Canadian International Trade Tribunal | Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2014-006

CGI Information Systems and Management Consultants Inc.

v.

Canada Post Corporation and Innovapost Inc.

Determination issued
Wednesday, August 27, 2014

Reasons issued
Tuesday, September 2, 2014

Canada

TABLE OF CONTENTS

DETERMINATION ... i

STATEMENT OF REASONS ... 1
- BACKGROUND ... 1
- PROCUREMENT PROCESS ... 2
- PRELIMINARY MATTER: "DESIGNATED CONTRACT" UNDER NAFTA ... 4
- ANALYSIS ... 5
  - Ground 1: Canada Post's Obligations under Article 1015(6)(b) of NAFTA ... 5
  - Ground 2: Whether Canada Post Departed from the Published Evaluation Plan in Breach of Article 1013(1) and Articles 1015(4)(c) and (d) of NAFTA ... 14
- REMEDY ... 18
- COSTS ... 20
- DETERMINATION OF THE TRIBUNAL ... 20

IN THE MATTER OF a complaint 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 complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

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, on its own behalf or through Innovapost Inc., provide CGI Information Systems and Management Consultants Inc. pertinent information, identified in accordance with the determination of the Canadian International Trade Tribunal, concerning the reasons for not selecting the tender submitted by CGI Information Systems and Management Consultants Inc. in response to Solicitation No. 2012-SDL-006. The Canadian International Trade Tribunal also 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.

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.

Stephen A. Leach
Stephen A. Leach
Presiding Member

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

Tribunal Member:	Stephen A. Leach, Presiding Member
Counsel for the Tribunal:	Anja Grabundzija
Procurement Case Officer:	Josée B. Leblanc
Registrar Officer:	Haley Raynor
Complainant:	CGI Information Systems and Management Consultants Inc.
Counsel for the Complainant:	R. Benjamin Mills Paul Conlin
Government Institutions:	Canada Post Corporation and Innovapost Inc.
Counsel for the Government Institution:	Nicholas McHaffie Justine Whitehead
Intervener:	Wipro Technologies Canada Ltd.
Counsel for the Intervener:	Martin G. Masse

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
15th Floor
333 Laurier Avenue West
Ottawa, Ontario K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

BACKGROUND

1. On April 14, 2014, CGI Information Systems and Management Consultants Inc. (CGI) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*,[1] concerning a Request for Proposal (Solicitation No. 2012-SDL-006) (RFP) issued by Innovapost Inc., a subsidiary of Canada Post Corporation (together, Canada Post), on behalf of the Canada Post Group of Companies, for the provision of data centre services.

2. CGI alleged that Canada Post failed to disclose pertinent information with respect to the reasons for not selecting CGI's tender and the relevant characteristics and advantages of the tender selected, in breach of Article 1015(6)(b) of the *North American Free Trade Agreement*.[2] CGI also alleged that Canada Post evaluated its proposal in a manner inconsistent with the evaluation plan published in the RFP, contrary to the requirements of Articles 1013(1) and 1015(4)(c) and (d).

3. As a remedy, CGI requested that Canada Post provide it with a list of documents and information regarding the procurement process and that Canada Post cancel the contract awarded under the RFP and issue a new solicitation. In the alternative, CGI requested compensation for lost profits, lost opportunity and/or its bid preparation costs. In the further alternative, it requested a re-evaluation of all bids. CGI also requested its litigation costs related to this complaint.

4. On April 24, 2014, the Tribunal informed the parties that the complaint had been 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*.[3]

5. On May 23, 2014, Canada Post filed a Government Institution Report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[4] CGI filed comments on the GIR on June 4, 2014.[5]

6. On motion, on July 10, 2014, the Tribunal granted intervener status to Wipro Technologies Canada Ltd. (Wipro), the contract awardee. Wipro filed comments on the complaint and GIR on July 17, 2014, and CGI replied on July 23, 2014.

7. The parties filed several motions and requests throughout the proceeding. Of note, the Tribunal granted in part a motion by CGI for an order that Canada Post produce certain documents relevant to the proceeding. On June 30, 2014, in filing these documents, Canada Post filed certain additional submissions that related to the substantive grounds of complaint.[6] On July 8, 2014, CGI filed further comments on the produced documents and Canada Post's further submissions.[7]

---

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. S.O.R./93-602 [*Regulations*].
4. S.O.R./91-499.
5. Exhibit PR-2014-006-20, Vol. 1G.
6. Exhibit PR-2014-006-23, Vol. 1G.
7. Exhibit PR-2014-006-27, Vol. 1G; Exhibit PR-2014-006-27A (protected), Vol. 2I.

8. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that an oral hearing was not required and disposed of the complaint on the basis of the written information on the record.

PROCUREMENT PROCESS

9. The RFP was issued on December 3, 2012. The solicitation closed on January 16, 2013.

10. The RFP consisted of two "Phases", each divided into several sequential evaluation stages, some scored and others not. CGI successfully completed Phase 1 of the RFP, which is not in issue in this proceeding, and thus qualified for the Phase 2 of the RFP.

11. On June 7, 2013, CGI and other qualified proponents received the "Phase 2 Selection Requirements and Information Package" (Phase 2 SRIP),[8] pursuant to which proponents were invited to submit technical proposals and financial proposals and to give oral presentations.

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

13. Stages 7 and 8 of the evaluation plan involved a different set of evaluation criteria, as published in the Phase 2 SRIP and/or supplemented in accordance with it. However, in sections 3.3 and 3.3.1, Canada Post reserved the right, respectively, to revisit the written technical proposal on the basis of "contradictory information" revealed during the oral presentations and to revisit the scores for a proponent's written technical proposal and its oral presentation on the basis of "contradictory information" discovered during the site visits.[9]

14. The Phase 2 SRIP indicated the overall points available for the technical proposal, as well as for the oral presentation, and the weights of certain broad sections within the technical proposal.[10] It did not provide a detailed breakdown of the weight attributed to each subsection or to each evaluated criterion.

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

16. The contract was awarded to Wipro on December 6, 2013.[12] The award was published on December 13, 2013.[13] CGI requested a debriefing on the same day.[14]

---

8. Exhibit PR-2014-006-14B (protected), tab 2, exhibit A, Vol. 2G.
9. Exhibit PR-2014-006-14A at para. 94, Vol. 1E.
10. Exhibit PR-2014-006-14B (protected), tab 2, exhibit A, sections 3.2, 3.3, 3.4, 3.6, Vol. 2G.
11. Exhibit PR-2014-006-01, exhibit 4, Vol. 1D.
12. Exhibit PR-2014-006-01, exhibit 5, Vol. 1D.
13. Exhibit PR-2014-006-01, exhibit 4, Vol. 1D.
14. Exhibit PR-2014-006-01, exhibit 4, Vol. 1D.

17. A first debriefing took place on January 15, 2014. The debriefing was provided on behalf of Canada Post by Ms. Maya Walker, the contracting authority for the RFP, and Mr. Jim Bezanson, an evaluator who participated at every stage of the Phase 2 SRIP evaluation process.[15]

18. In sum, CGI learned that it failed to achieve maximum points under several criteria of the technical evaluation at Stages 7 and 8. As CGI failed to score the minimum number of points necessary under the Phase 2 SRIP to move to the stage of the financial proposal evaluation, its financial proposal was not evaluated. Canada Post also provided some information on areas of CGI's proposal that were perceived as strong and on areas for improvement, without providing specific scoring. Ms. Walker and Mr. Bezanson spoke from speaking notes prepared prior to the debriefing, with Ms. Walker focusing on the evaluation methodology and process generally and the evaluation of the oral presentation, and Mr. Bezanson providing more technical information relevant to the evaluation of CGI's proposal. No information was provided regarding the evaluation of other bidders' proposals.[16]

19. CGI considered that this first debriefing was insufficient and requested a second debriefing, to which Canada Post agreed. The content of the second debriefing was the cause of some discussion between the parties. In a letter dated February 24, 2014, CGI wrote to Canada Post that it wished to receive certain specifics on the evaluation of its proposal, as well as the advantages of the winning proposal, adding that it would be "helpful" to obtain such information in writing.[17] Canada Post replied that it would be pleased to provide more information on the evaluation of CGI's tender, but ". . . in accordance with long-standing Canada Post procurement policies applied consistently to all Canada Post request for proposals . . ." and Canada Post advised that it would not provide explanations in writing, nor scores or content of any proponents' proposals, which were confidential.[18] CGI wrote to Canada Post again, on March 11, 2014, objecting to Canada Post's decision not to provide information on Wipro's proposal. It also included a list of specific information and documents that CGI wished to receive at the second debriefing.[19]

20. The second debriefing took place on March 31, 2014. At this meeting, Ms. Walker and Mr. Bezanson provided further feedback, again on the basis of prepared speaking notes. Broadly, this feedback consisted of additional details as to the areas of CGI's technical proposal and oral presentation that had failed to receive maximum points, as well as some information on the relevant characteristics and advantages of Wipro's proposal.[20] Canada Post also provided a written document with a high-level breakdown of CGI's technical proposal scores.

21. On April 9, 2014, following a letter from CGI,[21] Canada Post provided copies of the speaking notes used by Ms. Walker and Mr. Bezanson at the second debriefing[22] and confirmed, at the same time, that it would be providing no further documentation.

22. On April 14, 2014, CGI filed this complaint.

---

15. Exhibit PR-2014-006-14A at para. 52, Vol. 1E.
16. Exhibit PR-2014-006-14A at paras. 57-60, Vol. 1E; Exhibit PR-2014-006-14A, tab 2 at paras. 31-35, Vol. 1E; Exhibit PR-2014-006-14A, tab 3 at paras. 10-13, Vol. 1E; Exhibit PR-2014-006-14B (protected), tab 2, exhibits D and E, Vol. 2G.
17. Exhibit PR-2014-006-01, exhibit 6, Vol. 1.
18. Exhibit PR-2014-006-01, exhibit 7, Vol. 1D.
19. Exhibit PR-2014-006-01, exhibit 8, Vol. 1D.
20. Exhibit PR-2014-006-14B (protected) at paras. 65-69, Vol. 2G; Exhibit PR-2014-006-14A, tab 2, exhibits F and G, Vol. 1E; Exhibit PR-2014-006-14B (protected), tab 3, and attachments C and D, Vol. 2G.
21. Exhibit PR-2014-006-01, exhibit 9, Vol. 1D.
22. Exhibit PR-2014-006-01, exhibit 10, Vol. 1D.

PRELIMINARY MATTER: "DESIGNATED CONTRACT" UNDER NAFTA

23. While all parties agreed that *NAFTA* applies to this solicitation and that the Tribunal has jurisdiction to inquire into the complaint, a few comments in this regard are warranted.

24. 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*.

25. 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*.

26. Canada Post Corporation is a Canadian government enterprise designated in the Schedule of Canada in Annex 1001.1a-2 of *NAFTA*, under the heading "Canada". Innovapost Inc. is not an entity listed in the Schedules of Canada. It is Innovapost Inc. that issued the solicitation and that was to enter into the final contract with the chosen service provider.[23] Nevertheless, several undisputed facts drive the Tribunal's finding that, for the purposes of the *CITT Act* and *NAFTA*, the contract was awarded by a covered government institution, namely, Canada Post Corporation.

27. 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.[24] The procured services were to benefit the Canada Post Group of Companies.[25]

28. Innovapost Inc. is one of the subsidiaries 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]",[26] and, according to the GIR, it ". . . is an important part of [Canada Post Corporation's] corporate strategy".[27] Canada Post Corporation holds an 80 percent ownership share in Innovapost Inc. (the remainder being held by another subsidiary of Canada Post Corporation).

29. 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.[28] In addition, personnel from

---

23. Section 1.1 of the Phase 1 Request for Proposal for Data Centre Services, Exhibit PR-2014-006-14A, tab 2, exhibit A, Vol. 1E.
24. Section s1.1 and 1.3 of the Phase 1 Request for Proposal for Data Centre Services, Exhibit PR-2014-006-14A, tab 2, exhibit A, Vol. 1E.
25. Section 1.4.1 of the Phase 1 Request for Proposal for Data Centre Services stated that ". . . Innovapost is seeking a Service Provider who can provide . . . the efficient, stable and effective delivery of Data Centre Services in order to deliver value to the CPGC", with a stated result of the initiative being to "[i]ntroduce Data Centre technology synergies among the CPGC", Exhibit PR-2014-006-14A, tab 2, exhibit A, Vol. 1E.
26. Exhibit PR-2014-006-14A at para. 4, Vol. 1E.
27. Exhibit PR-2014-006-14A at para. 5, Vol. 1E.
28. Exhibit PR-2014-006-14A, tab 2 at para. 1, Vol. 1E.

Canada Post Corporation, Innovapost Inc. and at least one other company of the Canada Post Group of Companies appear to have been involved in carrying out different aspects of this procurement.[29]

30. Canada Post expressly acknowledged that Canada Post Corporation is the relevant designated government institution and that *NAFTA* applies to this solicitation, based on the ". . . structure and conduct of the procurement, the nature of the procured services and procurement, and the current shareholding and funding arrangements for Innovapost";[30] the GIR has been submitted on behalf of Canada Post Corporation, assisted by Innovapost Inc.[31]

31. Consistent with precedent,[32] the Tribunal finds that the nature of Canada Post Corporation's relationship with Innovapost Inc. and its involvement in this procurement process support the conclusion that, for the purposes of section 3 of the *Regulations* and section 30.1 and subsection 30.11(1) of the *CITT Act*, it can be considered that the contract was awarded by Canada Post Corporation and, therefore, by a designated government institution under *NAFTA*.[33] 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) of *NAFTA*, which provides that "[n]o Party may prepare, design or otherwise structure any procurement contract in order to avoid the obligations of this Chapter."

ANALYSIS

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

33. The substantive questions before the Tribunal are whether Canada Post breached its debriefing obligation to provide pertinent information regarding the reasons for not selecting CGI's bid, as well as the characteristics and advantages of Wipro's bid, and whether Canada Post departed from the published evaluation plan.

Ground 1: Canada Post's Obligations under Article 1015(6)(b) of NAFTA

<u>Parties' Positions</u>

34. CGI's first ground of complaint was that Canada Post failed to disclose pertinent information on the reasons for not selecting CGI's tender and the relevant characteristics and advantages of the winning bid

---

29. Exhibit PR-2014-006-14A, tab 2 at para. 16, Vol. 1E; Exhibit PR-2014-006-14B (protected), tab 2 at paras. 16-27, Vol. 2G.
30. Exhibit PR-2014-006-14A at para. 12, and tab 2, exhibit A, sections 1.1, 1.3, Vol. 1E.
31. Exhibit PR-2014-006-14A at paras. 12, 20, Vol. 1E.
32. See *Canada (Attorney General) v. Symtron Systems Inc.*, [1999] 2 FC 514, where 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 must be able to decide . . . the true contracting agent . . ." on the facts of a case. See *a contrario*, *Canada (Attorney General) v. Canadian North Inc.*, 2007 FCA 93 (CanLII).
33. 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.

relating to Stages 7 to 10 of the Phase 2 evaluation. CGI argued that, when requested, Canada Post was required to disclose all of the following documents and information:[34]

> i. The identity of the evaluators who evaluated the proposals at each stage of the Phase 2 Requirements, their qualifications and their relationship, if any, with the winning bidder;
>
> ii. The methodology actually used by the evaluators to evaluate the proposals submitted in response to the Phase 2 Requirements, including all criteria used to evaluate proposals, all written instructions provided to evaluators, any evaluation plan or other guidance provided to evaluators and the scoring sheets used by evaluators to evaluate the proposals;
>
> iii. With respect to the evaluation of CGI's proposal, the individual scoring sheets and notes of each evaluator (i.e. the raw data regarding CGI's evaluation) and their identities, the points achieved by CGI with respect to each evaluation criteria at each stage of the Phase 2 Requirements, the consensus scoring sheets and notes from any consensus evaluation and all notes, minutes, memoranda or other documents produced by evaluators in evaluating CGI's proposal; and
>
> iv. With respect to the evaluation of the winning proposal, the individual scoring sheets and notes of each evaluator (i.e. the raw data regarding the evaluation of the selected proposal) and their identities, the consensus scoring sheets and notes from any consensus evaluation, all notes, minutes, memoranda or other documents produced by evaluators in evaluating the selected proposal, the points achieved by the selected proposal with respect to each evaluated criteria at each evaluation stage of the Phase 2 Requirements, the total points obtained by the selected proposal, the evaluated price of the selected proposal, the selected proposal (subject to confidentiality issues) and a description of relevant characteristics and advantages of the selected proposal; and
>
> v. Such other documents in the possession, power or control of Canada Post that must be disclosed to meet its obligations under Article 1015(6)(b) of the NAFTA . . . .

35. CGI's position rested on *Ecosfera Inc. v. Department of the Environment*,[35] a decision in which the Tribunal held that the "primary purpose" of a debriefing is to ". . . provide transparency as to the reasons for not selecting the proposal . . ."[36] so as to enable unsuccessful bidders to determine the nature of their rights in view of the requirements set out in *NAFTA*.

36. Canada Post submitted that the debriefings held on January 15 and March 31, 2014, exceeded the disclosure required by Article 1015(6)(b) of *NAFTA*. According to Canada Post, in the circumstances, the only ". . . pertinent information to be provided to CGI about why its proposal was not selected [was] the fact that its technical proposal failed to meet the 70% scoring threshold to be further considered . . ."[37] and that conversely, the ". . . most relevant 'characteristic and advantage' of the proposal selected [was] simply that the Wipro proposal did meet the 70% scoring threshold, and that after the financial proposal was evaluated, the Wipro bid had the highest point score of all remaining proposals."[38] Accordingly, Canada Post submitted that it provided sufficient information to CGI in the debriefings and, in fact, went "significantly

---

34. Exhibit PR-2014-006-01 at paras. 9-11, 37, 132, 141, Vol. 1. This list reflects the one included in CGI's letter to Canada Post dated March 11, 2014, which preceded the second debriefing. Exhibit PR-2014-006-01, exhibit 8, Vol. 1D.
35. (11 July 2007), PR-2007-004 (CITT) [*Ecosfera*].
36. *Ecosfera* at para. 32.
37. Exhibit PR-2014-006-14A at para. 111, Vol. 1E.
38. Exhibit PR-2014-006-14A at para. 111, Vol. 1E. In support of its position, Canada Post relied on the Tribunal's decisions in *1091847 Ontario Ltd.* (12 March 2013), PR-2012-046 (CITT) and *ComXel Inc*. (23 July 2008), PR-2008-021 (CITT).

beyond" the minimal requirement.[39] Additionally, Canada Post submitted that its confidentiality obligations toward the winning bidder, Wipro, prevented it from divulging any further information to CGI.

37. More generally, Canada Post disputed CGI's contention that *NAFTA* requires the disclosure of all the information and documents requested by CGI or that it requires a government entity to provide information in any particular form.

38. On June 24, 2014 the Tribunal ordered Canada Post to produce additional documents, including the individual and consensus scoring sheets pertaining to the evaluation of CGI's bid.

39. In responding to the Tribunal's order, Canada Post admitted that it could not produce the individual scoring sheets because it is its policy to destroy them after consensus scores are finalized.[40] Canada Post did however produce the completed consensus scoring sheets for CGI and blank evaluation grids that presumably would have been used by the evaluators in scoring CGI's bid. Once again, Canada Post submitted that all documents containing detailed evaluation criteria and weighting are confidential commercial and proprietary information of Canada Post and must be designated confidential in order to ensure the fairness and efficiency of future potential procurements for the same or similar services.[41]

40. CGI replied that Canada Post's interpretation of its debriefing obligations is too narrow. In particular, disclosing only second-hand interpretations drafted at a time when the interests of Canada Post conflicted with those of CGI instead of the best evidence available is contrary to the goals of Article 1015(6)(b) of *NAFTA*, as is Canada Post's apparent position that all of Wipro's bid and evaluation are confidential.[42]

41. CGI added that the additional documents produced pursuant to the Tribunal's June 24, 2014, order should have been provided at the debriefing. The arguments against disclosure that are based on the alleged need to keep detailed evaluation criteria and weights confidential from bidders should be dismissed. CGI underlined that such reasons were not in fact included in the GIR, showing their lack of real significance to Canada Post, and that they are inconsistent with the principle of transparency in *NAFTA*. Further, Canada Post's policy of destroying individual scoring sheets is inconsistent with the debriefing requirements under *NAFTA*, as well as being in direct contravention of Article 1017(1)(p). The documents also disclose that Canada Post adopted an improper policy of restricting its debriefings to a general description of the strengths and weaknesses of a bidder's proposal.[43]

42. Wipro made no submissions regarding this ground of complaint.

Tribunal's Analysis

43. *NAFTA* requires government institutions to disclose to unsuccessful suppliers that request it the reasons why their tenders were not selected, as well as information regarding the selected tender. Article 1015(6)(b) provides as follows:

> An entity shall:
>
> . . .

39. Exhibit PR-2014-006-14A at paras. 111, 122, Vol. 1E.
40. Exhibit PR-2014-006-23 at 2, Vol. 1G.
41. Exhibit PR-2014-006-23 at 3-4, Vol. 1G.
42. Exhibit PR-2014-006-20 at paras. 5-74, Vol. 1G.
43. Exhibit PR-2014-006-27 at 5-10, Vol. 1G.

> (b) on request of a supplier whose tender was not selected for award, provide pertinent information to that supplier concerning the reasons for not selecting its tender, the relevant characteristics and advantages of the tender selected and the name of the winning supplier.

44. Article 1015(8) of *NAFTA* limits these disclosure obligations, providing that an entity may ". . . withhold certain information on the award of a contract where disclosure of the information: (a) would impede law enforcement or otherwise be contrary to the public interest; (b) would prejudice the legitimate commercial interest of a particular person; or (c) might prejudice fair competition between suppliers."

45. CGI's position is that Canada Post was required to provide it with the list of documents and information requested, as cited above. In summary, these pertain to the evaluation methodology, the evaluation of its own bid, Wipro's bid and its evaluation, and details concerning the evaluators.

46. In light of Article 1015(6)(b) of *NAFTA*, it is helpful to divide this ground of complaint into two questions: whether Canada Post provided "pertinent information" concerning the reasons for not selecting CGI's tender and whether it communicated to CGI "the relative characteristics and advantages of the tender selected".

Pertinent Information Concerning the Reasons for not Selecting CGI's Bid

47. The procurement regulatory regime established by the *CITT Act* and the various trade agreements, including *NAFTA*, aims to create a framework in which government procurement takes place in a context of fairness, competition, efficiency and integrity.[44] Transparent government procurement procedures further these goals and are mandated by various provisions of *NAFTA* regulating different aspects of the solicitation process. The requirement in Article 1015(6)(b) of *NAFTA* that a procuring entity explain to an unsuccessful bidder the reasons for not selecting its tender is a means towards reaching these goals.[45]

48. Consistent with this context, the Tribunal has previously found that the primary purpose of the obligation to provide pertinent information on 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 the 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*.[46]

49. The precise nature of the information to be provided depends on what information can reasonably be expected to reveal, in a particular case, the reasons for not selecting a tender. In light of the purpose of Article 1015(6)(b) of *NAFTA*, the information should focus on the considerations of those involved in making the decision, which includes communicating the reasons for not selecting the proposal, the justification for taking those reasons into account and the approach used to examine them.[47]

---

44. See, for example, *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 (CanLII) [*Almon*] at para. 23. In that case, the Federal Court of Appeal, discussing in particular the *CITT Act* procurement regime by reference to the *Agreement on Government Procurement*, identified four purposes of the system which must inform the Tribunal's inquiries, legal reasoning and remedy recommendations. In the Tribunal's view, these principles hold equal importance in the context of *NAFTA* and, in accordance with the Federal Court of Appeal's direction, must therefore inform the Tribunal's reasoning in this context.
45. *The Access Information Agency Inc.* (16 March 2007), PR-2006-031 (CITT) at para. 37.
46. *Ecosfera* at para. 32.
47. *Ecosfera* at para. 33.

50. Canada Post and CGI agree with these principles,[48] but they disagree on their practical application in the circumstances of this case.

51. Canada Post's submissions that the only information that it was required by law to communicate to CGI was that it failed to reach the 70 percent pass mark after Stages 7 and 8[49] is clearly inconsistent with the above principles because it divulges nothing of how and why the evaluators came to this conclusion in the context of an unsuccessful tender evaluated against a set of rated criteria designed to capture complex requirements.

52. However, the Tribunal finds that, taken as a whole, Canada Post's debriefings were more extensive than what the GIR submits was the minimal standard required by law. The disclosure notably consisted of two verbal debriefings identifying the strengths and weaknesses of CGI's proposal, along with the speaking notes, and a document outlining, albeit at a high level, the evaluation of CGI's bid. Additionally, the Tribunal has consistently held that it assesses the sufficiency of a debriefing in terms of its substance and not its form.[50] It is on these bases that the Tribunal will determine whether Canada Post has complied with its obligations under Article 1015(6)(b) of *NAFTA*.

53. The Tribunal finds that Canada Post failed to meet even the basic requirements of Article 1015(6)(b) of *NAFTA* by not disclosing to CGI, as an unsuccessful bidder, the detailed evaluation plan used by the evaluators, including the evaluation criteria, scales, weights and methodology as they were applied by the evaluators. Not only are the evaluation criteria and how they are applied obviously relevant to the reasons for not selecting a tender, the disclosure of such information also allows bidders to determine their rights under *NAFTA*, one of the central requirements of which is that procuring entities award contracts in accordance with the criteria specified in the tender documentation.[51] Where government institutions withhold the contents of evaluation plans and evaluator guides used in a selection process, it becomes difficult for a bidder to satisfy itself that the evaluation was carried out in accordance with the requirements and methodology specified in the tender documents. Withholding such information not only is inconsistent with the transparency required by Article 1015(6)(b) but also undermines the efficiency of the procurement complaint process, as it is unlikely to facilitate the early resolution of bidder complaints.

54. The Tribunal will now address Canada Post's submissions that detailed evaluation information should not be disclosed to CGI because it is commercial confidential and proprietary information of Canada Post and because its disclosure to CGI could negatively affect potential future procurements for the same or similar services.[52]

55. Canada Post argues that disclosing detailed evaluation plans to an unsuccessful bidder would prevent it from re-using the same or portions of the same evaluation plan, which, it states, was developed at great expense, because if re-used, then an unsuccessful bidder, such as CGI, would have an unfair advantage over other bidders due to its having seen the detailed evaluation plan; further, this unfair advantage could not be remedied by disclosing the same information to all bidders in a future solicitation, because, according to

---

48. Exhibit PR-2014-006-14A at paras. 113-15, Vol. 1E; Exhibit PR-2014-006-20 at paras. 11-13, Vol. 1G.
49. Exhibit PR-2014-006-14A at paras. 111, 122-23, Vol. 1E.
50. *Ecosfera* at para. 55.
51. Article 1015(4)(d) of *NAFTA*.
52. Exhibit PR-2014-006-23 at 3-4, Vol. 1G. While Canada Post's comments specifically addressed the reasons why it designated as confidential certain documents containing information on the detailed evaluation plan when filing them with the Tribunal, it is understood that Canada Post wished these arguments to be considered with respect to the merits of the complaint also. In this regard, see Exhibit PR-2014-006-31, Vol. 1G.

Canada Post, "it is well known" that when very detailed evaluation information is provided, bidders tend to submit solutions of a lesser quality in their tenders.

56. Essentially, Canada Post's arguments come down to administrative convenience with respect to the conduct of potential future procurements as a justification for ignoring its obligations to CGI in the current procurement. This is very clearly wrong. *NAFTA* posits a legal obligation on government institutions to conduct *each* of their procurements in keeping with the applicable trade agreements. In the present case, Canada Post is obligated, in a debriefing, to provide a reasonable explanation to CGI as to why its proposal in this procurement process was rejected.

57. Furthermore, other than arguing administrative inconvenience, Canada Post has not provided any reasonable explanation that the Tribunal's decision regarding its debriefing obligations in this case would make it impossible to conduct another procurement process for the same or similar services in keeping with the requirements of *NAFTA*, including the obligation to avoid creating a discriminatory advantage for one potential supplier. Specifically, the Tribunal rejects Canada Post's submission that "it is well known" that detailed evaluation information results in bidders offering poor quality solutions.

58. Similarly, the Tribunal does not accept Canada Post's submissions that detailed evaluation information must not be disclosed to CGI in the context of a debriefing regarding this solicitation due to its commercial confidential nature because, other than simply stating the argument, Canada Post has failed to provide any reasonable argument in support of this submission.

59. As the Tribunal found in *Ecosfera*, government institutions cannot simply state that there are confidentiality concerns and, on this basis alone, limit information reasonably required during a debriefing.[53] Indeed, when Articles 1015(6)(b) and 1015(8) of *NAFTA* are read together it is clear that, in each case, government institutions must make reasonable efforts to balance their disclosure obligations with the obligation to protect information where reasonably required by the restricted circumstances set out in Article 1015(8). In this case, the Tribunal finds that Canada Post has not made reasonable efforts to balance these two obligations.

60. Furthermore, the Tribunal finds that the non-disclosure of the detailed evaluation criteria and their weights, together with the non-disclosure of specific scoring obtained thereunder by CGI,[54] affected the appropriateness of Canada Post's explanations regarding the evaluation of CGI's bid. Despite the apparent length of the two debriefings, it remained difficult for CGI to assess the impact of any of the "weaknesses" identified by the evaluation team on its final scores or to understand how they justify the failure of its bid to score maximum points under particular criteria.

61. Canada Post's debriefing also clearly fell short of providing the scores and reasons for evaluation of individual evaluators. As it explained in the course of this proceeding, Canada Post considers that individual assessments become irrelevant once the final consensus scores are reached. Indeed, its stated procurement policy is to destroy individual scoring sheets and notes after the completion of consensual evaluations.[55]

62. The fact that the final results of this evaluation were based on consensus scoring does not make individual scoring and reasons irrelevant to the reasons for not selecting the proposal. While it seems obvious that, as a product of the evaluators coming together as a group, the final consensus evaluations and

---

53. *Ecosfera* at paras. 43, 48.
54. Exhibit PR-2014-006-14B (protected), tab 2, exhibit F at 2, Vol. 2G.
55. Exhibit PR-2014-006-23A, Vol. 1G.

scores will not necessarily reflect each and every one of every single evaluator's considerations, individual evaluators' considerations should logically underlie the consensus evaluation. As such, they remain an integral part of the overall evaluation process. Indeed, according to Canada Post's own directions to the evaluation team prior to the start of the Phase 2 evaluation, before the consensus scoring was to take place, each evaluator was expected to assess the tenders *individually*, *without discussing with other evaluators, and to keep a record of his or her comments*.[56] This clearly shows that Canada Post itself accorded considerable significance to the individual portion of the evaluation in the overall evaluation process. The importance of the role of evaluators in each procurement process has in fact been stressed by the Federal Court of Appeal, which stated that ". . . evaluators and their evaluations of proposals are at the heart of the procurement system",[57] such that "[h]ow the evaluators conduct themselves in their evaluation process determines whether the system has integrity and whether the important purposes of this regulatory regime are met."[58]

63. Thus, information regarding the individual evaluators' assessments of CGI's proposal shows part of the reasons for or approach to establishing the final scores and outcome of this solicitation; as such, it is pertinent information for the purposes of Article 1015(6)(b) of *NAFTA* that can help provide transparency to an unsuccessful bidder seeking to understand how its tender was evaluated. Canada Post's failure to provide this information is rendered more egregious by the fact that the Tribunal has found, in previous decisions, that, where consensus scoring is used, the debriefing must still include the communication of the considerations of each individual evaluator who contributed to the establishment of the consensus evaluation.[59]

64. In addition, and apart from the question of whether Canada Post erred by destroying the individual evaluation records,[60] the Tribunal finds that, in the context of a debriefing, Canada Post should have provided, upon request, any available documentary evidence to CGI that was pertinent to the evaluation of its bid. The circumstances of this case show that the disclosure of evaluation documents evidencing the reasons for not selecting a bid, and pertaining to the evaluation of a bidder's own bid, is consistent with the intent and purpose of Article 1015(6)(b) of *NAFTA*.

---

56. Exhibit PR-2014-006-23A, Vol. 1G.
57. *Almon* at para. 48.
58. *Almon* at para. 48. The Federal Court of Appeal's comments were made in the context of determining the impact of deficient record-keeping by the evaluators on the Tribunal's assessment of the appropriate remedy in that case.
59. For example, in *Ecosfera*, at para. 35, the Tribunal found that the debriefing by the government institution was insufficient, because the information provided ". . . could not reveal the considerations of each individual who contributed to building the consensus regarding each of the applicable criteria". In *Med-Emerge International Inc.* (15 June 2005), PR-2004-050 (CITT) at para. 41, the Tribunal found that, "[w]hile consensus scoring sheets provide an overall assessment of the bidder's proposal, the individual scoring sheets provide more assurance that the evaluation process was carried out in a transparent and fair manner."
60. As mentioned previously, on June 24, 2014, the Tribunal ordered Canada Post to produce certain additional documents that were deemed relevant to the grounds of complaint in this proceeding. However, Canada Post notified the Tribunal that certain documents, including the evaluators' individual scoring sheets, no longer existed, as they had been destroyed in accordance with Canada Post's policy. On July 10, 2014, CGI filed a new complaint in respect to the RFP, alleging that Canada Post's destruction of the evaluators' individual scoring sheets was in breach of its obligations under the relevant trade agreements. On July 15, 2014, the Tribunal informed the parties that it had accepted the new complaint for inquiry. Accordingly, as the Tribunal is currently reviewing the new complaint (File No. PR-2014-020), in the context of the present inquiry, the Tribunal will not comment further on the issue of the destruction of documents. Precisely, this proceeding deals only with the question whether Canada Post failed to disclose all *available* pertinent information and documents as part of its debriefing to CGI; the related, but distinct, issue of whether Canada Post breached its obligations by destroying some documents related to this solicitation, and thus making them *unavailable*, will be dealt with in full in File No. PR-2014-020.

65. Indeed, the proactive disclosure of contemporaneous evidence pertaining to the bidder's own bid is the simplest and best method to ensure transparency and provide an appropriate debriefing,[61] while withholding such information only raises questions as to why it is being withheld and is likely to cause the bidder to be suspicious as to the integrity of the evaluation process.

66. Finally, the Tribunal rejects CGI's claim that Canada Post was obliged, pursuant to Article 1015(6)(b) of *NAFTA*, to communicate the identity of the evaluators who participated at each stage of the Phase 2 evaluation process, their qualifications and their relationship, if any, with the winning bidder. Besides making this claim, CGI put forward no specific argument or explanation as to why such information on the identity of the evaluators should have been disclosed pursuant to Article 1015(6)(b). In the Tribunal's view, Article 1015(6)(b) requires disclosure of information focusing on what the evaluators did and how they did it, rather than on the evaluators themselves.[62] However, the Tribunal also notes that, if a bidder provides the government institution with a reasonable basis for producing the identity and qualifications of evaluators, for example, a reasonable apprehension of bias, then the government institution should consider disclosing such information during the debriefing. This is consistent with the Tribunal's approach to motions filed with it during an inquiry to disclose such information—the complainant must provide a reasonable basis for the request. In this case, the Tribunal finds that CGI did not provide Canada Post with a reasonable basis for the request to disclose such information and, therefore, Canada Post acted reasonably in not providing the information.

67. For the foregoing reasons, the Tribunal finds this part of the first ground of complaint to be valid.

Information Regarding the Relevant characteristics and Advantages of the Selected Tender

68. At the first debriefing held on January 15, 2014, Canada Post did not provide any information regarding the winning proposal.[63] At the second debriefing held on March 31, 2014, Canada Post provided CGI with certain information regarding the characteristics and advantages of Wipro's bid.[64] However, CGI argued that Canada Post should have provided more information, including a copy (redacted for confidentiality) of Wipro's proposal, as well as the individual and consensus scoring sheets and notes produced in evaluating the proposal, its price, and the total and specific points achieved by the selected proposal.[65]

69. Article 1015(6)(b) of *NAFTA* requires that the procuring entity communicate, on request from an unsuccessful bidder, pertinent information regarding the "characteristics" and "advantages" of the selected tender. The word "characteristic" is defined as "[a] feature or quality belonging typically to a . . . thing" and

---

61. In this regard, the Tribunal does not mean to suggest that when providing a debriefing, government institutions should not also consider supplementing such contemporaneous evidence with further explanations, where appropriate. Indeed, in *Ecosfera*, a case where contemporaneous evaluation documents *were* provided to an unsuccessful bidder, but such documents did not clearly indicate the reasons for the evaluation of the tender, the Tribunal found that the government institution in question was required to supplement the contemporaneous evidence with further explanations in order to meet its Article 1015(6)(b) obligations. See *Ecosfera* at para. 36.
62. As stated in *Ecosfera* at para. 33, the debriefing should normally focus on ". . . the considerations of those who were involved in making the decision that resulted in the proposal of the unsuccessful bidder not being selected", which includes ". . . the communication of the reasons why the proposal was not selected, the communication of the justification for taking those reasons into account and the approach used to examine them."
63. Exhibit PR-2014-006-14B (protected), tab 2, exhibit D at 1, Vol. 2G; Exhibit PR-2014-006-14A at para. 55, Vol. 1E.
64. Exhibit PR-2014-006-14B (protected), tab 2, exhibit F at 5-6, Vol. 2G.
65. Exhibit PR-2014-006-01 at para. 132, Vol. 1; Exhibit PR-2014-006-01, exhibit 8, Vol. 1D.

the word "advantage" as "[a] condition or circumstance that puts one in a favourable or superior position . . . .[66]" This language suggests that *NAFTA* requires procuring entities to communicate to an unsuccessful bidder the relative strengths of the selected tender.[67] Further, the disclosure of information on the selected tender pursuant to Article 1015(6)(b) is balanced with the need to protect the confidential commercial information of other bidders, as specified in Article 1015(8).[68]

70. Canada Post's debriefing in respect of the advantages and characteristics of Wipro's proposal complied with Articles 1015(6)(b) and 1015(8) of *NAFTA*. It informed CGI that Wipro's bid was selected because it achieved the highest overall score. Further, Canada Post informed CGI that Wipro's proposal was, on the whole, deliberate and focused, that it addressed all the requirements of the RFP and that it avoided making broad statements without substantiation.[69] Canada Post also described, in general terms, the ways in which each aspect of Wipro's response (i.e. different parts of the technical proposal and its oral presentation) was deemed appropriate, with reference to the evaluated criteria. While they did not include the details substantiating Wipro's proposal, the explanations provided, especially when read together with the reasons provided for not selecting CGI's bid, were reasonably informative on the "characteristics" and "advantages" of Wipro's bid.

71. Indeed, had Canada Post provided the actual details in Wipro's proposal by which Wipro supported and demonstrated the appropriateness of its response, it would have risked disclosing proprietary or commercial confidential information of Wipro to a competitor, thus breaching its obligations towards Wipro. Accepting CGI's argument that all the specific information requested by it had to be provided would pose an even greater risk of Canada Post disclosing sensitive information belonging to a third party.

72. Finally, the Tribunal finds that case law relating to the application of the *Access to Information Act*[70] does not support the proposition that the information requested by CGI in relation to Wipro's bid must be disclosed in the NAFTA debriefing context.[71] As recognized by CGI, the disclosure processes under *NAFTA* and the *Access to Information Act* are distinct processes that run in parallel. Also, the Tribunal finds that the Federal Court of Canada's determination that there are normally no longer any reasons to consider tender documentation as confidential after the point where the contract is awarded (or the solicitation is otherwise completed)[72] does not apply in the context of a debriefing contemplated by *NAFTA*. A debriefing typically occurs in close proximity of the close of the solicitation process, with the primary objective of allowing an unsuccessful bidder to determine its rights under the requirements of *NAFTA*. This includes deciding whether to file a complaint with the Tribunal in connection with the solicitation and could notably result in the Tribunal ultimately recommending that the solicitation be cancelled and re-tendered. In such a context, allowing a bidder to learn the specifics of a competitor's bid would be prejudicial to that competitor's legitimate commercial interests and to the principles of fair competition in any re-tendered or related solicitations, contrary to Article 1015(8) of *NAFTA*.

73. For these reasons, the Tribunal finds this part of the first ground of complaint to be not valid.

---

66. *Oxford English Dictionary*, (British & World English) online, www.oxforddictionaries.com. Similarly, *Merriam-Webster's Collegiate Dictionary*, 11th ed., defines the noun "characteristic" as "a distinguishing trait, quality, or property" and the noun "advantage" as "superiority of position or condition . . . a factor or circumstance of benefit to its possessor."
67. *Ecosfera* at para. 49.
68. *Ecosfera* at para. 48.
69. Exhibit PR-2014-006-14A at para. 68, Vol. 1E.
70. R.S.C., 1985, c. A-1.
71. As argued by CGI, see Exhibit PR-2014-006-20 at paras. 69, 72, Vol. 1G.
72. Exhibit PR-2014-006-20 at paras. 70-71, Vol. 1G.

Ground 2: Whether Canada Post Departed from the Published Evaluation Plan in Breach of Article 1013(1) and Articles 1015(4)(c) and (d) of NAFTA

74. Under its second ground of complaint, CGI alleged that Canada Post evaluated its proposal inconsistently with the evaluation plan published in the Phase 2 SRIP for Stages 7 and 8, in three different ways.

75. *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.[73] In turn, 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.[74]

76. It is well established that a procuring entity will meet these obligations when it conducts a reasonable evaluation. The Tribunal will not substitute its judgment for that of the evaluators unless it finds the evaluation unreasonable, such as where the evaluators wrongly interpret the scope of a requirement, base their evaluation on undisclosed criteria or otherwise conduct the evaluation in a procedurally unfair way.[75] Concurrently, it is also recognized that bidders bear the responsibility to make sure that their bids are responsive, which necessarily includes making sure that they understand the requirements and seeking timely clarifications where needed.[76]

77. As such, a procuring entity will comply with its *NAFTA* obligations as long as it uses an evaluation approach that is logically consistent with, and could reasonably be anticipated or derived from, the methodology and criteria stated in the tender documents (including any further clarifications). Similarly, if a procuring entity decides to use evaluation guides that rely on criteria more detailed than the ones published in the tender documents, the evaluation will remain reasonable if such detailed directions are consistent with, and could be anticipated or derived from, the published criteria.[77]

78. The Tribunal has examined CGI's allegations under this heading and, for the reasons that follow, finds them to be not valid.

---

73. 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 . . . ."
74. 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 . . . ."
75. *Quality Control International in joint venture with Service Star Building Cleaning* (30 November 2012), PR-2012-029 (CITT) at para. 15; *Samson & Associates* (19 October 2012), PR-2012-012 (CITT) at paras. 26-28.
76. *Excel Human Resources Inc. v. Department of the Environment* (2 March 2012), PR-2011-043 (CITT) at para. 34; *Storeimage v. Canadian Museum of Nature* (18 January 2013), PR-2012-015 (CITT) at para. 67; *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII) [*IBM*] at paras. 18-21.
77. *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2001 FCA 241 at paras. 43, 45; *MIL Systems (a Division of Davie Industries Inc.) and Fleetway Inc.* (6 March 2000), PR-99-034 (CITT) at 19-20.

The Allegation that Canada Post Applied Undisclosed "Weighting Criteria"

79. CGI submitted that Canada Post weighted different aspects of the proposals more heavily than others, while the Phase 2 SRIP nowhere indicated that there would be any "weighting" of criteria. In particular, CGI alleged that it learned, for the first time at the second debriefing held on March 31, 2014, that the criteria at section 5.2.2 of the RFP carried more weight than those at section 5.2.1 and that section 5.3.2 carried more weight than section 5.3.1.[78]

80. The GIR explained that Canada Post did not use undisclosed "weighting" criteria, having indicated to bidders the relative weights of sections 5.2 and 5.3 of the Phase 2 SRIP by way of a question and answer document circulated on June 19, 2013.[79] Further, to the extent that CGI considered this disclosure insufficient, it had 10 working days from that date to object or file a complaint.

81. CGI did not contest that the question and answer document had indeed been circulated or that it addressed the relative weights of the sections in question. However, it argued that the additional documents produced by Canada Post show that the use of undisclosed point weights went beyond the differential weights accorded to sections 5.2 and 5.3. On this basis, CGI argued that potential bidders could not submit responsive bids.[80]

82. Wipro argued that CGI's complaint regarding the weighting criteria was both unfounded and out of time.

83. It is clear that the Phase 2 SRIP only indicated the overall weight that would be attributed to large sections of the proposals. For example, it indicated that sections 5.2.1 and 5.2.2 together carried a maximum of 20 points and that sections 5.3.1 and 5.3.2 together accounted for 13 points out of the total points available at Stage 7 of the evaluation plan. In addition, following a question from another bidder asking Canada Post to provide a further breakdown of the points carried by these sections, Canada Post replied the following, in the document released on June 19, 2013:

> No further breakdown of scoring will be provided for Section 5.0. 5.2.2 has more weight out of the 20 points than 5.2.1. 5. 3.2 has more weight out of the 13 points than 5.3.1.[81]
>
> [Underlining in original]

84. No other detail was provided as to the weighting of the plethora of evaluation criteria applicable to sections 5.1, 5.2 and 5.3 of Stage 7.

85. In this context, the Tribunal finds that the RFP did not indicate that Canada Post would apply any particular distribution of points for the detailed criteria going to each aspect of the Stage 7 evaluation, apart from the overall section weights and the relative value of the criteria mentioned in the June 19, 2013, clarification. Contrary to CGI's position, reading the RFP's silence as an indication that every one of those detailed criteria for which weights were not specified were attributed the *same* relative importance is not a reasonable interpretation of that document. This is so especially in light of Canada Post's clarification of June 19, 2013, which expressly evoked the existence of criteria with unequal importance and refused to provide a further breakdown. CGI points to nothing in the tender documents that indicated expressly or by

---

78. Exhibit PR-2014-006-01 at paras. 13, 67, 69, 103, Vol. 1.
79. Exhibit PR-2014-006-14A at paras. 72-75, tab 2, exhibit B, Vol. 1E.
80. Exhibit PR-2014-006-27A (protected) at 2-4, Vol. 2I.
81. Exhibit PR-2014-006-14A at paras. 73-74, tab 2, exhibit B, Vol. 1E.

implication that a certain weight would be given to a particular criterion, or that the same weight would be accorded to all criteria.

86. As such, at the time of the evaluation, the scarcity of published detail regarding the weighting criteria gave Canada Post broad latitude to apply the weights that it considered appropriate. The Tribunal is unable to conclude that Canada Post departed from anything in the published information by giving some criteria more importance than others.

87. In the Tribunal's view, the pith and substance of CGI's grievance is in fact that the RFP documents failed to provide a sufficiently detailed or precise breakdown of points per criterion, so that bidders were unable to submit responsive bids.[82] However, an allegation that Canada Post breached its obligations under *NAFTA* to disclose the rules of this solicitation in adequate detail is now out of time and is not within the scope of this inquiry.

88. As stated, the fact that the detailed weightings are not disclosed is obvious on the face of the tender documents. CGI knew or should have known of the lack of detail with respect to the weighting of criteria when it first consulted the Phase 2 SRIP, or at the latest on June 19, 2013, following Canada Post's refusal to provide a further breakdown. If CGI considered such disclosure deficient, it was incumbent on CGI to react promptly, in accordance with the *Regulations*, which make it clear that a complainant has 10 working days from the date on which it first becomes aware, or reasonably should have become aware, of its ground of complaint to either object to the government institution or file a complaint with the Tribunal.[83] Instead, CGI chose to wait, contrary to the well-established jurisprudence according to which complaints grounded in the interpretation of the tender documents must be filed (or objections made) at the outset, not after contract award.[84]

89. Accordingly, the Tribunal is unable to conclude that Canada Post departed from the published evaluation criteria on this ground.

Allegation that Canada Post Departed From the Evaluation Plan by Using Different Evaluation Teams

90. CGI also alleged that Canada Post acted inconsistently with the evaluation plan by using different evaluation teams to evaluate the technical proposals at Stage 7 and the oral presentations and site visits at Stage 8. It submitted that the RFP required the use of a single evaluation team at all stages of the evaluation, specifically because the RFP provided that contradictory information revealed at later stages could be used to verify and change the scores at earlier stages.[85]

91. Canada Post admitted to having used different evaluation teams at Stages 7 and 8. However, it maintained that this was consistent with the published RFP, including sections 3.3 and 3.3.1. Section 3.3 advised bidders that Canada Post "reserved the right" to revisit the written technical proposals based on "contradictory information" learned during the oral presentations. Section 3.3.1 similarly advised bidders

---

82. Exhibit PR-2014-006-27 at 2-4, Vol. 1G.
83. Subsections 6(1) and (2) of the *Regulations*.
84. In *IBM* at paras. 18, 21, the Federal Court of Appeal confirmed that "[i]n procurement matters, time is of the essence. . . ." and that "potential suppliers are . . . expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process."
85. Exhibit PR-2014-006-01 at paras. 125-26, Vol. 1.

that Canada Post "reserved the right" to revisit the scores for a proponent's written technical proposal and its oral presentation based on "contradictory information" learned during the site visits.[86]

92. Canada Post emphasized that sections 3.3 and 3.3.1 only created an option, as opposed to an obligation, for Canada Post, which could have been ignored entirely without departing from the disclosed evaluation plan. In any event, Canada Post structured the evaluation and membership of the evaluation team in a way that permitted an adequate opportunity to exercise that option. Canada Post underlined also that, as the same teams were used for all the proponents at any given stage, the evaluation of bids was consistent and fair.[87]

93. In reply, CGI submitted that the RFP referred to a single evaluation team in several provisions. Further, it was impossible for Canada Post to meaningfully carry out the revisiting of scores following site visits and oral presentations without using the same team at all stages of the evaluation.[88]

94. Wipro agreed with Canada Post that the RFP did not prohibit Canada Post from varying the composition of the evaluation team at different stages of the evaluation process.

95. The expression "Evaluation Team" is used in the singular in the RFP. Further, "Evaluation Team" is defined as having ". . . the meaning ascribed to it in Section 4.2 of the Phase 1 RFP main body", which in turn stated that "]a]n evaluation team will evaluate the Proposals."[89]

96. In the Tribunal's view, none of these provisions 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.

97. In addition, the Tribunal does not find that changing the composition of the evaluation team at various stages of the Phase 2 evaluation process was inherently inconsistent with the overall structure of the published evaluation plan. The evaluation process, as a whole, was sub-divided into smaller units or stages, both between Phase 1 and Phase 2, and within Phase 2 itself. Further, the Phase 2 SRIP makes it clear that Stages 7 and 8 of the evaluation plan served to evaluate different aspects of a bidder's proposal, as the former concerned the written tender, consisting of lengthy, specific and highly technical demonstrations of the bidder's proposed solution, while the latter aimed to evaluate the bidder's oral presentation and provide for an opportunity for site visits. Nothing in this structure prohibits the membership of the evaluation team to vary at any given stage, and, given the high technical complexity of certain parts of the requirement, it was reasonably consistent with the RFP structure for Canada Post to use subject-matter experts for certain parts of the evaluation and evaluators with different qualifications for others.

98. This conclusion is not defeated by CGI's argument based on the clauses reserving the right for Canada Post to revisit scores on the basis of contradictory information learned at a later stage. The evaluation methodology applied by Canada Post reasonably gave effect to these clauses. For example, while the members of the team scoring the written tenders at Stage 7 and the oral presentations at Stage 8 were not the same, the oral presentations were also attended by a team of observers, which included 5 of the 11

86. Exhibit PR-2014-006-14A at para. 94, Vol. 1E.
87. Exhibit PR-2014-006-14A, tab 2 at paras. 14-24, attachment B, Vol. 1E.
88. Exhibit PR-2014-006-27 at 5, Vol. 1G.
89. Exhibit PR-2014-006-20 at para. 80, Vol. 1G; Exhibit PR-2014-006-01A (protected), exhibit 1, Annex 1, section 2.1, Attachment K, Vol. 2. See also section 4.2 of the Phase 1 RFP, Exhibit PR-2014-006-14A, tab 2, exhibit A, Vol. 1E.

people who had evaluated the written proposals at Stage 7.[90] It is this observer group that then decided whether the oral presentation disclosed any "contradictory information" that would require revisiting the Stage 7 scores. Similarly, the site visits were attended by 4 of the 11 members of the Stage 7 evaluation of written proposals, two of whom had also attended the oral presentations.[91] No contradictory information was found in respect of any proposal.

99. On this basis, the Tribunal finds that Canada Post's use of an evaluation team with varying membership was not prohibited by anything in the RFP and, in fact, instituted realistic measures to ensure that the evaluation of this complex and lengthy requirement would be carried out with due diligence. Accordingly, CGI's complaint in this respect is not valid.

Allegation that Canada Post Departed From the Evaluation Plan by Failing to Engage the Process of Revisiting Earlier Scores on the Basis of the Oral Presentations

100. CGI argued that Canada Post's evaluation was in violation of section 3.3 of the Phase 2 SRIP, because Ms. Walker's notes for the March 31, 2014, debriefing indicated that Canada Post engaged in the process of revisiting the oral presentation score following the Stage 8 site visits, but did not mention that any revisiting of Stage 7 technical proposal scores was considered following the oral presentations.[92]

101. Canada Post indicated, in the GIR, that such revisiting was in fact considered (with the result that no scores were changed, as no "contradictory information" was revealed in the oral presentation)[93] and that it was under no obligation under the Phase 2 SRIP to carry out such a revisiting in any event, as the clause created a discretion for Canada Post, not an obligation to carry out the revisiting.

102. The information disclosed in the GIR, and namely Ms. Walker's and Mr. Bezanson's affidavits, indicates that Canada Post did consider whether CGI's oral presentation revealed contradictory information that would warrant revisiting its Stage 7 score. Further, as the Tribunal has already explained in the previous section, it does not find that the fact that different evaluators formed the team evaluating Stages 7 and 8 made it impossible to effectively engage in the revisiting process contemplated by section 3.3 of the Phase 2 SRIP in the circumstances. On this basis, the Tribunal finds that CGI's complaint is not valid in this respect either.

REMEDY

103. The Tribunal has found CGI's complaint to be valid in part: Canada Post has not provided CGI with all pertinent information as to the reasons for not selecting its bid, contrary to Article 1015(6)(b) of *NAFTA*.

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

---

90. The five members included two individuals who had participated in the evaluation of all aspects of Stage 7, as well as three individuals who had participated in the evaluation of aspects bearing on their areas of expertise. Exhibit PR-2014-006-14B (protected), tab 2 at paras. 18-24, Vol. 2G; Exhibit PR-2014-006-14A at paras. 34-47, Vol. 1E.
91. Exhibit PR-2014-006-14B (protected), tab 2 at paras. 25-27, Vol. 2G.
92. Exhibit PR-2014-006-01 at paras. 12-14, 38-39, 119-28, Vol. 1.
93. Exhibit PR-2014-006-14A at paras. 41-44, 103-106, Vol. 1E; Exhibit PR-2014-006-14B (protected), tab 2 at paras. 21-23, tab 3 at para. 7, Vol. 2G.

105. CGI requested that Canada Post provide it with a list of documents and information regarding the procurement process, that it cancel the contract awarded under the RFP and issue a new solicitation. In the alternative, CGI requested compensation for lost profits, lost opportunity and/or its bid preparation costs. In the further alternative, it requested a re-evaluation of all bids. CGI also requested its litigation costs related to this complaint. CGI submitted that the prejudice to the integrity of the procurement system and the length of the resultant contract justify the remedies sought by it and outweigh Wipro's private interests.

106. Canada Post submitted that, if any breaches were found, the requested remedies are out of proportion with the alleged breaches, as none of the breaches could have materially affected CGI's score after Stages 7 and 8 and, thus, its disqualification. Further, the appropriate remedy for a breach of the debriefing obligation would be to require Canada Post to provide the further information identified by the Tribunal in the format chosen by Canada Post. The remedy recommendation should also consider the fact that Canada Post conducted this procurement with a liberal approach to its *NAFTA* obligations, even hiring a fairness monitor, and in a good faith effort to comply with all applicable requirements and obligations.

107. Wipro submitted that the Tribunal should order no remedy that would disrupt the awarded contract, which is already underway.

108. 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.

109. The deficiency found is serious due to its broader impact on the integrity and efficiency of the competitive procurement system. Disregarding debriefing obligations risks significantly affecting the trust of bidders and the public in the integrity of the procurement system, as well as the efficiency of the system. As stated, the debriefing obligations contemplated by *NAFTA* are one means of ensuring the transparency of the procurement system, which underpins the objectives of the procurement regime under the *CITT Act* and the trade agreements. In particular, debriefings serve to demonstrate that the procurement has been conducted with integrity, they provide bidders with the necessary information to assert, if need be, their *NAFTA* rights, and they can facilitate an early resolution of disputes between the parties. All of these are essential for the system to function efficiently.

110. CGI itself was prejudiced by this breach to the extent that it had to incur the costs of this complaint, including a motion for disclosure of documents, in order to obtain the appropriate debriefing. However, the breach of the debriefing obligation, which occurred after the award of the contract, could have had no impact on CGI's ability to participate in the procurement process or its capacity to be awarded the contract. This solicitation process was not significantly altered by Canada Post's breach, as the identified breach is inconsequential to its outcome and the resulting contract award.

111. In light of these circumstances, coupled with the fact that there is no indication that Canada Post acted in bad faith and the fact that contract performance appears to have begun and occasioned significant expenditures,[94] the Tribunal recommends that Canada Post Corporation, on its own behalf or through Innovapost Inc., provide CGI pertinent information, identified in accordance with the Tribunal's decision, concerning the reasons for not selecting the tender submitted by CGI in response to this solicitation. The

---

94. Exhibit PR-2014-006-34A (protected) at paras. 32-45, tab 1, Vol. 2J.

Tribunal also recommends that Canada Post Corporation, whether conducting procurements on its own behalf or through Innovapost Inc., change its debriefing practices and policies so that they are consistent with the principles and considerations in these reasons.

112. The Tribunal is of the view that the recommended remedy appropriately responds to the detrimental effects of Canada Post's breach. The Tribunal does not consider that the interests of fairness and efficiency, or the general public's interest in the integrity and efficiency of the competitive system, require recommending a remedy that would negate the contract awarded to Wipro, because, as explained, the particular breach identified in this inquiry concerned only facts and actions of Canada Post that occurred after the contract was awarded. For the same reasons, the Tribunal will not award CGI its bid preparation costs pursuant to subsection 30.15(4) of the *CITT Act*, or compensation for lost profits or loss of opportunity.

COSTS

113. CGI requested its litigation costs. 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. Wipro did not request costs.

114. The Tribunal has decided to award CGI its reasonable costs incurred in the Tribunal's process, which costs are to be paid by Canada Post Corporation or Innovapost Inc.

115. 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 the complaint case is Level 3, and the preliminary indication of the amount of the cost award is $4,700.

DETERMINATION OF THE TRIBUNAL

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

117. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that Canada Post Corporation, on its own behalf or through Innovapost Inc., provide CGI pertinent information, identified in accordance with the Tribunal's determination, concerning the reasons for not selecting the tender submitted by CGI in response to Solicitation No. 2012-SDL-006. The Tribunal also 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 Tribunal in the reasons for its determination.

118. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards CGI its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by Canada Post Corporation or Innovapost Inc. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of

complexity for this complaint case is Level 3, and its preliminary indication of the amount of the cost award is $4,700. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Stephen A. Leach
Stephen A. Leach
Presiding Member