

Ottawa, Wednesday, June 27, 2001

File No. PR-2000-063

IN THE MATTER OF a complaint filed by FM One Alliance Corp. 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 a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

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

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 not proceed with the proposed service agreement renewals and that, instead, a solicitation be issued for the property management services therein. The procurement process for those services is to be completed within six months and should be conducted in compliance with 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 FM One Alliance Corp. its reasonable costs incurred in filing and proceeding with this complaint.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

James A. Ogilvy
James A. Ogilvy
Member

Susanne Grimes
Susanne Grimes
Acting Secretary

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

Date of Determination:	June 27, 2001
Date of Reasons:	July 9, 2001
Tribunal Members:	Pierre Gosselin, Presiding Member Zdenek Kvarda, Member James A. Ogilvy, Member
Investigation Manager:	Randolph W. Heggart
Investigation Officer:	Paule Couët
Counsel for the Tribunal:	Philippe Cellard
Complainant:	FM One Alliance Corp.
Counsel for the Complainant:	Milos Barutciski Anita Banicevic Julie Soloway
Interveners:	Brookfield LePage Johnson Controls Facility Management Services Profac Facilities Management Services Inc.
Counsel for the Interveners:	Nancy K. Brooks Gordon Cameron Marni S. Dicker
Government Institution:	Canada Post Corporation
Counsel for the Government Institution:	Robb C. Heintzman R. Brendan Bissell



Ottawa, Monday, July 9, 2001

File No. PR-2000-063

IN THE MATTER OF a complaint filed by FM One Alliance Corp. 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 a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

STATEMENT OF REASONS

COMPLAINT

On February 12, 2001, FM One Alliance Corp. (FM One) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning the cancellation by Canada Post Corporation (CPC) of Request for Proposal (RFP) No. 6 NS 00 RS R1 for the provision of facility management services and the proposed renewal of Property Management Agreement No. 586600 dated September 1, 1994, as amended, with Brookfield LePage Johnson Controls Facility Management Services (BLJC) and the proposed renewal of Property Management Agreement No. 586599, dated September 1, 1994, as amended, with Profac Facilities Management Services Inc. (Profac) (the Service Agreements).

FM One alleged that, contrary to Article 1001(4) of the *North American Free Trade Agreement*,² the proposed “renewals” have been structured to avoid the obligations of Chapter Ten of NAFTA. FM One alleged that, contrary to Articles 1008(2)(a) and (b) of NAFTA, CPC’s actions leading to the proposed procurements failed to provide all suppliers equal access to information with respect to the procurements during the period prior to the issuance of any notice or tender documentation. Furthermore, FM One alleged that CPC failed to publish an invitation to participate in the proposed procurements, thus violating the provisions of Article 1010 of NAFTA. In addition, FM One alleged that CPC has engaged in unjustified limited tendering procedures, contrary to the provisions of Article 1016 of NAFTA. Finally, FM One alleged that, in structuring these procurements, CPC has breached the provisions of Article 1015(4)(e) of NAFTA, which requires that option clauses not be used in a manner that circumvents Chapter Ten of NAFTA.

FM One requested, as a remedy, that CPC be ordered to postpone the award of the purported contract renewals to BLJC and ProFac until the Tribunal determines the validity of the complaint. In addition, FM One requested that CPC be ordered to amend the RFP to make it compliant with NAFTA and the Tribunal’s determination in *Re Complaint Filed by Brookfield LePage Johnson Controls Facilities Management Services*³ and that it continue the bidding process with the qualified bidders, or issue a new solicitation compliant with NAFTA, for the designated contracts. In the alternative, FM One requested to be compensated for the profit that it lost as a result of the defective procurements. FM One requested to be

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].
3. (6 September 2000), PR-2000-008 and PR-2000-021 [hereinafter *Brookfield LePage*].

compensated for its costs in preparing a response to RFP No. 6 NS 00 RS R1 and all activities in relation thereto and for the costs of proceeding with this complaint.

On February 19, 2001, 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*.⁴ That same day, the Tribunal issued an order postponing the award of any contract, including the proposed contract renewals, in relation to any services described in Property Management Agreement Nos. 586599 and 586600, both dated September 1, 1994, and in the original RFP until the Tribunal determines the validity of the complaint. On March 7, 2001, the Tribunal informed the parties that BLJC had been granted intervenor status in this case, and on March 13, 2001, it informed the parties that Profac had also been granted intervenor status. On March 30, 2001, CPC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁵ On April 9, 2001, FM One filed a notice of motion with the Tribunal requesting that the Tribunal order CPC to file additional information with the Tribunal. Having reviewed the parties' submissions on the motion, on April 27, 2001, the Tribunal ordered CPC to file two additional documents with the Tribunal. This was done on May 1, 2001. On May 10, 2001, Profac filed comments with the Tribunal and, on May 11, 2001, BLJC did likewise. That same day, FM One filed comments on the GIR with the Tribunal and requested the production by CPC of additional documents. On May 24, 2001, the Tribunal informed the parties that it would not require additional information.

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

PROCUREMENT PROCESS

Background

The Service Agreements for the provision of property management services⁶ between CPC and each of BLJC and Profac,⁷ which CPC proposes to renew, have been in place since September 1, 1994, following a procurement process that began in July 1993. The Service Agreements were for an initial period of five years and seven months.

The Service Agreements contained, in part, the following provisions:

Section 3.1 Commencement of Term

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4. S.O.R./93-602 [hereinafter Regulations].
 5. S.O.R./91-499.
 6. The Service Agreements are limited to the provision of certain property management services for selected properties owned or leased by CPC, representing one third of CPC's real estate holding. The balance of the properties owned or leased by CPC, approximately 2,200, are, for the most part, rural postal facilities. In addition, real estate services were undertaken by CPC either through its own resources or through long-term arrangements made with various independent contractors. The property management services relate generally to the management and control of the operation and maintenance of buildings, including the regular inspection and maintenance of buildings and their mechanical systems, utilities, ventilation, air conditioning, janitorial services, landscaping, minor repair and the administrative and reporting functions necessary to carry out such tasks.
 7. Under the Service Agreements, Profac assumes responsibility for the management of approximately 65 percent of the facilities subject to those agreements located principally in Eastern Canada, Quebec and parts of Ontario. The facilities for which BLJC is responsible are located principally in Western Canada and other parts of Ontario.

The term of this Agreement shall commence on the Commencement Date and shall expire on midnight March 31, 2000 unless otherwise terminated in accordance with the provisions of this Agreement.

Section 3.4 Right to Renew

On at least 6 months notice given prior to March 31, 2000, Canada Post shall have the right to renew this Agreement for a further term of 5 years on terms and conditions to be mutually agreed upon, in advance, by Canada Post and [BLJC or Profac].

Section 4.7 Exclusion from Services

The Services shall not include the provision of Additional Work which is arranged and paid for in accordance with Article 11. The following types of general property management services shall also be excluded from the Services:

- 4.7.1 the negotiation of real property leases, the payment of Contract Rent and the collection of all rent;
- 4.7.2 the calculation and payment of grants in lieu of taxes;
- 4.7.3 the administration and supervision of the granting of easements, right of ways, licenses or other real property interests; and
- 4.7.4 the acquisition and disposal of real property.

In 1998, CPC began to consider whether to renew the Service Agreements or to seek a single service provider to perform most of its property management services and additional real estate services. In March 1999, CPC decided to discuss with each of BLJC and Profac the renewal of the Service Agreements. As a result, CPC received and considered a number of proposals from BLJC and Profac, which advanced the notion of a single service provider for property management, project inventory and asset management services.

On February 10, 2000, CPC's Board of Directors resolved to discontinue negotiations for the renewal of the Service Agreements and instead to seek, through a public procurement process, a single national service provider to manage most of CPC's real estate requirements. The scope of the RFP was wider than the scope of the Service Agreements. The RFP covered over 3,000 postal facilities and contemplated the provision of property management services and services relating to the acquisition and disposition of CPC's real estate, the administration of leases, the payment and collection of rents, the calculation and payment of grants in lieu of taxes, the administration and supervision of the granting of easements, rights of way, licenses and other real property interests, and project planning relating to major building construction and repair.

From February until December 2000, CPC proceeded with the RFP process. On March 30, 2000, CPC agreed with each of BLJC and Profac to extend the Service Agreements to February 1, 2001. As part of those extension agreements, CPC, BLJC and Profac elected not to renew the Service Agreements.

On May 25 and July 7, 2000, BLJC filed complaints with the Tribunal with respect to the RFP process. The Tribunal conducted an inquiry and, on September 6, 2000, issued its determination recommending that CPC amend the RFP to conform to NAFTA or issue a new one.⁸

According to the GIR filed in the present inquiry, starting in September 2000, a change in senior management took place at CPC. Concomitant with this change, growing concern surfaced about CPC's

8. *Supra* note 3.

ability, under the RFP process, to secure sufficient assurance that the quality and value of its real estate assets would be maintained following the selection of a single national service provider and about the stability of CPC's real estate department.

According to the GIR, by December 2000, CPC had decided to discontinue the RFP process, as it was inconsistent with CPC's view that it had to continue to maintain control over fundamental management decisions affecting the quality and value of its properties. Consequently, with the agreement of BLJC and Profac, CPC decided to renew the Service Agreements for a five-year period, in accordance with their existing terms. With regard to those services and properties included in the RFP, but not covered by the Service Agreements, CPC would continue to provide some services itself, while others would become the subject of future procurements in accordance with the provisions of NAFTA.

On January 19 and 24, 2001, BLJC and Profac, respectively, agreed to a further extension of the Service Agreements pending their renewal. On January 29, 2001, CPC advised FM One of its decision to cancel the RFP, to renew the existing Service Agreements and to consider new requests for proposal with regard to the remainder of the services included in the RFP.

On February 7, 2001, CPC informed FM One, in writing, that it was prepared to discuss the costs incurred by FM One in preparing and submitting a proposal in response to the RFP and the extent to which CPC would be prepared to contribute to those costs.

On February 12, 2001, FM One filed this complaint with the Tribunal.

POSITION OF PARTIES

CPC's Position

CPC submitted that, in essence, FM One has raised a single substantive issue, namely, "whether [CPC's] proposed renewals of the Service Agreements are in accordance with the contractual right to renew contained in such agreements or whether the proposed renewals are, in substance, new agreements disguised as renewals."

CPC submitted that, if it exercises its renewal rights, then the proposed renewals are not subject to the provisions of NAFTA and that the parties to the Service Agreements should be permitted to discharge their contractual obligations. If, on the other hand, CPC is entering into new arrangements with Profac and BLJC, CPC submitted that such arrangements are subject to NAFTA and that it would be obliged to secure such new services in accordance with the provisions of NAFTA.

CPC further argued that the resolution of the above-mentioned question depends entirely on an examination of the nature of the proposed arrangements in comparison with the Service Agreements. In this context, CPC submitted that the Service Agreements, while executed in 1994 after the enactment of NAFTA on January 1, 1994, arose from a procurement process that began in 1993. As a result, this procurement process was governed by Annex 1001.2c of NAFTA, which provides that "Chapter Thirteen of the *Canada-United States Free Trade Agreement* [FTA] shall govern any procurement procedures that began before January 1, 1994". Furthermore, CPC submitted that Chapter Thirteen of the FTA contained no provisions regarding contracts for services of the kind contemplated by the Service Agreements. Therefore, at the time, there was no restriction in the FTA, or elsewhere, that curtailed CPC's right to conclude contracts for services on such terms relating to the provision of those services and their renewal, as CPC considered appropriate.

CPC submitted that, while the precise terms on which the Service Agreements would be renewed were not established in 1994, there is no legal basis for concluding, as FM One seeks to do, that the renewal right given CPC can or should be ignored. CPC asserted that it clearly bargained for the opportunity to secure the services of two service providers for at least 10 years without having to undertake a new procurement.

CPC submitted that it proposes to renew the Service Agreements on precisely the same terms and conditions and with the same scope of services that currently exist and that the renewals are not being used by CPC to obtain, by other means, those additional property services contemplated in the RFP. CPC submitted that the only change relates to the costs to be incurred by CPC for the provision of such services.

With respect to FM One's allegation that CPC has structured the proposed renewals in order to avoid the obligations imposed by NAFTA, CPC submitted that the decision to withdraw the RFP initiated under NAFTA and to proceed with the renewals was motivated by a real concern, arising from the potential conflict in the RFP between the financial interests of the single national service provider and those of CPC. It submitted that that concern was heightened when, in a review of the proposals that it received in response to the RFP and subsequent discussions with the bidders, it became apparent that no reasonable assurance could be given that its real estate assets would be maintained, repaired and improved in a way that would preserve their long-term quality and value. CPC submitted that, while it may be criticized for not having realized earlier that the delegation of virtually all management services to a single outside supplier together with the provision to such outside supplier of a lump sum with which to manage CPC's real estate could result in long-term devaluation of those assets, the decision to withdraw the RFP was made for business reasons and not in an effort to avoid a process that it had itself initiated.

With respect to FM One's allegation that CPC is not entitled to renew the Service Agreements because, in March 2000, these were extended from March 31, 2000, to February 1, 2001, CPC submitted that the March extension was not effected through the exercise of the renewal provisions in section 3.4 of the Service Agreements. Furthermore, the extension was made for a limited period of time to secure continued essential services pending completion of the RFP process. CPC added that, as the purpose of the March extension was to allow for the RFP process under NAFTA, it is difficult to understand how the extension of the Service Agreements could be regarded as a breach of NAFTA.

CPC concluded that, in every case where, in accordance with a procurement subject to NAFTA, a new service provider is to be selected to replace an existing service provider, there is always the possibility that the services in question will have to continue to be provided until the process itself is completed. CPC submitted that, while it did not, at the time of the March extension, intend to exercise the renewal rights set out in section 3.4 of the Service Agreements, it still had the ability to do so.

With respect to FM One's suggestion that allowing CPC to exercise its renewal rights in the circumstances would "amount to a licence to extend these otherwise expired contracts into perpetuity", CPC indicated that the proposed renewals would come to an end in March 2006.

BLJC's Position

BLJC stated at the outset that, from the beginning, BLJC and CPC have taken the position that the renewal of the Profac or BLJC Service Agreement, or both, would not constitute a procurement subject to NAFTA, whereas starting anew with a single contractor with a different scope of work would constitute such a procurement.

BLJC submitted that, contrary to FM One's speculations in its complaint, the renewal of the Service Agreements does not relate to the scope of the RFP, but rather relates to the scope of the Service Agreements, which is considerably narrower than the RFP. This fact, BLJC submitted, is evidenced by CPC's decision to deal with the full range of services covered by the RFP in three different ways, i.e. the renewal of the Service Agreements, in-house performance and future NAFTA-compliant procurements.

With respect to the right to renew in section 3.4 of the Service Agreements, BLJC submitted that the Tribunal and the government procurement community accept that a renewal clause is "procured" at the time of the first contract and is governed by any applicable trade agreements at that time. In the present case, BLJC submitted that no trade agreement applied, as the procurement was started before NAFTA was in force and (as it concerns a contract for services) was not covered by the predecessor agreement, the FTA.

BLJC argued that, even if the trade agreements applied (which it denied), as long as CPC's actions can fairly be described as "renewing" the Service Agreements, no new procurement was started. BLJC submitted that such is the case in this instance, as the parties are identical and have been in the same relationship for over six years, the Service Agreements expressly provide for the intended renewals, and the renewals demonstrate that the type and scope of work, properties and all terms and conditions will remain identical, subject only to a revision of the method of payment intended to regularize the cost-saving obligations in the Service Agreements.

BLJC submitted that the renewal clause in the Service Agreements and the numerous locations in the Service Agreements where the parties have reasonably anticipated the possibility of change over time constitute typical contractual provisions in a complex contractual relationship that must be flexible enough to accommodate change. BLJC submitted that FM One's allegation that CPC's use of the renewal clause is intended to avoid the obligations of NAFTA is without merit, since this procurement is not covered by NAFTA.

BLJC argued that the complaint is premised on a fundamental misconception concerning the Tribunal's jurisdiction to deal with the manner in which government entities implement the Tribunal's recommendations. BLJC submitted that the power to ensure the implementation of the Tribunal's recommendations resides with the Federal Court of Canada, not with the Tribunal.

Profac's Position

Profac indicated that it has seen BLJC's comments and, subject to its specific factual situation, adopts BLJC's comments. In summary, Profac submitted that CPC has the right to renew the Service Agreements. The renewals for a further five-year term will result in agreements identical to the existing Service Agreements and, in no way, constitute an attempt to avoid or circumvent NAFTA.

FM One's Position

In its comments on the GIR, FM One stated that the renewal clauses in the Service Agreements leave fundamental terms and conditions to be negotiated. Therefore, FM One submitted, these clauses are insufficient to insulate the "renewals" from the Tribunal's review. FM One submitted that a supposed contractual right to renew an agreement that leaves all the terms and conditions of renewal to be agreed upon at some future date is no contractual right at all. FM One added that, in the absence of an agreement on the future terms and conditions, CPC could neither seek specific performance of the supposed five-year renewal right nor claim damages in a court of law. FM One argued that a renewal is essentially an amendment to the original term or length of the contract and no more.

FM One submitted that CPC has exhausted whatever renewal rights it might have had under the Service Agreements. In addition, it submitted that the renewals contemplated by CPC do not comply with the renewal terms of the Service Agreements, i.e. notice should have been given six months prior to the expiry of the Service Agreements, and the terms and conditions of the renewals should have been agreed upon in advance. In fact, FM One submitted, timely notice was never served and negotiations of terms and conditions are not yet finalized, even though the Service Agreements have already been extended twice. FM One argued that, in this instance, CPC is not only attempting to rely on a vague renewal clause that has clearly expired, but would also like to rely upon terms in the Service Agreements that it has expressly terminated.

FM One submitted that, although the precise timing and the terms of renewal may be of less concern in business relations between private parties that do not affect the interests of third parties, these considerations are clearly relevant where one of the parties is a government institution and the relationship is governed by NAFTA. FM One submitted that, unlike a private contractual setting, the NAFTA procurement rules address a situation where third parties (i.e. other potential suppliers) have legally enforceable expectations regarding the openness of the procurement process and their ability to bid competitively. Thus, FM One submitted, once CPC decided to proceed by way of a competitive process, CPC owed it to other participants in that process, such as FM One, to abide by the strict terms of its Service Agreements.

With respect to the application of NAFTA to the renewal of the Service Agreements, FM One submitted that the extensive “renewal” negotiations that took place before the issuance of the RFP, during the period following the Tribunal’s determination in *Brookfield LePage*, and that continued at least until the March 23, 2001, agreements are tantamount to a new procurement process and should therefore be subject to the rules of NAFTA.

FM One further submitted that there is evidence to suggest that new terms were likely introduced in the proposed renewals, creating essentially new contracts and, thus, necessitating a new procurement process. Furthermore, there is evidence on the record showing that terms and conditions are still being negotiated.

FM One indicated that it took the RFP process launched by CPC seriously and indicated that, if it had known at the time that CPC was preserving the option (contrary to its statement to FM One and other potential suppliers) to continue its Service Agreements with Profac and BLJC, it would not have invested the very substantial effort and resources that it did toward preparing such a proposal.

TRIBUNAL’S DECISION

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. Furthermore, 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 further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, include NAFTA.

Section 30.1 of the CITT Act indicates that a “designated contract” means a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations. Subsection 3(1) of the Regulations provides, in part, that, for the purposes of the definition of “designated contract” in section 30.1 of the CITT Act, any contract or class of contract concerning a procurement of services as described in Article 1001 of

NAFTA by a government institution is a designated contract. Subsection 3(2) further provides that, for the purposes of the definition of “government institution” in section 30.1, the government enterprises set out in the Schedule of Canada in Annex 1001.1a-2 of NAFTA are designated as government institutions.

In 1994, CPC entered into Service Agreements with BLJC and Profac for the provision of property management services. Section 3.1 of the Service Agreements indicated that they were to expire on March 31, 2000. On March 30, 2000, CPC entered into agreements with BLJC and Profac under which the parties agreed that the Service Agreements would not be renewed. The parties nonetheless agreed that the term of the Service Agreements would be extended until February 1, 2001, the date by which a facility management contractor should have been chosen in accordance with the then contemplated RFP process. In December 2000, CPC decided to cancel that RFP process and, rather, to negotiate the renewal of the Service Agreements. Further extensions to the Service Agreements were agreed to in January 2001, pending their proposed renewals for a five-year period. On January 29, 2001, CPC advised FM One of its decision to cancel the RFP and to renew the Service Agreements.

Having regard to the facts of this inquiry, it is clear to the Tribunal that, in January 2001, CPC intended to procure property management services for a five-year term by way of contract. A procurement process had begun. The Tribunal determines that, in this case, the designated contracts subject to its inquiry are the contracts for the supply of property management services for a five-year period, ending in 2006, that are proposed to be awarded by CPC. Property management services are covered under Annex 1001.1b-2 of NAFTA, and CPC is a government institution by virtue of Annex 1001.1a-2 of NAFTA.

CPC submitted that what it proposed to do was to renew the Service Agreements through the exercise of its renewal right. In this context, the Tribunal must first determine whether the “renewals” would constitute a proper exercise of the renewal clause contained in the Service Agreements. FM One contended that the renewal clause itself was not a proper option clause as contemplated in NAFTA, given that it left all the terms and conditions of renewal to be agreed upon. In the Tribunal’s view, it is not necessary to decide that issue in the present case. Taking for granted, for the purpose of this analysis, that the renewal clause was a proper option clause, the Tribunal must determine whether the renewal clause would be properly exercised if CPC went forward with the proposed renewals. Having regard to the wording of the clause and the circumstances surrounding the proposed renewals, the Tribunal comes to the conclusion that the renewals, as contemplated, would not constitute a proper exercise of the renewal clause.

Section 3.4 of the Service Agreements constitutes the renewal clause, which reads as follows:

On at least 6 months notice given prior to March 31, 2000, Canada Post shall have the right to renew [these] Agreement[s] for a further term of 5 years on terms and conditions to be mutually agreed upon, in advance, by Canada Post and [BLJC or Profac].

It is clear from the wording of section 3.4 that, in order to renew the Service Agreements, CPC had an obligation to give notice of its intention to do so six months prior to March 31, 2000. It is also clear from the record that CPC did not do so. This is not contested by CPC. Therefore, in the Tribunal’s view, the proposed renewals would not constitute a proper exercise of the renewal clause. In addition, the Tribunal notes that not only did CPC not give the required six-month notice, but it also indicated, in the separate agreements that it signed with BLJC and Profac on March 30, 2000, that it “elected not to renew” the Service Agreements.

In its complaint, FM One argued that CPC intends to include in the proposed renewal services that are not provided under the current contracts between CPC, BLJC and Profac. On the contrary, CPC submitted, it proposes to renew the Service Agreements on precisely the same terms, conditions and scope of services that currently exist and the renewals are not being used by CPC to obtain those additional

property services contemplated in the RFP. Given the Tribunal's conclusion that the proposed renewals would not constitute a proper exercise of the renewal clause contained in the Service Agreements, the Tribunal need not ascertain what were the precise terms, conditions and scope of the services contemplated under those proposed renewals.

CPC asserted that, in 1994, when it concluded the Service Agreements, it clearly bargained for the opportunity to secure the services of two service providers for at least 10 years without having to undertake a new procurement. Having determined that the proposed renewals would not constitute a proper exercise of the renewal clause contained in the Service Agreements, the Tribunal does not find that CPC has any "renewal rights" in addition to those provided by the renewal clause.

Were CPC not a government entity covered by NAFTA or were property management services not covered by NAFTA, CPC would have been free to procure the property management services from BLJC and Profac, even though the date to exercise the renewal clause had passed. However, this is not so and, as stated below, the new contracts to be issued should be subject to a tendering procedure compliant with NAFTA.

Before turning to the analysis of the designated contracts in relation to certain requirements contained in NAFTA, the Tribunal will address BLJC's submission that the complaint was premised on a fundamental misconception concerning the Tribunal's jurisdiction to deal with the manner in which government entities implement the Tribunal's recommendations. BLJC submitted that the breach of NAFTA alleged in the complaint is CPC's decision to cancel the RFP rather than to implement the Tribunal's recommendation in *Brookfield Lepage* and that the determination requested of the Tribunal by FM One is with respect to that decision.

The summary of the complaint found at the beginning of this statement of reasons clearly shows that such was not the main focus of FM One's complaint. FM One complained specifically about the proposed renewal of the Service Agreements. In its complaint, FM One was entitled to refer to events that preceded the proposed renewals. It is not CPC's decision not to implement the Tribunal's recommendation in *Brookfield Lepage* that is at issue in the present inquiry, but rather the proposed award of contracts that CPC envisaged afterwards.

As indicated earlier, the contracts that CPC intends to award for the procurement of property management services constitute designated contracts covered by NAFTA. The Tribunal must determine, pursuant to subsection 30.14(2) of the CITT Act, whether the complaint is 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 prescribes, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with NAFTA.

In the present case, it is clear that a number of requirements have not been observed. Article 1008(1)(b) of NAFTA provides that each Party shall ensure that the tendering procedures of its entities are consistent with Article 1008 and Articles 1009 through 1016. The procedures described in Articles 1009 to 1015 have not been followed with respect to the designated contracts. For example, Article 1010 requires that an invitation to participate be published for all procurements covered by NAFTA. That has not been done in the present case. Article 1016 provides for circumstances and conditions where limited tendering procedures can be used. No such circumstances have been alleged in the present case. Therefore, in the Tribunal's view, CPC breached Article 1008(1)(b) in attempting to renew contracts with BLJC and Profac for the provision of services for an additional five-year period. Consequently, the Tribunal determines that the complaint filed by FM One is valid.

As for the remedy appropriate in the present case, pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends that CPC not proceed with the proposed service agreement renewals and that, instead, a solicitation be issued for the property management services therein. That solicitation should be compliant with NAFTA.

The procurement of property management services by CPC has been under consideration since 1998. During that period, CPC has developed a number of approaches to meet this requirement. Although none of those approaches have been successfully completed, significant information has been gathered and preparatory work completed, which will be useful in implementing the Tribunal's recommendation. In addition, the Tribunal notes that the Service Agreements in place for the property management services have already been prolonged twice. Therefore, the Tribunal recommends that the procurement process to take place be completed within six months of its determination.

With respect to FM One's request to be compensated for its costs in preparing a response to the RFP, the Tribunal will not award FM One those costs, given that they do not relate to the designated contracts subject to this procurement inquiry.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that the procurement was not conducted in accordance with the provisions of NAFTA and that the complaint is therefore valid.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends that CPC not proceed with the proposed service agreement renewals and that, instead, a solicitation be issued for the property management services therein. The procurement process for those services is to be completed within six months and should be conducted in compliance with NAFTA. Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards FM One its reasonable costs incurred in filing and proceeding with this complaint.

Pierre Gosselin
Pierre Gosselin
Presiding Member

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