the evaluators ignored vital information in their initial evaluation of the technical proposals. For this reason, the Tribunal is concerned that there may be other technical proposals that were not initially evaluated in a reasonable manner.

197. In its complaint in File No. PR-2014-016, CGI requested that the contracts awarded to Accenture, Deloitte and Infosys be cancelled and that Canada Post re-issue the solicitation. CGI also requested a number of remedies in the alternative, such as re-evaluation of the bids by a new evaluation team in accordance with instructions from the Tribunal, compensation for lost profit and lost opportunity, bid preparation costs and the costs of preparing and filing its complaint. At the conclusion of the hearing, CGI submitted that, due to the serious deficiencies in this procurement process, the appropriate remedy would be for the Tribunal to order Canada Post to recommend that all bids be re-evaluated with a new and impartial evaluation team.[132]

198. In respect of its complaint in File No. PR-2014-021, CGI requested that the Tribunal recommend that Canada Post develop and implement procedures or policies designed to ensure that complete documentation is maintained for procurements, as required by the provisions of Article 1017(l)(p) of *NAFTA* and the parallel provisions under other applicable trade agreements. CGI also requested, in its complaint, that the contracts awarded pursuant to the solicitation be cancelled and that the solicitation be re-issued in a form that conforms to the requirements of *NAFTA* and other applicable trade agreements. In the alternative, as a remedy for the breach of *NAFTA* alleged in File No. PR-2014-021, CGI requested compensation, bid preparation costs and the costs of preparing and filing its complaint.

199. Canada Post submitted that the appropriate remedy for a breach of Article 1015(6) of *NAFTA* would be to recommend a change in Canada Post's practices going forward, as the Tribunal did in File No. PR-2014-006.[133] Canada Post also urged the Tribunal, in recommending a remedy, to consider that Canada Post's actions resulted from a differing interpretation of the obligations under *NAFTA* and that they were not indicative of bad faith. Canada Post also suggested that public policy might be considered by the

132. *Ibid.* at 122.
133. *Ibid.* at 140.

Tribunal, in the sense that CGI put forward bold allegations regarding bias, but did so without sufficient supporting evidence.[134]

200. Finally, Canada Post submitted that, even if the evaluation of the technical proposals was improper, there should be no remedy because any breach would not have impacted CGI's standing vis-à-vis the other bidders. In other words, CGI would not have been among the top three bidders even if it had received full marks on the particular items of its technical proposal with which it took issue.

201. Accenture submitted that setting aside the results of the procurement process would be an overly broad remedy. As an alternative, it proposed a graduated approach in the event that a breach was found by the Tribunal. Accenture suggested that it would be appropriate to recommend that Canada Post re-evaluate CGI's technical proposal only. If, following this re-evaluation, CGI was determined to be one of the top three bidders, Canada Post should be required to re-evaluate the bid of the third ranked winner of the initial procurement to determine whether it retains its position or whether CGI scores higher.[135]

202. 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 was prejudiced, (4) whether the parties acted in good faith and (5) the extent to which the contract was performed.

Seriousness of Deficiencies

203. The Tribunal agrees with CGI that the failure to provide an adequate debriefing and the destruction of documents relevant to the evaluation in a procurement process is serious due to the impact that this has on the integrity and efficiency of the competitive procurement system. In particular, 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.[136]

204. This inquiry demonstrates that the loss of part of the evaluation record creates difficulties, both procedural and substantive, in the Tribunal's inquiry into a complaint. Although it was not the case here for reasons already explained, the loss of relevant documents and information can potentially prevent the procurement authority from reasonably justifying its decisions and the Tribunal from determining what has transpired in the procurement process. As such, the loss of relevant 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 to the government, the bidders and, ultimately, the taxpayers.

Degree to Which the Complainant and all Other Interested Parties Were Prejudiced

205. In this case, CGI was prejudiced by Canada Post's breaches with respect to the insufficient debriefing and 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 that CGI correctly

134. *Ibid.* at 141.
135. *Ibid.* at 149.
136. *Almon* at para. 23.

considered integral to understanding what had happened in the evaluation, had already given it cause for concern.

206. Had complete and accurate information regarding the evaluation and the reasons for deducting points been available to CGI at the 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 missing, notably as it had to bring an additional complaint when this fact came to light. However, the breach of Article 1017(1)(p) of *NAFTA*, which occurred after the award of the contract, would have had no impact on CGI's ability to participate in the procurement process or its capacity to be awarded the contract.

Degree to Which the Integrity and Efficiency of the Competitive Procurement System was Prejudiced

207. The Tribunal finds that the facts disclosed in this inquiry give rise to significant concerns in regards to the integrity and efficiency of the competitive procurement system. Although the Tribunal does not question the good faith of the evaluators in this instance, the Tribunal finds that they jumped to a negative conclusion about the contents of a proposal based on nothing other than a sense of disbelief. This is tantamount to the evaluators having ignored information that they later admitted was clearly contained in Bidder A's bid. Although this error was discovered and rectified in respect of that bidder's evaluation, the fact remains that this has given rise to the Tribunal being concerned about the possibility that there may have been errors in the evaluation of the technical proposals of the bidder that did not progress to the site visit stage of the evaluation. Furthermore, the fact that the evaluators have ignored information that was apparently clearly contained in a bid raises serious concerns that the behaviour displayed by the evaluators in that situation was pervasive throughout the process and that other similar errors may have gone undetected. Finally, the manner in which the mistake was fixed raises a number of concerns already discussed in this statement of reasons.

208. It must also be noted that CGI's complaint and its complexity were tied to Canada Post's lack of transparency. Had Canada Post provided a greater level of specificity and been more open with CGI from the outset in the regard to the evaluation of its technical proposal, this would have helped narrow the range and complexity of issues to be addressed by the Tribunal in this proceeding.

Whether the Parties Acted in Good Faith

209. The Tribunal notes that there is no evidence that Canada Post or any other party acted in bad faith. Quite to the contrary, Canada Post actively took steps to try to ensure the fairness and integrity of the procurement process as a whole, namely, in acquiring the assistance and advice of a fairness monitor and in trying to remedy the consequences of an apparent error in evaluating technical proposals in the first instance. However, doing so provided no guarantees that the procurement would be impervious to breaches.

Extent to Which Contract has Been Performed

210. The Tribunal acknowledges that substantial investments have been made by the parties that were ultimately awarded the contracts, including Accenture. At the hearing, the Tribunal heard *in camera* witness testimony regarding the extent to which the contracts have been implemented and the significant operational challenges that Canada Post Corporation and Innovapost would face if the contracts were cancelled and re-tendered.[137]

137. *Transcript of In Camera Hearing*, 12 September 2014, at 44-47.

CONCLUSION

211. The deficiencies identified in this process bring into question the accuracy of all bidders' evaluations, including the bidder that was not initially granted a site visit and those bidders that did not take part in this inquiry process. The process used to change the final scores was not consistent with the consensus scoring process used for evaluating and ranking the other bidders. The final ranking of the bidders was affected by changes to the scoring of technical proposals made as a result of the site visits. Once they are brought to the Tribunal's attention, it cannot ignore these serious issues in connection with this procurement on the sole basis that CGI has not conclusively demonstrated that its score and ranking was directly affected. While considering all the circumstances relevant to this procurement, including the factors set out in subsection 30.15(3) of the *CITT Act*, the Tribunal comes to the conclusion that, on the facts of this matter, it must recommend a remedy that will ensure fairness to all bidders that took part in this process. For those reasons, the Tribunal finds that the appropriate remedy is to recommend that Canada Post re-evaluate the technical proposals of all six original bidders with a new team of evaluators and that Canada Post's debriefing and document retention practices and procedures be amended.

212. In making its recommendation to re-evaluate the technical proposals, the Tribunal is mindful of the size and complexity of this procurement process, with the related costs to all parties involved, and of the public interest in the continuation of the contract, until and unless the re-evaluation arrives at a different result. Accordingly, the Tribunal also finds that it is appropriate to recommend that the current contracts remain with Accenture, Infosys and Deloitte until such time as the re-evaluation is complete. In the event that the relative rankings of the bidders changes as a result of the re-evaluation, the Tribunal finds it appropriate to recommend that Canada Post Corporation and Innovapost either cancel the existing contracts and award contracts in accordance with the results of the re-evaluation or award additional non-exclusive contracts to any bidders ranking in the top three following the re-evaluation.

Costs

213. In regard to costs, CGI requested its bid preparation costs and the costs of filing and preparing the complaint. Canada Post requested its costs in responding to the complaint should the complaint be dismissed, but submitted that, if the complaint is found to be valid in part, each party should bear its own costs. Accenture did not make any submissions regarding costs.

214. In light of the fact that CGI was successful 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 awards CGI its reasonable costs incurred in the Tribunal's process, which it may not have initiated but for the breaches and general lack of transparency on the part of Canada Post. These costs may be paid by either Canada Post Corporation or Innovapost. This award is also influenced by the fact that Canada Post should have been more forthright about the destruction of the individual scoring sheets.

215. 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 information beyond the

normal scope of the proceedings and a 135-day time frame. Therefore, the Tribunal's preliminary indication of the level of complexity for this complaint is Level 3, and the preliminary indication of the amount of the cost award is $4,700.

DETERMINATION OF THE TRIBUNAL

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

217. 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, amend its debriefing practices and policies to be consistent with the principles identified by the Tribunal in the reasons for its determination in File No. PR-2014-006. In addition, the Tribunal recommends that Canada Post Corporation develop and implement procedures that ensure that complete documentation is maintained regarding such procurements, as required by Article 1017(1)(p) of *NAFTA*.

218. Further, the Tribunal recommends, as a remedy, that Canada Post Corporation and Innovapost re-evaluate all technical proposals that were submitted by the six pre-qualified bidders, so as to eliminate, as much as possible, all consequences of the evaluators potentially ignoring relevant information in conducting the first evaluation. The Tribunal further recommends that such re-evaluation be conducted, to the extent possible, by a new team of evaluators. The Tribunal also recommends that the current contracts remain with Accenture, Infosys and Deloitte until such time as the re-evaluation is complete. After the re-evaluation is complete, if the relative rankings of the bidders changes, the Tribunal recommends that Canada Post Corporation and Innovapost either cancel the existing contracts and award contracts in accordance with the results of the re-evaluation or award additional non-exclusive contracts to any bidders ranking in the top three following the re-evaluation.

219. 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. 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 third bullet of paragraph 83 should have read as follows:

Whether Canada Post's evaluation of CGI's bid complied with Articles 1013(1) and 1015(4).

The heading of paragraph 118 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