



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

Files No. PR-2014-016 and
PR-2014-021

CGI Information Systems and
Management Consultants Inc.

v.

Canada Post Corporation and
Innovapost Inc.

*Order and reasons issued
Monday, January 12, 2015*

TABLE OF CONTENTS

ORDER 1

STATEMENT OF REASONS 2

 INTRODUCTION 2

 SUBMISSIONS BY THE PARTIES 2

 TRIBUNAL’S ANALYSIS 3

 CONCLUSION 5

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 the Canadian International Trade Tribunal's indication of the level of complexity for the complaint cases and its indication of the amount of the cost award.

BETWEEN

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

Complainant

AND

CANADA POST CORPORATION AND INNOVAPOST INC.

**Government
Institutions**

ORDER

In its determination of October 14, 2014, the Canadian International Trade Tribunal, pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, awarded CGI Information Systems and Management Consultants Inc. its reasonable costs incurred in preparing and proceeding with the complaints. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for the complaint cases was Level 3, and its preliminary indication of the amount of the cost award was \$4,700.

After having considered the submissions on costs of both CGI Information Systems and Management Consultants Inc. and Canada Post Corporation, the Canadian International Trade Tribunal hereby revises its preliminary indication of the amount of the cost award by awarding CGI Information Systems and Management Consultants Inc. its costs in the amount of \$20,000, inclusive of disbursements and applicable taxes, for preparing and proceeding with the complaints and directs Canada Post Corporation to take appropriate action to ensure prompt payment.

Jean Bédard

Jean Bédard

Presiding Member

STATEMENT OF REASONS

INTRODUCTION

1. In its determination of October 14, 2014, the Canadian International Trade Tribunal (the Tribunal), pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*,¹ determined that the complaints filed by CGI Information Systems and Management Consultants Inc. (CGI) were valid in part and awarded CGI its reasonable costs incurred in preparing and proceeding with the complaints. The Tribunal's preliminary indication of the cost award was \$4,700. Parties were invited to make submissions to the extent that they disagreed with the Tribunal's preliminary indication of the level of complexity or the amount of the cost award.

SUBMISSIONS BY THE PARTIES

2. On November 12, 2014, CGI filed submissions on costs, requesting that the cost award be increased to \$89,000, which is reflective of 50 percent of CGI's actual costs in preparing and proceeding with the complaints. In the alternative, CGI requested that the cost award be increased by an amount that the Tribunal deemed appropriate on the basis of CGI's submissions. CGI pointed out that two of its grounds of complaint were resolved in its favour, in particular, one concerning the inadequacy of the debriefing it received from Canada Post Corporation (CPC) and another regarding CPC's failure to retain relevant documents in accordance with the *North American Free Trade Agreement*.² CGI also listed the additional steps that the proceedings involved, including a motion for production, a motion for particulars, and a motion challenging CPC's confidentiality designation and seeking limited disclosure of certain documents. Moreover, CGI submitted that it had no choice but to frame its complaints broadly, as a direct result of CPC's failure to disclose relevant information in its response to CGI's objection letter and during the debriefing. In other words, had CPC been more forthcoming from the outset, the complaints and the entire proceedings would have encompassed a much narrower range of issues.

3. CPC filed submissions on costs on November 19, 2014. CPC pointed out that a significant proportion of the time and effort in these proceedings involved issues on which CGI was unsuccessful, including CGI's allegations of improper evaluation, spoliation, bias and bid repair. In particular, CPC pointed to the complexity and number of pages dedicated to CGI's arguments regarding allegations of an improper evaluation, a ground of complaint which the Tribunal found was not valid. CPC indicated that allegations regarding the evaluation could have been withdrawn by CGI, but were not, after CPC provided a breakdown of its scoring and the weights attributable to the various parts of the evaluation. CPC's submissions also highlight that CGI made several serious allegations against CPC, including bid repair and bias, without providing evidence in support of these allegations. Further, CPC argued that the issues on which CGI's complaints were found valid were limited and less complex. Accordingly, CPC submitted that the Tribunal's preliminary indication of the amount of the cost award should be left unchanged or, in the alternative, should be decreased based on the parties' divided success on the issues.

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*].

TRIBUNAL'S ANALYSIS

4. Pursuant to subsection 30.16 of the *CITT Act*, the Tribunal can award costs of proceedings. As set out in the *CITT Act*, this is a discretionary power.

5. In the exercise of its discretionary power under the *CITT Act*, the Tribunal issued the *Procurement Costs Guideline* (the *Guideline*) in order to provide guidance to parties seeking to recover the costs of participating in procurement complaint proceedings. However, the *Guideline* is not binding on the Tribunal, as “. . . each case will be considered individually, and the guideline is not intended to replace, limit or detract from the discretion of the Tribunal”³

6. Paragraph 2.1 of the *Guideline* provides that “[t]he costs awarded normally represent a partial indemnity.”

7. For the following reasons, having considered the circumstances of this case and the submissions of the parties, the Tribunal finds that a departure from the rates set out in the *Guideline* is warranted.

8. First, the Tribunal notes the lengths to which CGI was required to go in order to discover the evidence necessary to establish its complaints. In the Tribunal's view, this was the result of CPC's minimalist approach regarding its obligations under *NAFTA*, an approach that was obvious throughout the proceedings. It is unreasonable to expect CGI to have submitted a more-focussed objection letter and ultimately more-focussed complaints when the information CGI had regarding the evaluation of its proposal was severely limited. Indeed, this minimalist approach no doubt gave rise to suspicions by CGI that something more sinister was afoot and accordingly was the root cause for much of the litigation in this matter.

9. On September 8, 2014, only a few days before the September 12 hearing in this matter, CPC sent a letter to the Tribunal and to CGI indicating that it would provide officials from CGI with access to various documents relevant to CGI's evaluation, including completed consensus evaluation grids, briefing notes, copies of agendas, and notes from the fairness commissioner.⁴ CPC's changed position on the confidentiality of these documents came only after a decision of the Tribunal on a similar matter⁵ made it clear that CPC would likely not be successful on the allegation that its debriefing did not meet the minimum requirements under *NAFTA* in this case.

10. At the hearing, CPC also retreated on its argument that the destruction of documents was not a breach of the document retention obligations under *NAFTA*, stating that, “. . . obviously, if it's going to be part of the debrief, it has to be maintained.”⁶ These last minute concessions do not negate the fact that, for the bulk of the proceedings, CPC's approach was not conducive to the effective and expedient resolution of the complaints.

11. Furthermore, the fact that CPC conceded on arguably the most important points of CGI's complaints only at a late stage of the proceedings did not leave CGI with much time to reassess its position on the other remaining issues. Crucial information was disclosed to CGI only days before the hearing.

3. *Guideline* at para. 1.1.2.

4. Exhibit PR-2014-016-56, Vol. 1P.

5. *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (27 August 2014), PR-2014-006 (CITT).

6. *Transcript of Public Hearing*, 12 September 2014, at 142.

12. These factors, in addition to the lack of transparency observed by the Tribunal at paragraphs 185 and 205 of its reasons, gave no choice to CGI but to engage with CPC in a similarly combative manner.

13. CGI, however, was unsuccessful on most of the issues that remained to be decided at the conclusion of the hearing. This is a factor that the Tribunal is also taking into consideration in this cost order.

14. One of the additional steps involved in these proceedings was an oral hearing. Although several issues were conceded as mentioned above, it must be noted that the hearing nonetheless served a very useful purpose.

15. In its cost submissions, CPC accurately mentions that CGI alleged bid repair and that the Tribunal's finding did not support this more serious allegation. It must be noted, however, that the relevant facts that led the Tribunal to its decision and recommendation regarding the evaluation of the proposals came to light primarily as a result of the oral evidence heard at the hearing. In particular, the specific details of the evaluators' error that required correction and a corresponding adjustment to the initial evaluation scores were notably absent from CPC's written pleadings. Furthermore, on the basis of the partial information provided by CPC in its written submissions and in view of its general lack of transparency throughout the process, it was not unreasonable in the circumstances for CGI to suspect that CPC might have engaged in bid repair. For those reasons, the hearing and CGI's efforts on that occasion had a meaningful impact on the outcome.

16. CGI's cost submissions list the various steps of the proceedings. The actual legal expenses associated with each step are, however, part of CGI's confidential submissions. As a result, the Tribunal will not engage in a line-by-line discussion of the various amounts which comprise the final award. Suffice it to say that greater weight is being given to the costs relating to drafting and submitting the complaints and the two replies. The fact that CGI has been unsuccessful on most of the issues that were the subject matter of the hearing is mitigated by the fact that CGI's efforts had nonetheless an impact on the final outcome. These balancing factors are taken into account in assigning an amount for the cost award.

17. The complaints in Files No. PR-2014-016 and PR-2014-021 were combined by the Tribunal⁷ and treated as one at the hearing. Accordingly, this cost award does not distinguish between the two complaints. In and of itself, however, the complaint in File No. PR-2014-021 was not as complicated and would not have qualified as a Level 3 on its own. The Tribunal also takes this into consideration in assessing the costs related to the destruction-of-document grounds of the complaint.

18. The flat rates set out in paragraph 4.1.2 of the *Guideline* indicate that amounts awarded for costs are not generally expected to be substantial. Accordingly, one should not presume or expect that the *partial indemnity* referred to in the *Guideline* would be identical to "partial indemnity" as that concept is understood in civil cases in Ontario.

19. The footnote to paragraph 4.1.2 of the *Guideline* refers to the Federal Court of Canada tariff for fees as one source of guidance used to determine the Tribunal's flat rates. The footnote also indicates that the flat rates in the *Guideline* include amounts generally expected to provide for disbursements.

7. *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (9 October 2014), PR-2014-016 and PR-2014-021 (CITT) at para. 7.

20. The “Costs Assessed on Unit Basis per hour” in CGI’s cost submissions are based on the *Federal Court Rules*.⁸ In the present circumstances and given the unusual complexity of this case, the Tribunal considers that this is an appropriate reference point to begin its determination of what would constitute a reasonable final amount for this cost award.

21. Most of the numbers in CGI’s cost submissions being confidential, the Tribunal cannot discuss the amounts attributed to each step of the proceedings. In its public cost submissions, however, CGI has indicated that its total costs (not including GST) on the basis of “Costs Assessed on Unit Basis per hour” are \$57,820. Furthermore, the invoices submitted in support of the confidential cost submissions indicate that the disbursements have been relatively modest.

22. Paragraph 2.1 of the *Guideline* also states that “[t]he assessment and taxation processes should be efficient, transparent, and fair to all parties.” Notwithstanding the fact that one would arrive at a cost award of \$57,820 if strictly adhering to the *Federal Court Rules*, the Tribunal is of the view that this amount should be reduced, given the divided success of the parties and bearing in mind that the cost award at the Tribunal is expected to be modest, all things considered.

23. Thus, on the basis of the foregoing, the Tribunal revises its preliminary indication of the amount of the cost award and awards CGI its costs in the amount of \$20,000, inclusive of disbursements and applicable taxes.

CONCLUSION

24. In its determination of October 14, 2014, the Tribunal, pursuant to section 30.16 of the *CITT Act*, awarded CGI its reasonable costs incurred in preparing and proceeding with the complaints. The Tribunal’s preliminary indication of the level of complexity for the complaint cases was Level 3, and its preliminary indication of the amount of the cost award was \$4,700.

25. After having considered the submissions on costs of both CGI and CPC, the Tribunal hereby revises its preliminary indication of the amount of the cost award by awarding CGI its costs in the amount of \$20,000, inclusive of disbursements and applicable taxes, for preparing and proceeding with the complaints and directs CPC to take appropriate action to ensure prompt payment.

Jean Bédard
Jean Bédard
Presiding Member

8. SOR/98-106.