CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, September 6, 2000

File Nos.: PR-2000-008 and PR-2000-021

IN THE MATTER OF two complaints filed by Brookfield LePage Johnson Controls Facility Management Services under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND IN THE MATTER OF decisions to conduct inquiries into the complaints under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that Canada Post Corporation, in conducting this solicitation, has violated the *North American Free Trade Agreement*, in that the Request for Proposal, as amended: (1) does not set out the method of scoring and weighting rated requirements nor their relative importance; (2) does not provide the criteria for dismissing proposals or for determining the most advantageous proposal; and (3) is ambiguous as to the negotiation regime that will apply. Therefore, the complaints are valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that Canada Post Corporation amend the Request for Proposal or issue a new solicitation that conforms to this determination and the requirements of the *North American Free Trade Agreement*.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Brookfield LePage Johnson Controls Facility Management Services its reasonable costs incurred in filing and proceeding with these complaints.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

James A. Ogilvy
James A. Ogilvy
Member

Michel P. Granger
Michel P. Granger
Secretary

The reasons for the Tribunal's determination will be issued at a later date.

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Date of Determination:	September 6, 2000
Date of Reasons:	September 25, 2000
Tribunal Members:	Pierre Gosselin, Presiding Member Peter F. Thalheimer, Member James A. Ogilvy, Member
Investigation Officer:	Paule Couët
Counsel for the Tribunal:	Gerry Stobo
Complainant:	Brookfield LePage Johnson Controls Facility Management Services
Counsel for the Complainant:	Gordon Cameron Nancy K. Brooks
Government Institution:	Canada Post Corporation
Counsel for the Government Institution:	Randall J. Hofley Justine M. Whitehead

CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

PUBLIC

Ottawa, Monday, September 25, 2000

File Nos.: PR-2000-008 and PR-2000-021

IN THE MATTER OF two complaints filed by Brookfield LePage Johnson Controls Facility Management Services under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND IN THE MATTER OF decisions to conduct inquiries into the complaints under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

STATEMENT OF REASONS

On May 25, 2000, Brookfield LePage Johnson Controls Facility Management Services (BLJC) filed a complaint (File No. PR-2000-008) with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] concerning the procurement (Solicitation No. 6 NS 00 RS R1) by Canada Post Corporation (Canada Post) of facility management, project management and other related services for various buildings and properties operated by Canada Post throughout Canada, for a period of five years, with an option to renew the contract for a further five years.

BLJC alleged that, in conducting this procurement, Canada Post acted contrary to the provisions of the *North American Free Trade Agreement*.[2] Specifically, BLJC alleged that:

(a) contrary to Articles 1013, 1013(1) and 1013(1)(b) of NAFTA, the Request for Proposal (RFP) reserved Canada Post the right to consider evaluation criteria not contained in the RFP, to withhold evaluation criteria from potential suppliers, to accept or reject proposals for reasons not described in the RFP and, in general, to conduct the procurement in an arbitrary manner;

(b) contrary to Article 1013(2)(b) of NAFTA, Canada Post did not respond promptly to a reasonable request made by BLJC for relevant information concerning this procurement;

(c) Canada Post has indicated its intention to conduct negotiations in conjunction with this procurement in a manner other than that described in Articles 1010 and 1014 of NAFTA;

(d) the RFP described a two-stage qualification process that contravenes the qualification procedures stipulated in Article 1009 of NAFTA;

(e) the RFP invited potential suppliers to submit proposals that do not comply with the mandatory requirements of the RFP and reserved Canada Post the right to consider and accept such proposals, thus removing the procurement entirely from compliance with Chapter Ten of NAFTA; and

(f) the RFP described stages of the bid process that are vague and uncertain, with the result that BLJC does not know its rights and obligations at each stage of the bid process, thereby creating a procurement process open to discrimination against potential suppliers, contrary to Articles 1008(1) and 1013 of NAFTA.

BLJC requested, as a remedy, that, pending the consideration of this complaint, Canada Post be ordered to suspend the procurement until it has provided complete and NAFTA-compliant responses to its

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].

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objections. In the alternative, BLJC requested that Canada Post be ordered to receive proposals without opening them until the Tribunal determined the validity of the negotiation regime described in the RFP. In the further alternative, BLJC requested that the Tribunal order the postponement of the award of any contract in relation to this solicitation until the Tribunal determined the validity of the complaint. BLJC also requested, in the event that the Tribunal determined that this complaint, or some aspect of it, is valid, that Canada Post be ordered to conduct a new solicitation for the designated contract that conforms to the provisions of NAFTA. In the event that a contract is awarded to a proponent other than BLJC, it requested that it be compensated for the profits that it lost as a result of this defective procurement. Finally, BLJC requested its costs for preparing a response to the RFP and for filing and proceeding with this complaint.

On May 31, 2000, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the CITT Act and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.[3] That same day, the Tribunal issued an order postponing the award of any contract in relation to the solicitation until the Tribunal determined the validity of the complaint. On June 7, 2000, Canada Post wrote the Tribunal certifying that the procurement was urgent and that a delay in awarding the contract would be contrary to the public interest. Accordingly, on June 8, 2000, the Tribunal rescinded its postponement of award order of May 31, 2000. On June 26, 2000, Canada Post filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[4]

On July 7, 2000, BLJC filed a second complaint (File No. PR-2000-021) in respect of the same solicitation. Therein, BLJC alleged that, contrary to Article 1008 of NAFTA, Canada Post has conducted this procurement in a manner that discriminates against potential suppliers and that Canada Post has stipulated new procedures and mandatory requirements for the RFP, but has declined to provide potential suppliers with all the information necessary to permit them to submit responsive tenders, contrary to Article 1013 of NAFTA.

BLJC requested, as a remedy, that the Tribunal postpone the award of any contract in relation to this solicitation until the Tribunal determined the validity of the complaint. BLJC further requested that the Tribunal recommend that Canada Post conduct a new procurement for the services at issue and that, in the present or any future procurement, Canada Post be required to appoint an independent third party to monitor the fairness of the procurement process, either as this procurement proceeds or as a new procurement is commenced. In the alternative, BLJC requested that, in the present or any future procurement, Canada Post not accept any proposals from ProFac Facilities Management Services Inc. (ProFac), or any affiliate of ProFac, and that a certain named project manager be removed from any involvement in the procurement. In the event that a contract is awarded to a proponent other than BLJC, it requested that it be compensated for the profits that it lost as a result of the defective procurement. BLJC also requested its costs for preparing a response to this solicitation and for filing and proceeding with this complaint. In respect of the second ground of complaint, BLJC further requested that Canada Post give full particulars of the mandatory pricing requirements and of the negotiation process referred to in Canada Post's letter of June 23, 2000, and allow a reasonable time afterwards for potential suppliers to prepare and submit tenders.

On July 10, 2000, BLJC filed comments on the GIR with respect to File No. PR-2000-008 with the Tribunal.

3. S.O.R./93-602 [hereinafter Regulations].
4. S.O.R./91-499.

On July 13, 2000, the Tribunal informed the parties that a second complaint relating to this solicitation had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the CITT Act and the conditions set out in subsection 7(1) of the Regulations. On July 28, 2000, the Tribunal, at the request of the parties, consolidated the two complaints and requested the parties to comment on the two complaints as if they were different grounds of the same complaint. On July 31, 2000, Canada Post filed the GIR for the second complaint and comments on BLJC's response to the GIR for the first complaint with the Tribunal. On August 11, 2000, BLJC filed comments in response with the Tribunal.

Given that there was sufficient information on the record to determine the validity of these complaints, the Tribunal decided that a hearing was not required and disposed of the complaints on the basis of the information on the record.

PROCUREMENT PROCESS

On April 25, 2000, Canada Post posted a Notice of Proposed Procurement (NPP) on Canada's Electronic Tendering Service (MERX). The NPP indicated that the solicitation was covered by NAFTA. It further stated that Canada Post was seeking a national contractor to provide facility management, project management and other related services for approximately 1,100 facilities across Canada, representing a surface of approximately 15 million square feet. The NPP indicated that Canada Post intended to negotiate with potential suppliers on this proposed procurement. That same day, Canada Post issued an RFP for the solicitation. The public version of the RFP was available to all potential suppliers upon request. However, the confidential version of the RFP, which contains commercial information confidential to Canada Post, was available only to those potential suppliers that responded to a pre-qualification questionnaire and that executed a non-disclosure agreement. The original deadline for the submission of proposals was June 19, 2000. It was subsequently extended to July 10, 2000.

According to the GIR, upon completion of a Facility Management Agreement, pursuant to the RFP, Canada Post will have outsourced all but its most strategic facility management responsibilities. In this context and to be ready before the peak season for mail at Christmas, Canada Post emphasized that it was important that the transition of all services to the selected contractor be achieved without delay.

In response to the NPP, Canada Post forwarded the complete RFP package (i.e. public and confidential versions) to seven potential suppliers, including BLJC and ProFac. On May 3, 2000, BLJC wrote Canada Post requesting clarification of the wording of the RFP in several areas, e.g. the consideration of alternative solutions by Canada Post, the "two-stage qualification process" for potential suppliers, the scope and process of negotiations, the evaluation criteria and evaluation guidelines, including weighting and scoring, the scope of work, the protection of confidential information submitted by proponents and the possibility of rejecting incomplete proposals. On May 11, 2000, Canada Post responded to BLJC, seemingly satisfying BLJC's concerns with respect to the protection of confidential information and the rejection of incomplete proposals. However, on May 15, 2000, BLJC requested clarification of Canada Post's response to the majority of the concerns that it had raised in its letter of May 3, 2000. On May 19, 2000, Canada Post advised BLJC that it hoped to be in a position to respond by May 25, 2000. In a letter dated May 25, 2000, the day on which BLJC filed its complaint with the Tribunal, Canada Post informed BLJC that it would respond by May 29, 2000.

On May 29, 2000, Canada Post issued amendment No. 1 to the RFP. The amendment reads, in part:

Item 2: Reference RFP Clause 2.9.1—Process

Replace existing wording with:

"The Corporation will evaluate all RFP responses on the basis of the evaluation criteria and essential requirements set out in the RFP."

Clause 2.9.1 previously read:

The Corporation reserves the right to evaluate all RFP responses against criteria specific to the Corporation's application. Such criteria are considered by the Corporation to be proprietary information, and as such, will not be released to any Proponent.

Amendment No. 1 further reads as follows:

Item 3: Reference RFP Clause 2.9.2—Corporation's Evaluation Team

Replace the final paragraph to this Clause with:

Proponents that meet the Mandatory Requirements will progress to the second phase of the evaluation. The second phase shall score the balance of the response provided.

The last two paragraphs of Clause 2.9.2 previously read, in part:

Responses to this RFP will be evaluated and the success of any Proponent will be based on, but not limited to, the following criteria:

. . .

The Corporation's evaluation process structure is such that Proponents will be evaluated against but not limited to, the criteria stated herein and the associated responses.

Amendment No. 1 goes on to read:

Item 4: Reference RFP Clause 2.9.3 – Identification of a Potential FMC [Facility Management Contractor]

Replace all of the existing wording with:

"Potential FMCs will be identified based on material submitted in response pursuant to this RFP.

Any implied obligation on the part of the Corporation to accept the lowest price response or any response is hereby expressly denied. Upon submitting a response, the Proponent acknowledges that its response is not reliant on any expressed or implied agreement on the part of the Corporation to accept the lowest price response or any response. Any ultimate selection will be based on perceived value and not necessarily the lowest price. The Proponent agrees that this clause shall govern the obligations of the Corporation notwithstanding any expressed or implied term to the contrary, whether customary in the trade or otherwise. . . ."

Clause 2.9.3 previously read:

Potential FMC's will be identified based on material submitted in response pursuant to this RFP and identical requests made to other Proponents and other factors to be considered by the Corporation to be relevant in the circumstances. . . . [T]he Corporation reserves the right to make its selection based on any factor relevant to the Corporation whether or not these factors are described in this RFP.

The Corporation reserves the right to accept or reject any response submitted for any reason which the Corporation may elect. Any response may not be accepted by the Corporation if the Corporation is of the opinion that any other response, for any reason which the Corporation may in its sole discretion apply, is preferable to the Corporation.

> . . . the Proponent acknowledges that its response is not reliant on any expressed or implied agreement on the part of the Corporation to accept the lowest price response or any other response, whether or not its decision is based on a disclosed or undisclosed, present or future policy or criteria applied by the Corporation. . .
>
> Depending on the number of responses received, successful Proponent(s) may be short-listed and required to provide additional information to the Corporation. Interviews with individual Proponent(s) may be requested by the Corporation prior to completion of the RFP evaluation process. The Corporation will make its best efforts to communicate the results of the evaluation of the proposals within 180 days after the proposal due date.

On May 11, 2000, Canada Post wrote BLJC on the subject of the consideration of alternative solutions by Canada Post, as follows:

> The Corporation will only consider alternative solutions, if any, after the Corporation has evaluated proposals for the mandatory and baseline requirements. The Corporation will only review the alternative solutions of Proponents who comply with Mandatory Requirements . . . If the Corporation reviews the alternative responses and considers one to be a potentially viable solution, then all other Proponents who have submitted a compliant proposal will be given the opportunity to submit a similar alternative solution.

In response to a request for further clarification, Canada Post advised BLJC, in a letter dated May 29, 2000, as follows:

> [I]f a Proponent's proposal has met the mandatory requirements of the RFP, is judged qualified to provide the services contemplated therein, and has presented a proposal(s) responsive to the RFP, said proposal(s) will be evaluated in accordance with the criteria set out in the RFP. If, in addition, the Proponent provides an "alternative solution" which is not responsive to the RFP, . . . and the Corporation concludes that it presents a viable alternative to that requested by way of the RFP which the Corporation wishes to consider, the Corporation will conduct itself in accordance with the dictates of NAFTA Chapter 10. Should this require that a new RFP be issued, the Corporation will act accordingly.

In a letter dated June 12, 2000, BLJC submitted further questions with respect to the evaluation criteria and the negotiation regime. These questions were answered in a letter to BLJC dated June 23, 2000, and by the issuance of amendment No. 3 to the RFP, dated June 23, 2000. Amendment No. 3 made some minor wording changes throughout the RFP and, more importantly, further explained Canada Post's intended evaluation process by adding the following paragraph at the end of clause 2.9.2 (Corporation's Evaluation Team):

> The evaluation process may include, where necessary, requests for clarifications, and/or request for a Presentation and/or Site Visit, as referenced in the RFP. During the evaluation process, the Corporation will determine whether it wishes to negotiate on any aspect of the RFP, including price. If the Corporation conducts negotiations on any aspect of the RFP and such negotiations lead to revised or modified criteria or requirements, including price, the Corporation will issue all revised criteria or requirements and request a final submission by all remaining suppliers, including, if applicable, a "best and final" offer on price. This process may be repeated, if necessary. Any such final submission will be evaluated and scored.

POSITION OF PARTIES

Canada Post's Position

Canada Post submitted that the RFP, including the evaluation criteria and procedure outlined therein, fully complies with the obligations of NAFTA. Specifically, Canada Post submitted that it has not acted contrary to the provisions of Article 1013(2)(b) of NAFTA and that it answered all the clarification questions raised by BLJC within 14 days of the request, as stipulated in clause 2.5.2 of the RFP. Furthermore, Canada Post submitted that, since BLJC never objected or complained that the time limit provided in clause 2.5.2 was contrary to Article 1013(2)(b), it is too late to raise this ground of complaint now because the time limit provided in subsection 6(2) of the Regulations has long expired. Canada Post argued that BLJC did not wait to consider all of Canada Post's responses before filing its complaint and that, therefore, its complaint was premature.

With respect to BLJC's allegation that, by failing to disclose, in the RFP, all the evaluation criteria, including the weighting and scoring methodology, Canada Post has reserved itself the right to conduct the procurement in an arbitrary manner, Canada Post submitted that a fair reading of the entire RFP would prove to the contrary. In any event, Canada Post further submitted, the issue is now moot, since Canada Post's amendments to clauses 2.9.1, 2.9.2 and 2.9.3 of the RFP make it clear that all the criteria upon which the contract will be awarded are included in the RFP and that no other criterion will be considered in awarding the contract. As well, Canada Post argued that the fact that no other potential supplier has complained to Canada Post or the Tribunal with respect to these provisions may well be considered evidence of the fact that the provisions do not reasonably raise an apprehension of arbitrariness on the part of Canada Post.

On the question of the evaluation guidelines, more specifically the weighting and scoring guidelines, Canada Post submitted that it is not obliged, by any provision of NAFTA, to supply the evaluation guidelines. As well, Canada Post disputed BLJC's contention that, by not providing the evaluation guidelines to potential suppliers, Canada Post will eventually be in breach of Article 1015(1) of NAFTA. It submitted that Article 1013(1) of NAFTA does not require, explicitly or implicitly, the provision of weighting and scoring guidelines to potential suppliers. It argued that, contrary to Article 506(6) of the *Agreement on Internal Trade*[5] which, in addition to the criteria that will be used in the evaluation of bids, specifically requires the provision of "the methods of weighting and evaluating the criteria", Article 1013(1)(h) of NAFTA and Article XII(2)(h) of the *Agreement on Government Procurement*[6] simply require the provision of the "criteria for awarding the contract". In this context, and noting the consistency between Canada's negotiated obligations under the international agreements on government procurement, Canada Post submitted that a departure from a fixed pattern of expression in the AIT signals an intent to connote a different meaning. Therefore, Canada Post argued, it cannot be said that there is an obligation under NAFTA and the AGP similar to that under the AIT to provide the methods of weighting and evaluating the criteria. Furthermore, Canada Post submitted that the failure to include in NAFTA a provision that is comparable to the provision in the AIT cannot be considered an oversight or a mistake, but must be considered a deliberate exclusion that should be respected by the Tribunal, as it did in File No. PR-99-040.[7] Canada Post further submitted that, while the Tribunal should ensure that government entities live up to their obligations under the trade agreements, it should be careful not to broaden Canada's

5. As signed at Ottawa, Ontario, on July 18, 1994 [hereinafter AIT].
6. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [hereinafter AGP].
7. *Brent Moore* (4 May 2000).

obligations under NAFTA unilaterally. It added that BLJC's reliance on the Tribunal's decision in File No. PR-98-032[8] to support its contention is misguided, as the Tribunal's decision in that case related to an entity subject to NAFTA, the AGP and the AIT and cannot apply to Canada Post's circumstances, as it is only subject to NAFTA.

Canada Post submitted that there is no basis for concluding, as BLJC did, that a potential supplier requires weighting and scoring guidelines in order to submit a responsive proposal and that failing to make such guidelines available to potential suppliers would amount to a breach of Article 1013(1) of NAFTA. After describing the contents of the RFP, Canada Post submitted that it already contains sufficient information for potential suppliers to submit responsive tenders. This, Canada Post submitted, is illustrated by the fact that no complaint has been filed by any other potential supplier. As well, Canada Post submitted, BLJC is a sophisticated business entity that has been providing facility management services to Canada Post for the last five years, and its contention that it cannot file a responsive bid is neither reasonable nor credible. Concluding on this point, Canada Post noted that this procurement is not for a specific, easily describable product, but for a proposal to provide significant, complex and key services to Canada Post.

On the subject of negotiations, Canada Post submitted that Article 1014(1) of NAFTA clearly authorizes the conduct of negotiations if an entity has advised potential suppliers of its intent to do so. Canada Post has clearly done so in the NPP and in clauses 2.9.4 and 4.9 of the RFP. Furthermore, Canada Post submitted that there is no obligation in NAFTA to detail in the RFP the negotiation regime or areas. However, Canada Post has issued an amendment to the RFP to provide a description of the negotiation regime and argued that, since no negotiations have yet taken place, any assertion by BLJC that such negotiations will not be conducted in accordance with Article 1014(4) is speculative and should not be considered by the Tribunal.

Canada Post submitted that the remedies requested by BLJC are not appropriate because, even if the Tribunal determines that some aspects of the RFP are, or were, not NAFTA-compliant, such a finding would not signal a serious deficiency in the procurement process, nor would the integrity and efficiency of the competitive procurement system be prejudiced. Furthermore, there is no allegation that Canada Post has acted in bad faith and, in fact, Canada Post argued that it has gone to great lengths to address all the issues raised by BLJC. In addition, Canada Post submitted that there is no justification for BLJC to be awarded its costs of preparing a response to the RFP or that it be awarded lost profits if another supplier is awarded the contract because BLJC continues to be involved in this solicitation and will have an opportunity to be awarded the contract. Canada Post requested the opportunity to make submissions on costs, as appropriate, and also requested that the Tribunal decide the matter expeditiously, considering the importance for Canada Post to initiate the transition phase as soon as possible.

In its submissions of July 26, 2000, Canada Post requested, due to the urgency of the situation, that the Tribunal issue its determination and recommendations with respect to both complaints by September 1, 2000.

In response to BLJC's comments on the GIR filed in response to the first complaint, Canada Post submitted that BLJC had raised new assertions of fact and law in its response to the GIR. Specifically, Canada Post submitted that, contrary to BLJC's assertion, it did not and does not intend to conduct this procurement in an arbitrary or unfair manner. Drafting an RFP for the scope of services at issue, Canada Post argued, is a massive undertaking, and there are bound to be areas that may be unclear or, alternatively, where Canada Post may have, inadvertently, misrepresented its intentions. This is why, Canada Post submitted, potential suppliers had the opportunity to submit clarification questions, to which Canada Post

8. *Polaris Inflatable Boats* (8 March 1999) [hereinafter *Polaris*].

has responded. Canada Post denied that it attempted to avoid NAFTA at each stage of this procurement and submitted that BLJC has not submitted a single piece of evidence that demonstrates that Canada Post was considering awarding a contract for the services at issue outside of its NAFTA procurement obligations.

It also submitted that BLJC has significantly refined, in its response to the GIR, its allegation that the RFP does not contain all the criteria for awarding the contract or all the information necessary to submit responsive tenders. For example, BLJC asserted for the first time in its comments on the GIR that evaluation criteria, as that expression is used in NAFTA, are "the standards or rules or tests by which the procuring entity will determine the comparative value of the tenders it receives". Canada Post submitted that this is a fundamentally different characterization of the issue from that proffered in the first complaint. Canada Post submitted that the contextual analysis of the words "evaluation criteria" in Article 1013(1) of NAFTA does not support BLJC's interpretation of the said words, which, Canada Post submitted, is based on vague and ambiguous dictionary meanings. Moreover, Canada Post noted that BLJC's policy argument that there is no downside to letting potential suppliers know the weighting assigned to each evaluation criterion has no merit. Indeed, there exist reasons which are unrelated to discriminatory or arbitrary intent, such as avoidance of limitation of scope and ingenuity on the part of potential suppliers, that justify that the weighting applicable to each evaluation criterion is not published.

Canada Post argued that, as long as an entity subject to NAFTA has objective weighting and scoring guidelines in place before the commencement of the evaluation of proposals, there is no risk that such an entity may discriminate against any potential supplier, or favour any potential supplier, by "skewing" the weighting and/or scoring of proposals.

With respect to BLJC's comments that there are or were actual undisclosed evaluation criteria, Canada Post submitted that, to the extent that this situation existed, it has been corrected.

With respect to BLJC's assertion that Canada Post must disclose, in the RFP, the basis on which the most advantageous proposal is to be identified, Canada Post submitted that this is a new allegation, which is late. As well, Canada Post added, BLJC has not pointed to any provision in NAFTA that supports this contention.

With respect to negotiations, Canada Post argued that it provided, in good faith, clarification of the negotiation regime applicable to this procurement, although nothing in NAFTA requires Canada Post to give such details. It submitted that, at the most, NAFTA requires entities to announce an intention to conduct negotiations and, thereafter, to conduct such negotiations in accordance with Article 1014.

Canada Post submitted that part of BLJC's allegation with respect to the negotiation regime in the RFP is speculative and that, for that reason alone, it should not be entertained by the Tribunal. Furthermore, Canada Post submitted that the allegation, as constructed, is without merit because, under any scenario, contrary to BLJC's assertion, complainants will be left with a timely remedy. Canada Post further submitted that, inasmuch as BLJC's allegation on this point relates to the evaluation criteria, this is a new ground of complaint based on Article 1013 of NAFTA and not on Articles 1010 and 1014 and that, therefore, it should not be considered by the Tribunal in respect of the first complaint.

Addressing BLJC's allegations contained in its second complaint, more specifically, that Canada Post, contrary to Article 1013 of NAFTA, has conducted this procurement in a manner that discriminates against potential suppliers, Canada Post offered the following information. Over the past 20 years, Canada Post, as a Crown corporation, has developed a wealth of specialized expertise in the implementation of advances in mail management services. This expertise has been marketed worldwide by Canada Post's

wholly owned subsidiary, Canada Post International Limited (CPIL),[9] which in the 1990s, on its own or in conjunction with many other organizations, completed more than 100 projects in some 45 countries. One such current project concerns the rehabilitation of Lebanon's postal system and is conducted in conjunction with ProFac. A local operating company, Libanpost SAL (Libanpost), was incorporated to actually provide the services to the Government of Lebanon over the 12-year contract period. Canada Post asserted that [confidential information omitted].

Canada Post asserted that, in essence, BLJC alleged that, because a subsidiary of Canada Post has a business relationship with ProFac, a potential supplier in this procurement, and because a named project manager of Canada Post has made comments, allegedly indicating a bias in favour of ProFac, Canada Post is unable to objectively and fairly evaluate proposals submitted in response to this RFP.

BLJC's concerns in this respect, Canada Post submitted, are entirely without foundation. Specifically, Canada Post asserted that the project manager in question is but one member of a large team of people responsible for conducting this procurement. Furthermore, the named project manager denied the comments attributed to him by BLJC. Canada Post submitted that the remarks made by the named project manager during the mail processing plant site visit in Vancouver, British Columbia were merely attempts to make conversation and to put the various representatives at ease. There was no attempt made to hide this conversation, and no discrimination, perceived or actual, was manifested in these facts.

Canada Post submitted that the "evidence" put forth by BLJC in the second complaint is not sufficient to establish an apprehension, reasonable or otherwise, of bias, let alone actual bias. Canada Post argued that it is ludicrous to suggest that: (1) any general comments made when discussing the recent acquisition of 100 percent of ProFac by another business interest were sufficient grounds to conclude that Canada Post has already formed views about the suitability of a potential supplier before the formal evaluation process; (2) Canada Post will favour a potential supplier with which it has a business relationship; and (3) Canada Post has indicated a predisposition to one potential supplier and, thus, discouraged participation in this solicitation. Canada Post submitted that its financial interests are not "inextricably linked" with those of ProFac, that there is no overarching business relationships between ProFac and CPIL and Canada Post and that CPIL is not involved at all in the procurement decisions of Canada Post. Canada Post also submitted that BLJC's attempt to use the procedural obligations of NAFTA to ban a government entity from choosing the proposal of a potential supplier that may well be considered, after a fair and impartial evaluation, to be the most advantageous would run counter to the purpose of procurement disciplines to get the best value for the public.

Furthermore, referring to the Tribunal's determination in File No. PR-98-040,[10] Canada Post submitted that an apprehension of bias is not founded on a breach of any NAFTA obligation and that, thus, the Tribunal does not have the jurisdiction to consider this matter. Canada Post also submitted that BLJC's allegation of bias is "out of time", as the basis thereof, i.e. the business relationship between CPIL and ProFac, was known or should reasonably have been known to BLJC in the early months of 2000. Concluding on this point, Canada Post submitted that BLJC is not able to point to any concrete evidence that bias has infected the evaluation process, given that the evaluation process had not yet commenced as of the filing of the second complaint. Accordingly, Canada Post submitted that this concern is speculative and should not be considered by the Tribunal, as it decided in File No. PR-95-024.[11]

9. Formerly known as Canada Post Systems Management Limited.
10. *Cougar Aviation* (7 June 1999) [hereinafter *Cougar*].
11. *Array Systems Computing* (25 March 1996).

With respect to BLJC's allegation that Canada Post introduced "new" mandatory pricing requirements and a "new" negotiation process in amendment No. 3 to the RFP, Canada Post submitted that none of the information in the amendment is "new". Furthermore, Canada Post submitted that, on a fair reading of the document, it is clear that it did not announce new "mandatory" pricing requirements or a new negotiation process, but rather only provided clarification and amplification of information already in the RFP. The reasonableness of this position, Canada Post submitted, can be gauged by the fact that Canada Post has now received a small number of proposals in response to the RFP and that neither the other potential suppliers nor the many others that received the RFP have alleged that the RFP does not provide all the information necessary to permit suppliers to submit responsive tenders or that Canada Post introduced new mandatory pricing requirements or a new negotiation process in amendment No. 3. Canada Post submitted that there are clear mandatory format requirements for pricing in the RFP which were explained further in amendment No. 2 issued on June 7, 2000. With respect to BLJC's assertion that a potential supplier requires details of the negotiation process in order to submit a responsive tender, Canada Post submitted that BLJC has not cited a single NAFTA provision or a single case before the Tribunal in which such an obligation was imposed pursuant to NAFTA. In the alternative, even if the information is "new", which Canada Post expressly denied, the information is clear, unambiguous and sufficient for potential suppliers to submit responsive bids. Accordingly, Canada Post argued, it is not in breach of its NAFTA obligations.

Canada Post submitted, in the event that the Tribunal determines that the second complaint is valid, that none of the relief requested should be granted. Specifically, Canada Post submitted that BLJC's request that the Tribunal postpone the award of any contract in relation to the solicitation is unfounded, given that the postponement of award order previously issued was rescinded by the Tribunal. Furthermore, Canada Post submitted that a new solicitation is not warranted, since BLJC has not demonstrated how the alleged facts can conceivably justify a new procurement. As well, the Tribunal cannot simply assume that a procurement will be conducted in an unfair manner and, on this basis, recommend the appointment of a "fairness monitor" to oversee the process. Canada Post submitted that there are no compelling reasons to appoint a "fairness monitor", given that potential suppliers can always have recourse to the Tribunal if evidence of actual bias in the evaluation process is discovered. With respect to BLJC's request that, in the present procurement or any future procurement which may be recommended by the Tribunal, Canada Post not accept any proposal from ProFac or any of its affiliates, Canada Post submitted that there is no ground upon which the Tribunal can make this recommendation. Such a recommendation, Canada Post submitted, would subvert the purpose of Canada's international trade obligations to get the best value possible for the public. The trade agreements, Canada Post argued, do not exist to assist in levelling the balance of power between the government and individual suppliers. Moreover, Canada Post submitted that BLJC's request that a named project manager be removed from this procurement and any future procurement which may be recommended by the Tribunal is ridiculous. To single out this individual is an unwarranted attack on the integrity of the named individual. The said individual is but one member of a team that includes personnel that represents Canada Post's Real Estate, Legal Affairs, Risk Management, Purchasing and Quality Assurance departments and whose work will be overseen by the responsible senior management personnel at Canada Post.

BLJC's Position

BLJC indicated that all the grounds that it raised in its complaint dated May 25, 2000, except the two discussed below, have been resolved to its satisfaction and that, therefore, it will not make comments on these grounds in its submission. BLJC further indicated that it supports Canada Post's wishes for an expedited process in the matter and, in this regard, requested that the Tribunal issue its determination, with reasons to follow.

Addressing Canada Post's suggestion in the GIR that BLJC's complaint was premature, BLJC submitted that the evidence on the record demonstrates that it has done everything that it could to get this procurement in line with NAFTA, all against the stiff resistance of Canada Post, and that its first complaint to the Tribunal was only made when it was necessary and inevitable.

BLJC submitted that two issues remain:

(1) whether Canada Post is required by NAFTA to disclose the evaluation criteria that it will use to evaluate the proposals and to award the contract; and

(2) whether the provisions in the tender document pertaining to negotiations are in compliance with NAFTA.

On the first issue, BLJC submitted that Canada Post is in breach of Article 1013 of NAFTA for failing to disclose, in the RFP, the evaluation criteria for the rated requirements, the method or particulars of scoring the various requirements, the relative importance (weight) of the various rated requirements and how it will select the winning bid (the most advantageous proposal) and award the contract.

BLJC submitted that it is clear from the GIR that Canada Post has evaluation information that it is not releasing because, allegedly, there is no such obligation in the wording of NAFTA and, in particular, because of a difference between the wording of NAFTA and the wording of the AIT.

Relying on the wording of Articles 1013(1)(h) and 1015(4)(c) and (d) of NAFTA and on definitions of the words "evaluation" and "criterion",[12] BLJC submitted that the expression "evaluation criteria" used in NAFTA refers to the standards, rules or tests by which the procuring entity will determine the comparative value of the tenders that it receives. BLJC submitted that Canada Post did not purport to identify any such things in the RFP, as indeed there are none. Evaluation criteria, BLJC submitted, are not simply the description of the work or of the information that potential suppliers must put in their proposals. They are the factors that the procuring entity will use to evaluate the proposals, i.e. to judge and rank them, and to select a winner for contract award.

BLJC submitted that not only does the RFP not identify the evaluation criteria but it is also silent on the "criteria for awarding the contract", as required by Article 1013(1)(h) of NAFTA.

Concerning Canada Post's assertion that scoring and weighting information is not part of the information required by potential suppliers in order for them to "submit responsive tenders", BLJC not only submitted that it would be inappropriate for the Tribunal to draw factual inferences on whether the RFP complies with NAFTA from the number of complainants but, more importantly, asserted that, if potential suppliers do not know what is very important to Canada Post and what is less important, they cannot be responsive to its needs. In this respect, BLJC submitted that the evaluation information disclosed in Canada Post's letter of June 23, 2000, is completely opaque and unhelpful to bidders. Indeed, all the talk of "line items", "sections", "weighting" and "totals" in the June 23, 2000, letter cannot be found in the RFP and correlated with anything in the RFP that will instruct bidders on how their proposals will be evaluated.

12. BLJC's comments in response to the GIR, 10 July 2000, at 6.

With respect to Canada Post's argument that NAFTA does not require the disclosure of weighting and scoring criteria, BLJC submitted that, inasmuch as a goal of NAFTA is to avoid arbitrariness or discrimination in government procurements, it is necessary that procuring entities not just have but disclose the evaluation criteria and use them to award contracts. The requirement that evaluation criteria be disclosed, BLJC submitted, provides both that potential suppliers know how to prepare a winning bid and that the selection by the procuring entity be seen as objective, based on the published criteria. Concerning Canada Post's statutory interpretation argument, BLJC submitted that the argument has no applicability to separate trade agreements between different parties.

With respect to the issue of negotiations, BLJC submitted that the issue at this stage is not, of course, that Canada Post has already conducted negotiations contrary to NAFTA. However, BLJC submitted, this does not necessarily make this ground of complaint premature. BLJC submitted that it is timely for the Tribunal to consider this ground of complaint because, if potential suppliers were required to participate in the procurement and to wait for a breach of NAFTA during negotiations, then there would be no remedy for the potential suppliers that declined to participate in the procurement because of the improper negotiation regime. In addition, there would not likely be a timely remedy for those suppliers that found themselves, at the end of the procurement process, with the imminent award of the contract, facing an improper negotiation regime.

BLJC submitted that the provisions of this procurement, as they relate to the negotiations, as currently set out in the RFP, are confusing and contradictory and that potential suppliers do not know how the negotiation process currently set out in the RFP will work. In addition, BLJC submitted, bidders still do not know how Canada Post will, "during the evaluation process", select the potential supplier with which it will negotiate, since negotiations will be conducted before the selection of the most advantageous proposal is made. BLJC submitted that the information relative to the negotiation regime to be applied is critical to potential suppliers in submitting responsive bids. For example, knowing whether the price that they are submitting will decide their fate or whether they will be asked to better their price can have an important impact on the financial aspect of their proposals. As well, BLJC submitted that, under the current circumstances, it would be practically impossible to determine, after the fact, whether Canada Post abided by the terms of the negotiation regime set out in the RFP.

In its comments of August 11, 2000, BLJC submitted that the consolidated complaints can be summarized into three primary areas, as follows: (1) the failure to disclose the criteria for awarding the contract; (2) the confusion and lack of disclosure concerning the negotiation regime; and (3) the failure to ensure that the tendering procedures are applied in a non-discriminatory manner. BLJC submitted that there is some measure of overlap between the two complaints and the arguments made in support of each, such that the complaints cannot be discussed in watertight compartments; vague evaluation criteria and negotiation provisions exacerbate the confusion wrought by each and can allow for subjectivity and discrimination.

With respect to the disclosure of the evaluation and contract award criteria, BLJC submitted that potential suppliers are entitled to know how their proposals will be evaluated and how the successful bid will be chosen. This position, BLJC submitted, is supported by Articles 1013(1) and 1013(1)(h) of NAFTA and is reinforced when these articles are read in conjunction with Article 1015(4)(c). Articles 1013 and 1015, BLJC submitted, have an obvious symmetry. Article 1013 requires the disclosure, in the tender documentation, of the criteria that will be used to evaluate proposals and to award the contract, and Article 1015 requires that the contract be awarded in accordance with the criteria that are disclosed in the tender documentation. There is no allowance in these provisions for information known only to the

procuring entity about how the proposals will be evaluated and how the contract will be awarded, as suggested by Canada Post.

With respect to Canada Post's argument that the disclosure of evaluation guidelines might limit the "scope" and "ingenuity" of the proposed solutions, BLJC submitted that this argument is irrelevant in light of Canada Post's statement that it has developed weighting and scoring guidelines for this procurement. Therefore, BLJC submitted that Canada Post has already formed an idea as to what is important to it and what it is looking for.

With respect to Canada Post's argument that NAFTA requires that an entity have weighting and scoring guidelines in order to avoid discrimination, but that NAFTA does not require that they be revealed, BLJC submitted that this argument is as untenable as it sounds. Article 1013 of NAFTA pertains to the disclosure of various types of information so that potential suppliers can submit responsive tenders. Furthermore, BLJC submitted, potential suppliers should be able to assess this information for objectivity and fairness at the time of the procurement and, after award, to determine if it was applied fairly, equitably and consistently.

Concerning Canada Post's "best value" argument, BLJC submitted that the best means to this end is for Canada Post to tell potential suppliers what it considers to be important and how it judges best value (i.e. the weighting and scoring guidelines and the method of determining the most advantageous proposal). Otherwise, BLJC argued, Canada Post could receive many bids in response to its solicitation, none of which providing as good a value as it could have received if Canada Post had disclosed the relative importance of the various factors that it is considering and its ultimate preferences in awarding the contract. Simply put, BLJC submitted that the government cannot achieve its goal of obtaining best value if it does not tell potential suppliers what it values most.

BLJC indicated that, contrary to Canada Post's assertion, the determination in *Polaris* does stand for the proposition that the evaluation criteria, including the "method of weighting and evaluating the criteria", must be disclosed under NAFTA, the AGP and the AIT. In addition, BLJC submitted, not many cases on this point exist at the Tribunal because, to its knowledge, no entity subject to NAFTA has attempted to take the position that it is not required to disclose all the criteria that it will use in evaluating proposals and awarding the contract.

With respect to disclosing how the winning bid will be selected, BLJC submitted that the language in NAFTA on this point is clear and is at least as broad as the language in the AIT. In this respect, BLJC submitted that it is not sufficient for Canada Post to list those requirements on which proposals will be judged, but that it must indicate how it will select a winner. How does a bidder score points on a rated requirement? What is the relationship among the rated requirements? What is the relationship between price and the rated requirements? This, BLJC submitted, is the kind of information that potential suppliers need to know and to which they are entitled.

With respect to the issue of mandatory price requirements, BLJC indicated that it is satisfied with Canada Post's response on this point and is not pursuing this aspect of its second complaint.

Concerning the new negotiation regime, BLJC submitted that not only did Canada Post fundamentally change the negotiation process in the RFP through its so-called clarifications but, more importantly, it asserted that the RFP, on this point, is now confusing and contradictory. Furthermore, BLJC submitted, the vagueness and confusion in the negotiation provisions of the RFP are exacerbated by the absence of information on how proposals will be evaluated and how the successful bid will be chosen.

BLJC submitted that Canada Post cannot rely on the interpretation of Article 1014 of NAFTA that all that a procuring entity needs to do with respect to negotiations is to notify potential suppliers that it intends to conduct negotiations. Canada Post has chosen to go beyond this simple notification requirement and, therefore, must ensure that the process set out in the RFP complies with Article 1014 in all respects, including the provisions that refer to the evaluation criteria set out in the notices and tender documentation.

With respect to the issue of bias, BLJC, recognizing that it may prove difficult for the Tribunal to resolve the issue of just what was said at the site visit in Vancouver, nevertheless, stands by its original position. Furthermore, after indicating its puzzlement at Canada Post's difficulty to assess the significance of its business relationship with ProFac in the context of this solicitation, BLJC indicated that the question which must be asked was: what aspect of public sector procurement could give rise to greater concern of bias than a situation where the government agency conducting a procurement has a secret business relationship with one of the bidders?

Citing publicly available facts, BLJC asserted that CPIL, a wholly owned subsidiary of Canada Post, is entirely controlled by Canada Post and that the financial interests of CPIL are exclusively those of Canada Post. Furthermore, CPIL and ProFac are not merely contracting parties; they are in a true joint venture, sharing investment, risks and reward. BLJC submitted that, in the Lebanese joint venture, CPIL, and thus Canada Post, makes money only when, indeed, ProFac makes money. The nature and significance of this relationship, BLJC submitted, are obvious in the business world and do not require serious discussion among persons familiar with business matters to distinguish it from the relationship between a government entity and a supplier under contract. BLJC submitted that the relationship between Canada Post and ProFac is unprecedented in public sector procurements and, given the requirement for non-discriminatory treatment under Article 1008 of NAFTA, requires, at a minimum, exceptional measures, such as the appointment of a "fairness monitor" or similar distancing or transparency arrangements.

With respect to Canada Post's assertion that BLJC's allegation of bias is anticipatory, given that the proposals have not yet been evaluated, BLJC submitted that its complaint regarding bias and discrimination is not premature. Indeed, it submitted that Canada Post, by refusing to recognize the nature and significance of its relationship with ProFac and by failing to take steps to address that relationship, has failed to ensure that its tendering procedures were applied in a non-discriminatory, non-biased manner. Furthermore, BLJC submitted, it is highly preferable to deal with such matters as soon as the context in which the discrimination arises is known. If the Tribunal declines to deal with the complaint at this time, and if the contract is awarded to ProFac, BLJC asserted that it could presumably pursue a complaint on this ground at that time.

TRIBUNAL'S DECISION

Section 30.14 of the CITT Act requires that, in conducting inquiries, the Tribunal limit its consideration to the subject matter of the complaints. Furthermore, at the conclusion of the inquiries, the Tribunal must determine whether the complaints are valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contracts have been observed. Section 11 of the Regulations further provides, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with NAFTA.

PRELIMINARY MATTERS

The Tribunal will first address a number of preliminary matters raised by Canada Post that go to the Tribunal's jurisdiction to decide these complaints.

Canada Post has alleged that BLJC's first complaint is premature, in that BLJC failed to afford Canada Post a reasonable period of time in which to answer its objections. The Tribunal finds that BLJC's first complaint is timely. BLJC advised Canada Post of its concerns with this procurement process on May 3, 2000. On May 11, 2000, Canada Post responded, but its response did not, in BLJC's opinion, clear up all concerns. BLJC followed up by requesting further clarification on May 15, 2000, and requested that Canada Post respond by May 19, 2000, fearing that a longer delay would jeopardize its right to file a complaint with the Tribunal. Canada Post responded on May 19, 2000, promising a response by May 25, 2000. No response was received by close of business on May 25, 2000. BLJC, in the circumstances, concluded to constructive denial of relief on the part of Canada Post and filed its first complaint with the Tribunal in late afternoon on May 25, 2000. The Tribunal is satisfied, given the circumstances, that BLJC acted reasonably when it concluded to constructive denial of relief on the part of Canada Post and filed its complaint with the Tribunal on May 25, 2000.

Canada Post has alleged, relying on the Tribunal's determination in *Cougar*, that the Tribunal has no jurisdiction under NAFTA to decide issues having to do with bias, apprehended or real. The Tribunal notes that it decided *Cougar* exclusively under the provisions of the AIT and that, as such, the decision makes no pronouncement as to the issue of bias, apprehended or real, under NAFTA. The Tribunal also notes that Canada Post has not cited any provisions of the CITT Act, the Regulations or NAFTA which support its contention. The Tribunal is of the view that the CITT Act and the Regulations clearly mandate the Tribunal to receive, inquire into and decide bid challenges concerning any aspects of the procurement process relating to designated contracts, including issues of bias. Article 1017 of NAFTA expressly provides that the aim of bid challenges is to promote "fair, open and impartial procurement procedures" [emphasis added], and several provisions of Chapter Ten of NAFTA require entities not to conduct themselves in a manner that might result, wilfully or not, in the creation of unnecessary obstacles to trade. Furthermore, in the Tribunal's opinion, there is no provision in law or in NAFTA that prevents the Tribunal from considering issues having to do with discrimination and bias arising out of its procurement review jurisdiction.

Canada Post has alleged, with respect to the issue of bias, that it is either speculative (at the time that BLJC's complaint was filed, the evaluation of proposals had not yet commenced) or late (the business relationship between Canada Post and CPIL and ProFac is a matter of public record) and should reasonably have been known to BLJC at the beginning of 2000, more than 10 working days prior to the date on which it filed its second complaint.

The Tribunal finds that BLJC's ground of complaint concerning bias is neither speculative nor late. Clearly, BLJC is not challenging the objectivity of the actual evaluation of proposals, which was yet to commence at the time that it filed its complaint. Rather, BLJC's concern is that Canada Post's recent actions relating to the Vancouver site visit, its reaction to BLJC's representations concerning CPIL's business relationship with ProFac and, generally, its dealings with BLJC since the beginning of this procurement, reveal a pattern of behaviour which connotes a favourable disposition by Canada Post towards ProFac, thus compromising Canada Post as an "objective instrument" for bid evaluation in this instance. In the Tribunal's opinion, this constitutes a proper ground of complaint that is timely. Accordingly, the Tribunal will consider this ground of complaint on its merits.

Throughout its submissions, Canada Post has made references to the fact or suggestions that, because it is a "government enterprise", not a "standard" federal government entity, and because it is covered by NAFTA, but not the AIT or the AGP, it is entitled to a more liberal interpretation of the provisions of NAFTA. With the exception of Article 1010(5) of NAFTA, concerning the kind of "invitation to participate" that government enterprises may use, the Tribunal is not aware of any provisions in NAFTA

that support Canada Post's assertion. Simply stated, in the Tribunal's opinion, Canada Post is not entitled to a different regime under NAFTA.

MERITS

By agreement between the parties, only three issues remain to be considered by the Tribunal:

(1) whether, under NAFTA, Canada Post is required to disclose the criteria that it will use to evaluate proposals, including both the weight and the scoring method to be applied to the rated requirements and to award the contract for this solicitation and the method and formula for determining the most advantageous proposal;

(2) whether the provisions in the RFP, as amended, pertaining to "negotiations" are clear and comply with NAFTA; and

(3) whether this procurement process has been and is capable of being conducted in a non-biased, non-discriminatory manner.

A fundamental objective of NAFTA as set out in Article 102 is to promote transparency. In that context, the purpose of bid challenges, as set out in Article 1017, is to promote "fair, open and impartial procurement procedures". Against this backdrop, Article 1008 requires entities to apply their tendering procedures in a non-discriminatory manner. More specifically, Article 1013(1)(h) stipulates, in part, that tender documentation provided to suppliers shall include "the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders". Furthermore, Article 1015(4)(a) provides, in part, that "to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation". Article 1015(4)(c) further provides that "the entity shall make the award to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is either the lowest-priced tender or the tender determined to be the most advantageous in terms of the specific evaluation criteria set out in the notices or tender documentation". Finally, Article 1015(4)(d) provides that "awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation".

With respect to the first issue, the Tribunal is of the view that Article 1013(1)(h) of NAFTA requires that entities provide, in the solicitation documents, not only the information necessary to permit suppliers to submit responsive tenders but also the criteria that will be used in the evaluation of tenders. In the Tribunal's opinion, this includes the method of weighting and evaluating the criteria, as well as a clear statement of the methodology and criteria to be used to determine the most advantageous proposal and to award a contract.

Canada Post has argued that the solicitation at issue concerns the procurement of services that are difficult to describe and to assess as precisely as a commercial off-the-shelf product, for example. This is why, Canada Post argued, it used, in this instance, as the preferred solicitation instrument, an RFP and, therefore, it should be afforded some flexibility as to how it expresses its requirements and, generally, some latitude as to how it applies the evaluation criteria to this procurement. The Tribunal sees nothing wrong in using an RFP approach to meet certain requirements, such as the one here. This solicitation method has been tested over many years, is in no way injurious or contrary to the provisions of NAFTA and is well suited for situations such as this one. As a matter of principle, the Tribunal agrees that, whenever an entity properly uses an RFP as its solicitation instrument, it signifies to the supplier community that the entity is looking for the best solution to a particular need or service and not for a specific pre-determined outcome. In this context, the Tribunal recognized that flexibility is needed by entities to express their needs and to receive and assess the solutions that are proposed by potential suppliers. The same flexibility is required by potential

suppliers to allow them to express their creativity and ingenuity in proposing solutions in response to the RFP. However, in the Tribunal's opinion, this does not mean that entities can dispense with establishing rules governing the formulation of proposals, their receipt and evaluation, their ranking and the identification of a winner for award, or that they can keep such rules secret. On the contrary, in the Tribunal's opinion, the less well defined the expected outcome, the more the procurement framework, including the evaluation and award rules, must be transparent and well-articulated in the RFP. The reason for this position is that the role of subjectivity in the evaluation of proposals increases significantly when the expected solution is broadly defined.

Canada Post has argued, on the basis of statutory interpretation, that NAFTA does not require entities to disclose the weighting methodology, rating parameters and general distribution of the evaluation points to be used in the evaluation of proposals, their ranking and the determination of the most advantageous proposal. This information, Canada Post argued, is not necessary in order for bidders to submit responsive tenders. In part, Canada Post comes to this conclusion by comparing the provisions of NAFTA with the provisions of the AIT, which are more explicit in respect of the disclosure of the weighting methodology and rating criteria. The Tribunal is of the view that the statutory interpretation arguments advanced by Canada Post are without merit. In considering the wording of Article 1013 of NAFTA, the Tribunal finds that it is appropriate to read that provision as requiring the weighting methodology and rating parameters to be disclosed. The preamble in Article 1013 states, in part, "the [tender] documentation shall contain all information necessary to permit suppliers to submit responsive tenders". According to the Vienna Convention on the law of treaties, international agreements are to be interpreted according to their objects and purposes. In order to conduct a fair, open and impartial procurement, as mandated under NAFTA, it is, in the Tribunal's opinion, necessary for bid documents to include the weighting methodology and rating criteria. Having this information will assist in achieving the overall objects and purposes of the bid challenge provisions in NAFTA.

Moreover, the Tribunal is of the view that, without being informed of the rating and weighting methodology and of the general distribution of the rating points between the various evaluation areas and criteria, bidders have no idea of the importance that Canada Post attaches to the various requirements in the RFP and, therefore, cannot construct their proposals to be most responsive to Canada Post's requirements. As well, by not being informed of all the "rules of the game", bidders are unable to maximize their efforts in order to be the successful bidder. Not giving the rating and weighting methodology is like a teacher giving students a test comprising different questions, each being worth different point values, but not disclosing those point values. A student would not know where to focus his or her energies in responding. Such an approach is simply unfair. In this instance, since Canada Post has already developed specific weights and weighting methods, it is clear that all requirements are not valued equally. However, unless Canada Post discloses such weights and weighting methods in the RFP, the relative importance of the evaluation criteria will remain unknown, and bidders will be handicapped in their efforts to submit responsive proposals that meet Canada Post's requirements. Moreover, the Tribunal is satisfied that its interpretation of Article 1013(1)(h) of NAFTA is further reinforced by the wording of Article 1015(4)(c), which provides that the determination of the most advantageous tender is to be made on the basis of the "specific evaluation criteria set out in the notices or tender documentation".

With respect to the negotiation provisions in the RFP, as amended, the Tribunal is of the opinion that these provisions remain ambiguous to the point where it is difficult to determine whether, taken together, they conform to the requirements of Article 1014 of NAFTA. For example, it is not clear to the Tribunal whether certain provisions regarding negotiations were only clarified or were cancelled or superseded by the clarifications or if the provisions co-exist. Moreover, it is not clear whether negotiations

will be undertaken with all potential suppliers or on what basis proponents will be selected for the conduct of negotiations.

Canada Post has indicated that negotiations will be conducted in conformity with the provisions of NAFTA. The Tribunal acknowledges this commitment. However, for greater clarity, the Tribunal notes that the negotiation process to be used in this instance must be based, in part, on evaluation criteria, including the method for rating and evaluating the criteria clearly set out in the solicitation document, as required by Article 1014(4)(a) of NAFTA. Ultimately, the Tribunal will interpret any and all provisions of the RFP, regarding negotiations, on the basis of the legal standard set in NAFTA, more specifically, Article 1014.

With respect to the issue of bias and/or discrimination, the Tribunal finds that there is no evidence on the record to support BLJC's allegation of bias. In this respect, the Tribunal notes that it has jurisdiction to rule on the issue of bias, as the impartial treatment of bidders is an essential component of a fairly conducted procurement procedure.

The Tribunal is not satisfied that BLJC has demonstrated that, since the beginning of this procurement process, Canada Post has attempted to direct this procurement to ProFac. Furthermore, the Tribunal is not persuaded that the events that took place at the Vancouver site visit (the parties disagree as to what took place during the site visit and disagree even more strongly as to the significance of what took place) demonstrate that Canada Post has a preference for ProFac. The Tribunal is not persuaded either that Canada Post has compromised itself as an instrument for the valid evaluation of proposals in this instance or that it is impossible that a proposal submitted by ProFac be fairly evaluated by Canada Post. Although the business relationship between Canada Post and ProFac seems closer than the more common contractor/contractee business relationship, in the Tribunal's opinion, this does not preclude Canada Post from fairly evaluating all proposals. That said, the Tribunal can understand how the absence of transparent rules governing the evaluation of proposals, their weighting and ranking and the identification of a winner has exacerbated BLJC's perception of the unfair or preferential treatment. In the Tribunal's opinion, once the situation has been corrected, as is recommended below, that risk should disappear. In the Tribunal's view, the establishment and use by Canada Post of transparent, clear, coherent and fully developed procurement rules, as directed by NAFTA, will ensure the integrity of this procurement process.

One of the remedies requested by BLJC in its complaints is that the Tribunal order Canada Post to conduct a new solicitation for the designated contract that conforms to the provisions of NAFTA. Because the Tribunal has determined that the RFP, as constituted at the time that the complaints were received, failed to meet the requirements of Article 1013(1)(h) of NAFTA, the Tribunal is of the view that, unless these aspects of the solicitation document are corrected to be in line with NAFTA, this procurement process will remain flawed. Therefore, the Tribunal will recommend that Canada Post amend its solicitation documents to correct the deficiencies outlined in this determination.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that the procurement was not conducted in accordance with the requirements of NAFTA and that, therefore, the complaints are valid.

Pursuant to subsection 30.14(1) of the CITT Act, the Tribunal determines that Canada Post, in conducting this solicitation, has violated NAFTA, in that the RFP, as amended, does not set out the method of scoring and weighting rated requirements nor their relative importance. It does not provide the criteria for dismissing proposals or for determining the most advantageous proposal for award. Furthermore, the RFP is ambiguous as to the negotiation regime that will apply to this procurement process.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, if the need still exists, that Canada Post amend the RFP or issue a new solicitation that conforms to this determination and the requirements of NAFTA.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards BLJC its reasonable costs incurred in filing and proceeding with these complaints.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Peter F. Thalheimer
Peter F. Thalheimer
Member

James A. Ogilvy
James A. Ogilvy
Member