



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2006-026

Canadian North Inc.

v.

Department of Indian Affairs and
Northern Development

*Determination and reasons issued
Monday, February 5, 2007*

*Corrigendum issued
Thursday, March 1, 2007*

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IN THE MATTER OF a complaint filed by Canadian North Inc., under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47.

AND FURTHER TO a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

CANADIAN NORTH INC.

Complainant

AND

**THE DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN
DEVELOPMENT**

**Government
Institution**

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 the Department of Indian Affairs and Northern Development commence a new procurement for the conveyance of Food Mail as expeditiously as possible. The Canadian International Trade Tribunal also recommends that the Department of Indian Affairs and Northern Development compensate Canadian North Inc. by an amount equal to 60 percent of the profit that it would reasonably have earned for Food Mail from the date on which the current contract was entered into by Canada Post Corporation and Bradley Air Services Limited, to the date on which the contract for the new procurement is signed. If no new contract is entered into, Canadian North Inc. should be compensated in the amount of 60 percent of its reasonable lost profits for Food Mail for the duration of the contract between Canada Post Corporation and Bradley Air Services Limited. The Canadian International Trade Tribunal recommends that, based on the preceding considerations, the parties develop a joint proposal for compensation, to be submitted to the Canadian International Trade Tribunal within 30 days of the date of publication of this determination.

Should the parties be unable to agree on the amount of compensation, Canadian North Inc. shall file with the Canadian International Trade Tribunal, within 40 days of the date of publication of this determination, a submission on the issue of compensation. The Department of Indian Affairs and Northern Development will then have 7 working days after the receipt of the submission to file a response. Canadian North Inc. will then have 5 working days after the receipt of the Department of Indian Affairs and Northern Development's reply submission to file any additional comments.

The joint proposal for compensation or the submissions for compensation, as the case may be, shall take into account the actual time period of the contract between Bradley Air Services Limited and Canada Post Corporation, the actual volume of Food Mail that has been delivered, an estimate of the volume of Food Mail that will be delivered until the contract for the new procurement is entered into, the applicable profit margins contained in Canadian North Inc.'s proposal, and the date and method of payment of compensation. The joint proposal or the submissions shall include a prorated scheme that will allow the parties to determine the amount of compensation for the full life of the contract between Bradley Air

Services Limited and Canada Post Corporation, or any part thereof, so that the amount of compensation can be adjusted to accommodate the actual time period until the contract for the new procurement is entered into. The Canadian International Trade Tribunal reserves its jurisdiction to recommend the amount of compensation that the Department of Indian Affairs and Northern Development should pay to Canadian North Inc. following receipt of the submissions.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Canadian North Inc. its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Indian Affairs and Northern Development. The Canadian International Trade Tribunal's preliminary indication of the amount of the cost award is \$10,000, as the level of complexity is beyond what would normally be contemplated as level 3 complexity. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated by the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Elaine Feldman

Elaine Feldman
Presiding Member

Ellen Fry

Ellen Fry
Member

Meriel V. M. Bradford

Meriel V. M. Bradford
Member

Hélène Nadeau

Hélène Nadeau
Secretary

Tribunal Members:	Elaine Feldman, Presiding Member Ellen Fry, Member Meriel V. M. Bradford, Member
Director:	Randolph W. Heggart
Senior Investigator:	Michael W. Morden
Counsel for the Tribunal:	Dominique Laporte Reagan Walker
Complainant:	Canadian North Inc.
Counsel for the Complainant:	Gordon Cameron Meghan Gardner
Intervener:	Bradley Air Services Limited
Counsel for the Intervener:	Gerry H. Stobo Jack Hughes
Government Institution:	Department of Indian Affairs and Northern Development
Counsel for the Government Institution:	Alexander Gay Karima Karmali

Please address all communications to:

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

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

STATEMENT OF REASONS**COMPLAINT**

1. On September 21, 2006, Canadian North Inc. (Canadian North) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerned the procurement (Solicitation No. TCS 04/95) of air transport services in relation to the execution of the Food Mail Program (the Program) in Canada's North.
2. Canadian North alleged that the Department of Indian Affairs and Northern Development (DIAND) and/or Canada Post Corporation (Canada Post) failed to disclose all the criteria that were employed in the evaluation of the proposals. It also alleged that the evaluation criteria were applied in a discriminatory manner that favoured the incumbent supplier that was ultimately awarded the contract—Bradley Air Services Limited (carrying on business under the trade name of First Air) (First Air).
3. As a remedy, Canadian North requested that the contract awarded to First Air be cancelled and that the procurement be re-tendered. In the alternative, it requested that it be compensated for the profits that it lost as a result of the award of the contract to First Air. Canadian North also requested its reasonable costs incurred in preparing its proposal and its complaint. In its response to the Government Institution Report (GIR), Canadian North altered the remedies that it had requested, indicating that it preferred to be compensated for lost profits for the full term of the contract and, in the alternative, that DIAND conduct a new procurement and compensate Canadian North for its lost profits up to the date of the contract award resulting from the new procurement.
4. On September 28, 2006, the Tribunal informed the parties that it had accepted the complaint, as it met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² On October 20, 2006, First Air requested that it be granted intervener status, which was granted on October 23, 2006.
5. On October 23, 2006, DIAND filed a motion with the Tribunal requesting that it dismiss the complaint for want of jurisdiction. Canada Post filed comments on the complaint on October 23, 2006, also submitting that the subject procurement did not constitute a designated contract under the *Agreement on Internal Trade*,³ the only applicable trade agreement, and that, therefore, the complaint did not fall within the Tribunal's jurisdiction. On November 9, 2006, after reviewing submissions from all the parties, the Tribunal dismissed DIAND's motion. The Tribunal also determined that DIAND was responsible for filing the GIR and ordered that the GIR be filed no later than December 5, 2006. On December 22, 2006, the Tribunal issued its reasons for its dismissal of the motion.
6. On December 8, 2006, along with its comments on the GIR, First Air filed a motion requesting that the Tribunal dismiss the complaint on the grounds that the complaint was filed beyond the 10 working days after the day on which Canadian North had actual or constructive knowledge of the denial of relief or, in the alternative, that the complaint was filed beyond the 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to Canadian North. On December 18, 2006,

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

2. S.O.R./93-602 [*Regulations*].

3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

DIAND and Canadian North filed their respective comments on the motion. On December 20, 2006, First Air filed its response to DIAND's and Canadian North's comments. On January 11, 2007, the Tribunal dismissed the motion, determining that the complaint had been filed in a timely manner.

7. On December 5, 2006, DIAND submitted the GIR. On December 8 and 12, 2006, First Air and Canadian North filed their respective comments on the GIR. On December 13, 2006, DIAND wrote to the Tribunal asking permission to comment on Canadian North's comments on the GIR. On December 14, 2006, DIAND clarified specifically on what it would like to comment. On December 18, 2006, the Tribunal granted DIAND and First Air permission to comment only on the aspect of Canadian North's submission that had to do with remedy. On December 21, 2006, DIAND and First Air filed responses to Canadian North's new position on remedy. On January 4, 2007, Canadian North filed final comments on remedy.

8. On December 20, 2006, the Tribunal ordered Canada Post to produce a copy of First Air's proposal as well as all documents relating to the evaluation of both Canadian North's and First Air's proposals. Canada Post submitted the documents on January 10, 2007. On January 16, 2007, Canadian North, First Air and DIAND all submitted their comments on the Canada Post documents. On January 22, 2007, Canadian North, First Air and DIAND submitted their respective responses to the other parties' comments of January 16, 2006.

9. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal disposed of the complaint on that basis.

PROCUREMENT PROCESS

10. The services at issue in this complaint relate to the conveyance of Food Mail by air between Northern Quebec through Nunavut, the Northwest Territories and area communities. The Food Mail Program is described in a brochure posted on DIAND's Web site as follows:

...

Food Mail is a Government of Canada program that pays part of the cost of shipping nutritious perishable food and other essential items by air to isolated northern communities that are not accessible year-round by road, rail or marine service. This subsidy makes it possible for retailers in these communities to sell fresh food at lower prices.

Indian and Northern Affairs Canada (INAC) manages the program and provides funding to Canada Post to cover part of the cost of transporting eligible items. Health Canada provides advice and guidance on nutrition. Canada Post provides Food Mail service by contracting with air carriers.

In these northern communities, fresh affordable food from the south is an important complement to traditional Aboriginal foods. With lower-cost nutritious food shipped by Food Mail, a healthy diet becomes more affordable. This promotes healthy eating.

...

11. The Food Mail Program has existed since the late 1960s, originally as the Northern Air Stage Program. The relationship between DIAND and Canada Post concerning the terms and funding for the Program is set out in an agreement (the Agreement) dated October 7, 1996, which has been amended numerous times between signature and the issuance of the Request for Proposal (RFP). Essentially, Canada Post contracts for air carrier services to carry out the Program in accordance with these agreed terms. Users pay for the delivery of the Food Mail directly to Canada Post at a pre-established rate. DIAND subsidizes

the remainder of Canada Post's cost of the Food Mail transportation. [REDACTED]

12. On May 20, 2005, because the existing contract for air carrier services was soon to expire, Canada Post issued an RFP for a new contract. The contract was for both Food Mail and regular mail. The due date for the receipt of proposals was July 7, 2005. The RFP indicated that the period of the contract would be up to 65 months. It specified a four stage evaluation process during which bidders' compliance with listed mandatory criteria would be evaluated first, followed by an evaluation of the rated criteria, after which the price data would be examined and, as a final step, the results of the rated criteria evaluation and the pricing data would be combined. Canada Post would then enter into negotiations with the bidder whose proposal had the highest score following the amalgamation of the points and price data.

13. After the evaluation of compliance with the mandatory requirements, Canadian North's and First Air's proposals were the only two proposals considered compliant. The evaluation team continued the evaluation process for those proposals. This stage in the process included site visits to each bidder's facilities and a round of clarification questions for each bidder. The evaluation team ranked First Air's proposal higher than Canadian North's and therefore entered into negotiations with First Air.

14. On November 24, 2005, Canadian North was informed by Canada Post that it had not been selected for contract award.

15. On February 20, 2006, Canadian North attended a debriefing with Canada Post staff. On March 6, 2006, Canada North wrote to the Deputy Minister of DIAND and objected to the manner in which the procurement had been conducted. On September 7, 2006, DIAND staff faxed Canadian North a copy of a letter dated August 22, 2006, from DIAND's Deputy Minister, responding to Canadian North's objection. On September 21, 2006, Canadian North filed its complaint with the Tribunal.

PRELIMINARY MATTERS

Timeliness

16. Before considering the merits of the complaint, the Tribunal will first address the reasons for which it dismissed the motion by First Air. In that motion, First Air requested that the Tribunal dismiss the complaint as Canadian North had not filed it within the time limits specified in section 6 of the *Regulations*. On December 8, 2006, while providing its comments on the GIR, First Air filed a motion requesting that the Tribunal dismiss the complaint on the basis that Canadian North had filed it outside the time limits imposed by section 6 of the *Regulations*. The motion contained the following grounds:

- (1) The complaint was filed well beyond the 10 working days after the day on which Canadian North had actual or constructive knowledge of the denial of relief, as required by subsection 6(2) of the *Regulations*; or,
- (2) In the alternative, the complaint was filed well beyond the 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to Canadian North, as required by subsection 6(1) of the *Regulations*.

17. The motion requesting that the Tribunal dismiss the complaint relies on the time limits specified in subsections 6(1) and (2) of the *Regulations*, which read as follows:

(1) Subject to subsections (2) and (3), a potential supplier who files a complaint with the Tribunal in accordance with section 30.11 of the Act shall do so not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.

(2) A potential supplier who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.

First Ground—The complaint was filed well beyond the 10 working days after the day on which Canadian North had actual or constructive knowledge of the denial of relief

18. Canadian North objected to DIAND on March 6, 2006. First Air and DIAND argued that, because DIAND took six months⁴ (until September 7, 2006) to reply, Canadian North had constructive knowledge of the denial of relief with respect to its objection long before the actual receipt of DIAND's response. First Air submitted that Canadian North knew, during that time period, that First Air was continuing to execute the contract with Canada Post. First Air argued that the fact that the contract was not cancelled and that Canadian North was unable to secure a response from DIAND amounted to constructive knowledge of denial of relief. According to First Air, in the past, the Tribunal has accepted that denial of relief does not have to involve the written word.⁵ First Air also cited two Tribunal cases in which the Tribunal accepted that the passage of a reasonable amount of time (one to three months) would be sufficient to consider that constructive knowledge of denial of relief has occurred.⁶ First Air and DIAND submitted that, by waiting six months for a response to its objection, Canadian North did not take the steps to act on its rights required by subsection 6(2) of the *Regulations*.

19. DIAND argued that Canadian North knew or reasonably ought to have known that DIAND would not assume responsibility for the Canada Post procurement and, therefore, that Canadian North knew or should reasonably have known much earlier than September 7, 2006, that its objection had been denied.

20. DIAND submitted that the *Regulations* were specifically crafted to discourage potential suppliers from adopting a "wait and see attitude" before filing their complaints. It further submitted that the Federal Court of Appeal, in *IBM Canada Ltd v. Hewlett-Packard (Canada) Ltd.*⁷ stated that potential suppliers "... are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process. . . ." First Air and DIAND submitted that, therefore, Canadian North had a responsibility to file its complaint considerably earlier than it actually did. They submitted that

4. After requesting a faxed copy of the reply, Canadian North received a copy of DIAND's reply, dated August 22, 2006, by facsimile on September 7, 2006.

5. *Re Complaint Filed by Joncas Postexperts, a Division of Quebecor World Inc.*, (8 December 2005), PR-2005-028 (CITT); *Re Complaint Filed by Cognos Incorporated* (29 November 2002), PR-2002-017 (CITT).

6. *Re Complaint Filed by Brymark Promotions Inc.* (1 September 2004), PR-2004-030 (CITT); *Re Complaint Filed by Sweetman Consulting Associates* (7 October 2004), PR-2004-035 (CITT).

7. 2002 FCA 284.

Canadian North is requesting that the Tribunal interpret subsection 6(2) of the *Regulations* such that the “10 working days” would start only when the complainant has “actual” knowledge of the denial of relief, thereby eliminating the “constructive knowledge” requirement from the subsection.

21. First Air also submitted that Canadian North had actual knowledge of its denial of relief through correspondence that it had received from DIAND after the contract had been awarded, but prior to March 6, 2006, when it filed its objection. First Air based this argument on a letter dated January 6, 2006, from the Minister of Indian Affairs and Northern Development to two “stakeholders of Canadian North”,⁸ the President of Nunavut Tunngavik Inc. and the Chair and CEO of Inuvialut Regional Corporation; the letters indicated that the proposals received were duly and properly evaluated by Canada Post and that Canada Post had the sole responsibility for issuing the RFP, evaluating the proposals and awarding the contract.

22. Canadian North, on the other hand, submitted that it objected to DIAND within 10 working days of its February 20, 2006, debriefing, when it first became aware of its grounds of complaint, by sending DIAND its letter of March 6, 2006. It also submitted that it followed up with DIAND through numerous telephone calls to DIAND officials, inquiring into the status of the reply to its objection, and that it filed its complaint with the Tribunal within 10 working days from the date on which it received DIAND’s letter dated August 22, 2006 (received via facsimile on September 7, 2006). This letter, which it considered to be its denial of relief, stated, among other things, that, based on the debriefing that Canada Post provided to DIAND officials and on the fairness monitor’s report, DIAND considered that the evaluation process was conducted in an equitable, objective, impartial and consistent manner and that the allegations made in Canadian North’s letter did not appear to have any validity.

23. On the basis of the evidence and submissions before it, the Tribunal is of the view that the basis of the complaint became known or should reasonably have become known to Canadian North on February 20, 2006. It was at that time that Canadian North received a debriefing from Canada Post that explained, to some degree, the reasons for which it had not been awarded the contract. The January 6, 2006, letter referenced by DIAND was not a substantive response from DIAND describing the specifics of the evaluation of the proposals, but simply a general statement that Canada Post had fairly evaluated the proposal. At that time, Canada Post had not yet provided a debriefing to Canadian North about the evaluation of its proposal.

24. The Tribunal finds that, on March 6, 2006, 10 working days after its debriefing, Canadian North made an objection to DIAND in relation to its concerns about the way Canada Post had conducted the evaluation of the proposals. After repeated contacts between Canadian North and DIAND,⁹ including one in June 2006 when DIAND advised Canadian North that a response was not likely to come before the late summer or fall because a new minister had just been appointed, Canadian North received a reply to its objection on September 7, 2006.

25. The Tribunal considers that Canadian North did not adopt a “wait and see attitude” between March 6, 2006, when it objected to DIAND, and September 7, 2006, when it received a reply to its objection letter. To the contrary, Canadian North actively pursued a response to its objection. DIAND’s own

8. According to DIAND, Canadian North is owned by NorTerra Inc., which, in turn, is jointly owned by the Inuvialuit of the Western Arctic and the Inuit of Nunavut.

9. DIAND’s December 18, 2006, submission, para. 9.

submission reveals that Canadian North made numerous inquiries about its objection. DIAND was an active participant in this exchange, providing Canadian North with a reasonable explanation for the delay and an estimate as to when a response could be expected.

26. The Tribunal therefore finds that Canadian North had actual denial of relief on September 7, 2006, and had not received what would have amounted to constructive knowledge of denial of relief before that time.

27. On September 21, 2006, 10 working days later, Canadian North filed its complaint with the Tribunal.

Second Ground—The complaint was filed beyond the 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to Canadian North

28. First Air submitted a second ground to its motion that argued, in the alternative, that the complaint was filed beyond the 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to Canadian North.

29. First Air submitted that Canadian North should not have made its objection to DIAND because Canadian North was aware that Canada Post was the procuring entity and, therefore, the appropriate entity to which an objection should have been made. Since Canadian North did not make an objection to Canada Post nor file a complaint with the Tribunal within 10 working days from February 20, 2006, the complaint was filed beyond the time limit prescribed by subsection 6(1) of the *Regulations*.

30. The Tribunal has already dealt with this matter in its dismissal of the motion by DIAND and the reasons thereto, wherein the Tribunal determined that DIAND is the government institution for the purposes of the complaint before it and, therefore, the appropriate entity to which an objection should have been made.

31. The Tribunal found that both the objection and the complaint were filed within the time limits specified in subsection 6(2) of the *Regulations*. The Tribunal, therefore, dismissed the motion before it.

Procedural Fairness

32. The Tribunal will now address another matter raised by the parties, that of procedural fairness, before it proceeds to consider the merits of the complaint. On December 20, 2006, the Tribunal ordered Canada Post, which was neither a party nor an intervener in the case, to produce documents that were relevant to the matter before it. Before filing the documents in response to the Tribunal's order, Canada Post requested a seven-day extension of time. The Tribunal granted an extension, however, due to the Tribunal's tight statutory deadline, the extension was only granted until noon on January 10, 2007 (an extension of just under five days). Canada Post filed the documents by the deadline, designating all of the submitted documents as confidential. The parties were given until January 16, 2007, to file their comments on Canada Post's submission and until January 22, 2007, to file comments on one another's submissions.

33. Given the tight time frames it had imposed for the two rounds of comments and the fact that all comments dealt with confidential information from Canada Post, the Tribunal waived the normal requirement for a public version of comments.

34. Counsel for the parties opposing the complaint voiced concerns arising from the confidential designation of Canadian North's submission of January 16, 2007, because this designation made them

unable to consult their respective clients for the purpose of obtaining instructions concerning the position they should take on their behalf. Counsel for DIAND and First Air also added a concern that the submission contained new grounds of complaint not included in the original complaint.

35. These concerns, in addition to the small amount of time the Tribunal had allowed for responses to one another's comments on the Canada Post documents, were the basis for submissions by counsel for the parties opposing the complaint that, in structuring the two rounds of comments as it did, the Tribunal had breached the principle of procedural fairness.¹⁰

36. The Tribunal does not agree that these circumstances gave rise to procedural unfairness, given the legislative rules that the Tribunal is required to observe concerning timelines and confidentiality.

Legal Basis of Procedural Fairness

37. It is a general principle of law that every administrative tribunal making a decision which affects the rights, privileges or interests of a person owes a duty of procedural fairness.¹¹ The rules of natural justice involve basic rules of procedure which were formulated to guarantee a basic level of procedural fairness in proceedings before quasi-judicial tribunals.¹² However, it is well settled that the *manner* in which the rules of natural justice are applied by an administrative or quasi-judicial tribunal depends on the context of the proceeding before it.¹³

38. The Federal Court of Appeal had occasion to consider the procedure that the Tribunal must use to carry out its inquiries in *GRK Fasteners v. Leland Industries Inc.*,¹⁴ in which it stated:

...

[8] "Subsection 17(2) of the CITT Act gives the Tribunal all of the powers, rights and privileges of a superior court of record regarding matters necessary or proper for the due exercise of its jurisdiction. In turn, its rules [citation omitted] provide further direction as to how that statutory discretion will be exercised. Rule 5 provides that where a question of procedure arises to which the rules do not provide an answer, the issue may be disposed of in such a manner as the Tribunal directs. Rule 6 allows the Tribunal to dispense with, vary or supplement any of the rules to provide for a *more expeditious or informal process* as the circumstances and considerations of process permit.

[9] The applicants' principal complaint is that, due to the pre-hearing procedures chosen by the Tribunal, participants were unsure of the scope of the products subject to inquiry *until late in the process when meaningful representations were impossible*. This is really a complaint about the manner in which the Tribunal exercised its residual discretion to manage the particular proceeding arising from Leland's complaint.

[10] ... Procedural fairness in this case required the Tribunal to devise a procedure that gave the parties enough notice of the case to be met to enable them to make meaningful representations. ...

...

[Emphasis added]

10. Letter from counsel for First Air dated January 18, 2007, at 2; letter from counsel for DIAND dated January 19, 2007, at 1.

11. *Nicholson v. Haldimond-Norfolk (Reg. Police) Comm.*, (1979) 1 S.C.R. 311.

12. *Canada Post Corp. v. Workers Compensation Board (Sask.)*, (1988) 174 Sask. R. 284.

13. *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, [1991] S.C.J. No. 66, at pp. 884-85.

14. 2006 FCA 118.

39. In other words, Parliament has provided the Tribunal with broad discretion to shape its procedures to fit the circumstances of its inquiries, within the parameters set by law for its inquiries, provided an overall level of fairness is met.

40. The Tribunal has exercised its discretion to meet this objective in these proceedings despite circumstances which were challenging in light of the legislative requirements which establish a deadline for the Tribunal to render its decision and specific requirements for dealing with confidential material. These challenging circumstances were brought about largely by the parties, the intervener and Canada Post and will be addressed in the following order: first, the deadline established by the Tribunal for filing the two rounds of comments; second, the matter of Canada Post having designated the whole of its evaluation as confidential; and third, the issue of the alleged new grounds of complaint raised in Canadian North's comments of January 16, 2007.

The Deadline Established by the Tribunal for Filing the Two Rounds of Comments

41. The deadline for the issuance of the Tribunal's determination is found in section 12 of the *Regulations* and reads as follows:

12. The Tribunal shall issue its findings and recommendations in respect of a complaint to the complainant, the relevant government institution and any other party that the Tribunal considers to be an interested party

(a) subject to paragraphs (b) and (c), within 90 days after the filing of the complaint;

(b) where, under any rules made pursuant to subsection 39(1) of the Act, the Tribunal grants a request for an express option, within 45 days after it grants that request; or

(c) where, under any rules made pursuant to subsection 39(1) of the Act, the Tribunal authorizes an extension of time, within 135 days after the filing of the complaint.

Since the Tribunal had authorized an extension of time, it had 135 days from the date of the filing of the complaint to issue its findings and recommendations. The other deadlines in the proceedings are established by the *Canadian International Trade Tribunal Rules*,¹⁵ a form of secondary legislation approved by Order in Council: 25 days to file the GIR, from the date on which the complaint is received by the government institution, and 7 working days to file comments on the GIR.

42. The Tribunal notes that all counsel were provided with the same amount of time to comment on the Canada Post documents and each other's submissions. The table below contains a chronology of the process that was followed in this case, including the dates of key milestones and the number of days remaining in each instance before the Tribunal's statutory deadline for issuing its findings and recommendations. It should be noted that the dates marked with one asterisk were extended at the request of the submitter.

15. SOR/91-499 [*Rules*].

Document	Date	Days Remaining
Complaint filed by Canadian North with the Tribunal	September 21, 2006	135 ¹⁶
Receipt of complaint by DIAND and Canada Post	September 28, 2006	128
DIAND motion to dismiss for reasons of jurisdiction (including a request that the deadline for the GIR be extended should the motion be dismissed); Canada Post comments requesting dismissal of the complaint	October 23, 2006	103
Tribunal order dismissing the motion after receiving submissions on the motion from all parties	November 9, 2006	90
GIR submitted by DIAND (deadline is normally 25 days from the receipt of the complaint per 103(1) of the <i>Rules</i> , i.e. October 23, 2006). In this case, 26 days from the Tribunal order of November 9, 2006	December 5, 2006	60
Comments on the GIR by the intervener, First Air, and motion to dismiss for reasons of timeliness	December 8, 2006	57
DIAND and Canadian North responses to First Air motion	December 18, 2006	47
First Air final comments in relation to its own motion	December 20, 2006	45
Tribunal order to Canada Post for the production of documents	December 20, 2006	45
Canada Post (not a party to the proceeding) production of documents as per Tribunal order	Noon, January 10, 2007*	24
Tribunal order dismissing First Air motion	January 11, 2007	23
Canadian North, First Air and DIAND comments on Canada Post documents	January 16, 2007	18
Canadian North, First Air and DIAND responses to each other's comments	January 22, 2007*	12
Tribunal determination due	February 3, 2007**	
* Extended at the request of the submitter.		
** The due date, set at 135 days in accordance with section 12(c) of the <i>Regulations</i> , fell on Saturday, February 3, 2007. Monday, February 5, 2007, was the first working day after that date.		

43. As can be seen from the above table, when DIAND filed its GIR, (for which, according to the *Rules*, it has 25 days after the receipt of a copy of the complaint) there were 60 calendar days remaining until the Tribunal's finding was required. In an ordinary case, comments on the GIR (and occasionally a reply) are filed within 10 to 20 calendar days, leaving the Tribunal with 40 to 50 calendar days to meet its statutory deadline. However, at the point where the Tribunal received the GIR, Canada Post's evaluation documents were missing from the record, which prevented the Tribunal from rendering a careful and appropriately reasoned decision. The Tribunal's letter of November 9, 2006, invited Canada Post to file comments on the GIR by December 8, 2006, provided it requested intervener status. It became evident with

16. Section 12 of the *Regulations*.

the passing of the December 8, 2006, deadline that Canada Post had chosen not to request to become an intervener. Had Canada Post become an intervener, it is unlikely that the Tribunal would have needed to issue the order to produce all documents related to the evaluation of the proposals, since Canada Post would likely have filed most or all of the documents in question as a matter of course.

44. An additional challenge to meeting the statutory deadlines was that, three days after the GIR was filed, on December 8, 2006, First Air filed a motion to dismiss the complaint on the ground that it had been filed out of time. The Tribunal wished to consider submissions on First Air's motion before deciding whether to order the production of the documents by Canada Post, given that no documents would have been required if the Tribunal had decided to dismiss the complaint for lack of timeliness. The last of the comments on this motion were filed on December 18, 2006. After considering the submissions on the motion, the Tribunal ordered Canada Post to produce the documents relevant to the complaint that DIAND had attempted unsuccessfully to obtain from Canada Post for purposes of the inquiry.¹⁷ The Tribunal's order to produce documents was issued two days after the filing of the last of the comments, on December 20, 2006.

45. The Tribunal originally ordered Canada Post to produce the evaluation documents on January 5, 2007, but the latter requested an extension. After careful consideration, the Tribunal agreed to an extension until noon on January 10, 2007, the maximum time it could allow Canada Post to gather its materials while still allowing itself the time necessary to conduct its deliberations in a considered way and produce its findings and recommendations.

46. The table indicates that, by allowing the parties a right of comment and reply on Canada Post's evaluation documents, the Tribunal had reduced its own time for deliberation and decision-making to 15 days from the normal 40 to 50-day timeframe. Due to another request for an extension made by First Air and DIAND, this time was reduced even further to only 12 days.

47. In other words, the Tribunal gave to the parties the maximum time for consideration of their comments and replies that it could give without compromising the Tribunal's ability to meet the statutory deadline for issuing its decision. The Tribunal notes that there is no discretion in the *CITT Act* for the Tribunal to extend this deadline.

Canada Post Having Designated the Whole of its Evaluation as Confidential

48. Subsection 45(1) and paragraph 46(1)(b) of the *CITT Act* set strict requirements to prevent the disclosure of information that has been filed with the Tribunal as confidential. Subsection 45(1) reads as follows:

45. (1) Where a person designates information as confidential pursuant to paragraph 46(1)(a) and that designation is not withdrawn by that person, no member and no person employed in the public service of Canada who comes into possession of that information while holding that office or being so employed shall, either before or after ceasing to hold that office or being so employed, knowingly disclose that information, or knowingly allow it to be disclosed, to any other person in any manner that is calculated or likely to make it available for the use of any business competitor or rival of any person to whose business or affairs the information relates.

17. Letter from DIAND to Canada Post dated November 23, 2006, which states: "We have been advised by you that CPC does not intend to provide DIAND with any of the information or assistance. Given our understanding that the procedures followed by CPC in regard to the RFP would meet any standard of review, we wonder at the wisdom of your client's position.", GIR, Tab 1.

49. Paragraph 46(1)(b) provides that, a person submitting confidential information must also submit:

(b) a non-confidential edited version or non-confidential summary of the information designated as confidential pursuant to paragraph (a) in sufficient detail to convey a reasonable understanding of the substance of the information or a statement

i) that such a non-confidential edited version or non-confidential summary cannot be made, or

(ii) that such a non-confidential edited version or non-confidential summary would disclose facts that the person has a proper reason for wishing to keep confidential,

together with an explanation that justifies the making of the statement.

50. As mentioned above, when Canada Post submitted its documents to the Tribunal, it chose to designate all of them as confidential and did not provide a public version as required by paragraph 46(1)(b) the *CITT Act*. The Tribunal notes that the time necessary for Canada Post to review its documentation, redact the purely confidential passages and leave a public version or, in the alternative, produce a public summary of its documents, would have caused several more days of delay. Each day required for Canada Post's document review would have further reduced the time available for comment by the parties and decision-making by the Tribunal, which was already at a minimum. After weighing the advantages and disadvantages of compelling Canada Post to create a public version of its documents, the Tribunal decided to accept Canada Post's materials as filed. In the Tribunal's opinion, any challenges of having to deal with a confidential version of Canada Post's materials (and comments on those materials) were justified, given the time required for the redaction process described above. Requiring Canada Post to fulfil its duty to supply a public version would have resulted in the Tribunal not issuing its decision and reasons by the statutory deadline.

51. Moreover, the Tribunal notes that Canadian North's counsel had requested and was refused Canada Post's permission to show the Canada Post documents to his client.¹⁸ Therefore, the Tribunal did not believe that a redacted version would have provided a significant amount of useful information for counsel to share with their respective clients.

52. Accordingly, the Tribunal decided that it would be in the best interests of procedural fairness to leave the confidential designations intact and provide stringent timelines for the parties to comment on the documents. It also followed that, since the Canada Post documents were designated as confidential, any comments thereon would also be designated as confidential. Therefore, Canadian North's January 16, 2007, submission was designated as confidential, which is what the parties opposing the complaint were complaining about in their letters of January 18, 2007, because they submitted that they were unable to consult with their clients regarding the "new" allegations.

53. The Tribunal is of the view that, while the evaluation details may not have been knowable without access to Canada Post's confidential materials, the two main heads of complaint and the six allegations illustrating those heads were public and had been known throughout the proceedings. The prejudice, if any, to the parties opposing the complaint, from not having access to a redacted public version of Canada Post's evaluation, was therefore minimal and was outweighed by the need to permit the Tribunal to complete its inquiry within the time required by its governing legislation.

18. Letter from counsel for Canadian North dated January 16, 2007, para. 3.

Allegedly New Grounds of Complaint Raised in Canadian North's Comments

54. The parties opposing the complaint alleged that Canadian North's comments on Canada Post's evaluation, filed on January 16, 2007, contained new grounds of complaint and that they were prejudiced by the inclusion of these allegedly new grounds in these proceedings. The Tribunal disagrees for several reasons.

55. As the Tribunal stated in its letter dated January 19, 2007, it is of the view that these matters were not new grounds of complaint, but rather new arguments and allegations supporting the original two grounds of the complaint.

56. In addition, the parties opposing the complaint had access to the evidence concerning Canada Post's evaluation at the same time as Canadian North, i.e. on January 10, 2007, when Canada Post filed its documents with the Tribunal and the parties. The parties on both sides had an opportunity to use this evidence to support their positions. The Tribunal does not see how the opposing parties have been prejudiced by the fact that Canadian North took advantage of the same opportunity that they were afforded.

57. Therefore, the Tribunal admitted Canadian North's January 16, 2007, submission as further support of its two main grounds of complaint. However, as explained below, the Tribunal will not consider the new allegations because, in the interest of judicial economy, it has chosen to reach its decision based on the original six allegations supporting the complaint.

TRIBUNAL'S ANALYSIS OF THE SUBSTANCE OF THE COMPLAINT**Introduction**

58. 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, is the *AIT*.

59. The complainant alleges that the procurement violated the provisions of the *AIT* in that:

- the RFP did not disclose the evaluation criteria that were used to evaluate proposals; and
- the evaluation criteria were not applied consistently to the two competing proposals, resulting in discrimination among potential suppliers.

60. Article 506(6) of the *AIT* provides as follows:

... The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.

61. In its initial complaint of September 21, 2006, Canadian North presented six allegations in support of its complaint. Those allegations relied on the debriefing that Canadian North had received from Canada Post on February 20, 2006, in which Canada Post officials explained to Canadian North why its proposal had not been selected.

62. The RFP contained the following general provisions relating to the evaluation of rated criteria:

...

Proposers' responses to rated requirements will be evaluated on the extent to which they meet the requirements.

Proposers' Proposals should therefore contain detailed responses and references to any attached substantiating documentation. Responses and substantiating documentation should be clear, direct and grouped together with an index provided to make it easy for the evaluators to locate a particular response or substantiating item.

Proposals that do not respond to a particular rated requirement will receive a zero-point score for that rated requirement. Where the evaluation team cannot easily find responses to a rated requirement, a zero-point score may be assessed to that rated requirement.

For each Proposal that has proceeded to Stage 2, the Corporation will review, and score the information provided by the Proposer in response to the Rated Requirements provided for in **Schedule 3** of the RFP.

Up to the top five (5) rated Proposers will be eligible to proceed to Stage 3 of the Evaluation and Selection Process. Proposals that do not meet the minimum score requirement (40 points) will be eliminated from further consideration and shall not be eligible to proceed to Stage 3.

The total score awarded to the Proposal at the end of this stage is the "Stage 2 Score".

...

63. A breakdown of the weighting of evaluation criteria that was to be used for the overall ranking of the proposals is found in the following table:¹⁹

Evaluation Criteria and Weighting:

Rated Requirements	
RFP Response Format	10
Mandatory requirements	14
Commercial	19
Service Capability	11
Facilities	4
Financial (excluding Price)	4
Pricing	20
Total	82

64. The Tribunal notes that of the possible 82 points, only 20 related to pricing. Canada Post officials told Canadian North representatives, in the February debriefing, that pricing was important but the ability to provide the service was key. The Tribunal also notes that, of the remaining 62 points, only 15 points, i.e. those for service capability (11 points) and facilities (4 points), were directly related to the actual provision of the required services. The remaining 47 points were given for tangential requirements. For example, 10 points were dedicated to the RFP response format, e.g. _____

_____ The Tribunal notes that the proposals of Canadian North and First Air received _____
_____ a matter that the Tribunal will consider in its discussion of the ground of "Related Airlines" raised by Canadian North.

19. RFP at 17.

65. The 15 points directly related to the actual provision of the required services were the heart of the evaluation of the proposals. The RFP provided a further elaboration of the service capability and facilities requirements in Schedule 3, Rated Requirements, as follows:

Service Capability Requirements

5. The Proposer is to demonstrate its ability to provide for the Statement of Requirements that is included in Attachment 1 to this RFP. Respond on a paragraph-by-paragraph basis using the same division, section, subsection, page number, etc. in the response. For those requirements to which Proposers cannot comply, state the page number, section and subsection and the reason for non-compliance. Significant non-compliance may be assessed as non-conformance.

Proposer Facilities Requirements

6. Supply detail of location and size of offices and facilities including if they are owned or rented. Supply detail of freezers and coolers, if applicable, including size and capacity.

66. The Statement of Requirements, referred to above, is Attachment 1 of the RFP and consists of four pages, in tabular format, showing departure points, destination points, distance, annual volume of Food Mail (estimated), annual volume of regular mail (estimated) and frequency of departure for the conveyance of regular mail and Food Mail (see excerpt below). The fifth and last page contains additional information related to the provision of the required services. As the Tribunal noted in its reasons related to jurisdiction, Attachment 1 shows that over 80 percent of the annual volume (by weight) of the cargo to be carried is Food Mail. Most of the additional points found on page 5 of Attachment 1 (shown in the excerpt below) relate to the conveyance of Food Mail.

EXCERPT FROM ATTACHMENT 1—STATEMENT OF REQUIREMENTS

1) The conveyance of mail and Foodmail by air between the following departure/destination points:

DEPARTURE POINT(S)	DESTINATION POINT(S)	DISTANCE (Km's)	ANNUAL VOLUME FOOD (Kg's) (Estimated)	ANNUAL VOLUME FOOD (Kg's) (Estimated)
Val D'Or YVO	Qikiqtarjuaq YVM	2,299	155,000	
	Clyde River YCY	2,540	256,000	
	Cape Dorset YTE	1,797	341,000	
	Hall Beach YUX	2,308	136,250	
	Igloolik YGT	1,477	390,500	
	Iqaluit YFB	1,835	2,613,000	
	Kimmirut YLC	1,713	121,000	
	Kuujuaq YVP	1,374	1,513,500	
	Nanisivik YSR	2,788	182,000	
	Pond Inlet YIO	2,736	395,000	
	Pangnirtung YXP	2,127	375,000	
	Resolute YRB	2,736	132,000	
...				

Yellowknife YZF	Cambridge Bay YCB	849	68,000	50,690
	Fort Simpson YFS	360		5,425
	Gjoa Haven YHK	1,089	219,098	61,002
	Hay River YHY	191	0	8,863
	Holman YHI	933	113,000	21,113
	Iqaluit YFB	2,260		34,225
	Kugluktuk YCO	596	268,422	57,443
	Nanisivik YSR	1,869	1,338	112
	Kugaaruk (Pelly Bay) YBB	1,308	133,123	25,877
	Resolute YRB	1,557	72,434	14,266
	Rankin Inlet YRT	1,135		14,750
	Taloyoak YYH	1,216	186,775	24,010
	Whitehorse YXY	2,584		7,930
...				

3. The above requested services will have a frequency of departure as follows:

FREQUENCY OF DEPARTURE

DEPARTURE POINT (S)	DESTINATION POINT (S)	Frequency of Service
...		
Yellowknife YZF	Cambridge Bay YCB	1,2,3,4,5
	Fort Simpson YFS	1,2,3,4,5
	Gjoa Haven YHK	1,2,3,4,5
	Hay River YHY	1,2,3,4,5
	Holman YHI	2,4,6
	Iqaluit YFB	1,3,5
	Kugluktuk YCO	1,2,3,4,5
	Nanisivik YSR	1,3,5
	Kugaaruk (Pelly Bay) YBB	2,3,5,6,7
	Resolute YRB	1,3,5
	Rankin Inlet YRT	1,3,5
	Taloyoak YYH	1,3,4,6,7
	Whitehorse YXY	1,3,5
...		

Note – Canada Post would expect that every attempt will be made to have mail arrive on aircrafts during the normal working hours (approx. between 9:00 and 17:00).

- 4) In addition to the above, there are **AIRPORT FACILITY REQUIREMENTS**. It should be noted that there are Foodmail entry points, and as such several communities are eligible to receive Foodmail. Sufficient space is required, at the airport, to receive deposits of Foodmail shipments. Appropriate temperature controlled facilities are required (e.g. Freezers & Coolers) to ensure that product quality is maintained. Foodmail handling, etc. shall be in keeping with “**Schedule L**” of the terms and conditions listed on Attachment 2.
- 5) The Contractor(s) shall provide, if available, a printed schedule of service detailing the flight(s) and aircraft types the contractor will use to meet the specifications as outlined in this RFP.
- 6) Due to weather conditions and Canada Post services requirements, the airlines must be capable of providing Instrumentation Flight Rules (IFR) service.
- 7) The Corporation will consider recommendations for deviation from the specifications where such recommendations are supplied by demonstrated advantages or cost reductions not resulting in associated reductions in services.
- 8) The contract may be up to a **65** month period from the effective date. The Corporation, at its discretion, may exercise its option to extend or reduce the contract period.
- 9) A separate proposal for the Foodmail inventory management, up to and including “order level”, is being requested. This system should describe, in keeping with Schedule “L”, Section 2 of the Terms and conditions (page 68), how tracking and control of items being loaded onto the plane by the airline are verified and confirmed upon delivery to the designated receiver. Proposals for Section 1 and 2 of Schedule “L” may be submitted individually or as combined format. Please ensure you specify which presentation you are making.

67. In addition to this information in the RFP, Tab 1 of the confidential submission of First Air, filed on October 27, 2006, contains a series of 43 questions and answers that Canada Post provided to the bidders. Although this document was designated as confidential by Canada Post when it was originally distributed to the bidders, it is believed that it was available to all bidders prior to bid closing.

68. In evaluating the proposals, however, Canada Post used an evaluators’ grid which incorporated numerous sub-criteria (with associated point allocations) that were not disclosed to the bidders. The Tribunal must therefore consider whether applying the criteria and points allocation that was provided in the evaluators’ grid, but not in the RFP, constituted a violation of the *AIT* requirement that “[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of proposals and the methods of weighting and evaluating the criteria”.

69. The Tribunal has noted the arguments from all the parties regarding previous cases in which the Tribunal²⁰ and the Federal Court of Appeal,²¹ have ruled on a comparison between the evaluation criteria listed in the tender documents and the scoring scheme. Typically, evaluators have been provided with an evaluators’ grid that differs from the scoring scheme included in the tender documentation. The evaluators’ grid is normally more explicit and defined than the scoring listed in the RFP and, in general, breaks down the points to show the number of points to be awarded for partial achievement of a criterion, in cases when it is not simply a question of pass or fail. In instances where the Tribunal finds that these sub-criteria are either

20. *Re Complaint Filed by Brookfield LePage Johnson* (6 September 2000), PR-2000-008 and PR-2000-021 (CITT); *Re Complaint Filed by Siemens Westinghouse Incorporated* (19 March 2001), PR-2000-029 (CITT), *Re Complaint Filed by Med-Emerg International Inc.* (15 June 2005), PR-2004-050 (CITT); *Re Complaint Filed by P&L Communications Inc.* (22 December 2005), PR-2005-026 (CITT); *Re Complaint Filed by Deloitte & Touche* (11 May 2006), PR-2005-044 (CITT).

21. *Siemens Westinghouse Inc. v. Canada (PWGSC)* (2001) 202 D.L.R. (4th) 610, at para 43 *Fed.C.A). Tab 2.

provided for in the RFP or can reasonably be inferred from the RFP, it will not interfere with that evaluation on the basis of undisclosed evaluation criteria.

70. On the other hand, if the Tribunal finds that the sub-criteria, scoring scheme, or any other aspect of the undisclosed evaluators' grid cannot be reasonably anticipated by bidders on the basis of information in the RFP, it will find that there are undisclosed evaluation criteria, in violation of the requirements of the trade agreements.

71. In determining the reasons why Canadian North lost points, the Tribunal did not have the benefit of submissions from Canada Post and, hence, needed to rely on its interpretation of the evaluation documentation provided by Canada Post, considered in the light of the submissions by the other parties concerning the proper interpretation and the explanations allegedly given to Canadian North at the debriefing. In the view of the Tribunal, the submissions by the parties suggested reasons for the attribution of points by the evaluators that, in some instances, were not supported by the contents of the evaluation documents.

Analysis

72. The Tribunal will now consider the six allegations originally submitted by Canadian North and will determine whether the ground of complaint that the RFP did not disclose the evaluation criteria that would be used to evaluate the proposals is valid. The Tribunal had the benefit of being able to view the evaluators' grid used by Canada Post evaluators, including the reasons for the deduction of points during the evaluation of Canadian North's proposal.

Facilities

Facilities—General

73. During the debriefing, Canada Post advised Canadian North that it had lost points with regard to facilities, stating the following: _____

_____ ²² In its complaint, these items all fell under the heading "Turnkey Facilities". The Tribunal will first examine these allegations as they relate to the RFP requirement for facilities, which was worth four points. According to the documents provided by Canada Post, Canadian North's proposal had points deducted because _____

_____ ²³ _____

74. The RFP provides the following regarding "facilities":

Proposer Facilities Requirements

6. Supply detail of location and size of offices and facilities including if they are owned or rented. Supply detail of freezers and coolers, if applicable, including size and capacity.²⁴

22. Complaint, Tab 1 at 4.

23. Schedule "L" covers all of the items in this paragraph. It is impossible to break these out according to how the complaint was formulated.

24. RFP at 21.

75. Schedule “L” set the standards and specifications to be used when handling or storing Food Mail items. Separate specifications were stipulated at two types of destination points as follows:

Destinations:

Large Communities/Transfer Points (e.g. Iqaluit, Kuujuaq)

Air Carriers should have access (owning or contracting) to the following facilities, with the capacity to hold a full aircraft load (based on the largest aircraft operating within the respective vicinity), in preparation of a shipment, in case of delayed or cancelled flights.

- One cold room at 0 to 4 degrees Celsius
- One cold room at 10 to 12 degrees Celsius
- One freezer at minus 18 degrees Celsius

Air Carriers should take the following actions to assure the protection of the boxes during ground operations:

- White colour plastic wrapped over the load (high and low temperatures, rain, snow and sun protection,
- Insulated blanket if load is subjected to stay more than 15 minutes on the tarmac (not required if aircraft is loaded directly from a facility -side loading or front loading)

All Other Destination Points

Air carriers should take the following actions to assure the protection of the boxes during ground operations if load is not delivered to the recipient at the aircraft door :

- White colour plastic wrapped over the load (high and low temperatures, rain, snow and sun protection,
- Insulated blanket if load is subjected to a stay of more than 15 minutes on the tarmac (not required if aircraft is loaded directly from a facility -side loading or front loading).

76. Canadian North submitted that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁵ Canadian North submitted that the [REDACTED]

[REDACTED]

[REDACTED]

77. At paragraph 41 of the GIR, DIAND submitted that it was unable to formulate a GIR that responded to the merits of the complaint, as it did not have access to Canada Post’s records relating to the evaluation of the proposals. However, it was able to provide comments on the documents that Canada Post submitted to the Tribunal on January 10, 2007. DIAND noted that bidders were also required to provide details regarding its freezers and coolers, including details about their size and capacity. DIAND submitted that Canadian North [REDACTED]

78. First Air submitted that, [REDACTED]

25. RFP at 67-70.

79. The Tribunal notes that, the evaluators' grid reveals that, in assessing the criterion "location and size of offices and facilities, including if they are owned or rented", as provided for in the RFP, a separate sub-criterion [REDACTED]

[REDACTED] The Tribunal considers that the introduction of this sub-criterion is evidence of the use of undisclosed criteria in the evaluation.

Facilities—Turnkey

80. Canadian North submitted that it was informed at the debriefing that Canada Post staff had discounted its proposal for "risk" because its facilities were not "turnkey" at the time of submission. It submitted that, while the RFP asked for detail of location and size of offices and facilities, including if they are owned or rented, there was nothing in the RFP to indicate that the bidder would be penalized for renovating existing facilities or building additional facilities to meet the RFP's physical requirements. Canadian North submitted that, in its proposal and responses to Canada Posts clarification questions, it clearly committed to having six such facilities, one of which was to be newly constructed. Canadian North also submitted that, [REDACTED]

[REDACTED] Canadian North submitted that [REDACTED]

[REDACTED] It submitted that [REDACTED]

81. DIAND submitted that the RFP expressly required bidders to provide information regarding the location and size of offices and that Canadian North [REDACTED]

[REDACTED] DIAND submitted that Canada Post [REDACTED]

82. First Air submitted that Canadian North [REDACTED]

[REDACTED] First Air submitted that [REDACTED]

83. The Tribunal cannot find any requirement in the RFP that the Kuujuaq facility, or indeed any facility, had to exist as of the date of the submission of the proposal. The Tribunal notes that it is open to the evaluators to take into account the risk that a facility may not be completed when necessary, provided that there is wording in the RFP to that effect. In this instance, the Tribunal could not find such wording in the RFP. The Tribunal therefore finds that there was an undisclosed criterion regarding the evaluation of a bidder's facilities—that the facilities had to exist as of the date of the proposal.

84. The Tribunal also notes that it appears that the evaluators relied on the mistaken assumption that [REDACTED]

[REDACTED]

Although this indicates that the evaluators failed to properly consider information in the proposal, it does not indicate the use of undisclosed criteria in the evaluation and, hence, is not encompassed in the complaint.

Facilities—Interline Transfers

85. Canadian North submitted that Canada Post staff discounted its proposal due to the risk associated with a bidder proposing to use third party airline services in the operation of any of its scheduled routes. It submitted that the RFP did not specify that bidders were required to propose using their own aircraft exclusively. Canadian North noted that the Sample Agreement, included as Attachment 2 to the RFP, expressly stated the contractor was to provide interline and intraline transfers as required, thus demonstrating that such transfers would be acceptable, or mandatory, in certain circumstances. It submitted that, in its proposal, it committed to delivering 97.7 percent of the mail and Food Mail itself, without transfers.

86. Canadian North submitted that its score was affected by its lack of a contingency plan for its interline partners (see the

It claimed to have addressed

Canadian North also noted that

87. DIAND submitted that Canadian North

DIAND submitted that it should have

been

88. First Air submitted that Canadian North

First Air agreed with Canadian North that

89. Regarding “interline”, Attachment 2 contains the following:²⁶

“Interline” means the transfer of Mail by the Contractor from one (1) of its flights to a flight operated by another air carrier.

2.1 The Contractor shall accept all mail tendered by [Canada Post] and shall carry (or cause to be carried on its behalf) all such Mail between Departure Points and Destination Points and shall deliver such Mail to the particular Destination Points within the time specified under this Agreement....

26. RFP at 30.

90. Schedule “A” included an example of an “Airline Transfer Bill” which was defined as the document to be used by Canada Post and the contractor “. . . respecting Mail when performing interline transfers. . . .”

91. Accordingly, it is clear that bidders were entitled to include interline transfers as part of their proposals. The evaluation documents do not indicate that the inclusion of interline transfers per se caused Canadian North to lose points.

92. According to the Canada Post evaluation results, Canadian North’s proposal had [REDACTED]

93. As discussed above, the evaluators used an undisclosed criterion [REDACTED]

[REDACTED] the Tribunal agrees with Canadian North that, [REDACTED]

[REDACTED] This seems to be a case of the evaluators not properly evaluating the proposal submitted by Canadian North; it does not however indicate the use of undisclosed criteria in the evaluation and, hence, is not encompassed in the complaint.

94. The Tribunal therefore finds that there were undisclosed criteria regarding the evaluation of proposals in respect of the use of interline carriers.

Service Capability

95. The Tribunal will now consider the RFP’s “Service Capability” requirements, which were worth 11 points according to the evaluation criteria and weighting grid provided to bidders in the RFP. The weighting grid used by the Canada Post evaluators reveals that this criterion was [REDACTED]

96. In its original September 21, 2006, submission, Canadian North made three allegations related to these requirements.

Service Capabilities—Contingency Plan

97. Canadian North submitted that its proposal was evaluated based on terms contained in a contingency plan that was not a required deliverable under the terms of the RFP. It submitted that, when Canada Post representatives were conducting a site visit of Canadian North’s facility, they requested, and Canadian North provided, a copy of its contingency plan. Canadian North submitted that it was not informed that this contingency plan would be evaluated. However, at its debriefing, it was informed that its proposal had been discounted based on certain information contained in the contingency plan.

98. After a review of the Canada Post documents, Canadian North submitted that its proposal [REDACTED]
[REDACTED] It submitted that the RFP [REDACTED]
[REDACTED]

99. DIAND submitted that it is clear from the evaluators' notes that Canadian North [REDACTED] DIAND
submitted [REDACTED] It also submitted that [REDACTED] DIAND
submitted that [REDACTED]
[REDACTED]

100. First Air submitted that Canadian North [REDACTED] It submitted that Canadian North [REDACTED]
[REDACTED] First Air submitted that Canadian North [REDACTED]
[REDACTED] It also submitted that [REDACTED]
[REDACTED]

101. As noted above regarding interline transfers, [REDACTED]
[REDACTED]
[REDACTED]

102. The Tribunal is unable to find, in the RFP, any requirement to include [REDACTED]
[REDACTED], or any contingency plan, in the bidders' proposals. Section 5.2 of Attachment 2, the
sample agreement for which bidders had to indicate their compliance on a paragraph-by-paragraph basis in
their proposals, specifically requires that the contingency plan be provided by the *contractor* "on or before
the date of the signing of th[e] Agreement", the Tribunal does not consider that a bidder would reasonably
anticipate from the RFP that a sub-criterion on contingency planning would be applied earlier, at the time of
evaluation. It therefore considers the requirement for a contingency plan, including [REDACTED]
[REDACTED], to be an undisclosed evaluation criterion.

Service Capabilities—Frequency of Aircraft Use

103. Canadian North submitted that Canada Post discounted its proposal because smaller aircraft were to
be used multiple times in one day, to meet the required schedule, as compared to the use of fewer aircraft
with larger cargo capacity. It submitted that the RFP did not contain any requirement for the use of larger
aircraft. It submitted that it proposed the use of more reliable aircraft than those proposed by First Air but
that no value was ascribed to that benefit.

104. DIAND submitted that Canadian North [REDACTED] It submitted that Canadian North [REDACTED] DIAND
submitted that, [REDACTED]

DIAND submitted that it was reasonable for the evaluators

105. First Air submitted that Canadian North It submitted that,

First Air submitted that the evaluators

In addition, First Air also submitted that the evaluators

106. Based on the evaluation results furnished by Canada Post, Canadian North's proposal

107. While the RFP sets out the delivery needs of the various locations in terms of annual volume of both Food Mail and regular mail,²⁷ as well as the days on which service is required,²⁸ it is silent as to the required frequency of aircraft use or size of aircraft. It is not self-evident that more points would be allocated for the single use of larger aircraft over smaller aircraft that may have to be used multiple times in one day, or that one of these alternatives necessarily has advantages in terms of minimizing risk. The Tribunal notes that, for example, if a larger aircraft were to experience a mechanical failure, this might adversely affect an entire day's shipment, whereas a mechanical failure of one of several smaller aircraft might mean that part of the day's shipment would still be delivered. This criterion of frequency of aircraft use cannot be reasonably inferred from the wording of the RFP and, accordingly, the Tribunal finds that an undisclosed criterion has been used in the evaluation.

Service Capabilities—Flight Schedule

108. Canadian North submitted that it was informed that its proposal lost points because not all of its flights were scheduled to arrive during regular working hours. It submitted that the RFP did not require that all flights arrive during regular working hours; rather, it asked bidders to commit to making an effort to have flights arrive during approximate working hours. It submitted that, of the 121 flights contained in its proposal, only 3 carrying Food Mail were scheduled to arrive outside of the hours of 8:00 a.m. to 6:00 p.m. Canadian North submitted that it was impossible for a bidder to determine

It submitted that

109. Canadian North submitted that, in general, It submitted that, if

27. RFP at 22-24.
28. RFP at 24-25.

110. DIAND submitted that there was nothing [REDACTED]
[REDACTED] It submitted that,
[REDACTED]
[REDACTED]

111. DIAND submitted that Canadian North [REDACTED] 29
[REDACTED]
DIAND submitted that, [REDACTED]
[REDACTED] DIAND submitted that it was therefore reasonable
[REDACTED].

112. First Air submitted that [REDACTED] It submitted
that [REDACTED]
[REDACTED] First Air submitted that there was a [REDACTED]
[REDACTED] It submitted that it was reasonable to think that [REDACTED]
[REDACTED] It noted that the Statement of
Requirements attached to the RFP contained a [REDACTED]
[REDACTED] First Air submitted that Canadian North,
[REDACTED] According to First Air,
[REDACTED]

113. Canada Post's scoring scheme for service capability was as follows:

Service Capability Requirements [worth 11 points]		
	Points	Notes
[REDACTED]	1	See Technical Evaluation
[REDACTED]	1	See Technical Evaluation
SUB-TOTAL	11	
[REDACTED]		
[REDACTED]	1	[REDACTED]
[REDACTED]	1	[REDACTED]
[REDACTED]	1	[REDACTED]

29. Canada Post, when it submitted its documents, [REDACTED]
[REDACTED]

114. The Tribunal notes that, according to the information provided by Canada Post, Canadian North’s proposal [REDACTED]

115. The Tribunal notes that, in past determinations,³⁰ it has considered whether rating schemes are reasonably foreseeable based on the RFP. In the case currently before the Tribunal, it finds that the above rating scheme on scheduling, as it relates to a bidder who was not able to meet the 100 percent fully capable level, could not be reasonably foreseen based on the RFP.

116. Attachment 1 to the RFP sets out, in the form of four pages of tables, the annual volume of both Food Mail and regular mail,³¹ as well as the daily service requirements.³² Immediately following those tables is a note which reads:

Note – Canada Post would expect that every attempt will be made to have mail arrive on aircrafts during the normal working hours (approx. between 9:00 and 17:00).

117. The Tribunal agrees with Canadian North that it was not reasonable to expect, given the wording of the RFP, that failure to deliver 100 percent of the mail between 9:00 a.m. and 5:00 p.m. would lead to a loss of as many points as it did. The note shown above uses the words “would expect that” and “every attempt” and qualifies normal working hours as “approx. between 9:00 and 17:00” (emphasis added). This is far from a clear statement that it is extremely important that 100 percent of mail be delivered between 9:00 a.m. and 5:00 p.m.

118. [REDACTED]

119. The Tribunal considers that the evaluation criteria in the RFP would not in any way lead a bidder to reasonably infer that it could lose a full [REDACTED] of the possible points for delivering regular mail on [REDACTED] flights occurring outside of normal working hours. This score was particularly important to the final rating of Canadian North, given that this [REDACTED] of the 11 points for the “Service Capability” requirements, unlike [REDACTED]

Commercial Requirements—Related Airlines

120. The final allegation from Canadian North’s September 21, 2006, submission related to an element of the “Commercial” requirements of the RFP, which bidders were informed was worth 19 points in total.

121. Canadian North submitted that Canada Post discounted its proposal for failing to demonstrate, in listing its affiliates, that it was commercially related to any other airlines with complementary service. It submitted that [REDACTED]

It submitted that the RFP [REDACTED]

30. *Re Complaint Filed by P&L Communications* (22 December 2005), PR-2005-026 (CITT); *Re Complaint Filed by Prudential Relocation Canada Ltd.*(30 July 2003), PR-2002-070 (CITT).

31. RFP at 22-24.

32. RFP at 24-25.

Canadian North submitted that it is part of a larger network of commonly owned Aboriginal airlines and, if it had been required to demonstrate evidence of its corporate structure and affiliated companies in this manner, it would have responded accordingly.

122. DIAND submitted that [REDACTED] DIAND claimed that [REDACTED] DIAND noted that Canadian North [REDACTED] It submitted that Canadian North [REDACTED]

123. First Air submitted that [REDACTED] It submitted that Canadian North, [REDACTED] First Air submitted that [REDACTED] It submitted that [REDACTED]

124. Regarding affiliates and related airlines, the RFP provided the following under “Commercial” requirements:³³

2. The Proposer is to provide an executive summary which contains a synopsis of its response to this Request for Proposal. It should include:
 - An overview of the Proposal’s major strengths as they relate to Canada Post’s requirements
 - Corporate information for the Prime Contractor, and where applicable, for each of the Prime’s major Sub Contractors
 - Areas of expertise and the role of each Sub Contractor with respect to this project
 - Provide the following information about your Company:
 - a) ownership;
 - b) number of employees; (union and non-union, union affiliations);
 - c) corporate status;
 - d) affiliated companies;
 - e) type of business;
 - f) licensing (include license no. by class of service, areas licensed);
 - g) equipment details (type; size; capacity; ownership);
 - h) list of most recent contracts for similar service (include names, address and telephone number for each contract listed).

125. The RFP defines “affiliates” as follows:³⁴

“Affiliates” shall have the meaning of that term as it is defined in the Canada Business Corporations Act, as amended, and in any successor legislation thereto.

33. RFP at 20.

34. RFP at 29.

126. According to Canada Post's scoring, Canadian North's proposal [REDACTED]

127. The Tribunal agrees with Canadian North that the context regarding the requirement to list affiliated companies does not provide bidders with any indication that they are to provide information about companies with which they are affiliated in any manner, other than to name its affiliates in the legal sense of the term. Consequently, the Tribunal does not consider that a bidder could reasonably conclude from the RFP that points would be awarded [REDACTED] the affiliates are. In the Tribunal's opinion, to obtain full points, all the RFP appears to require is to provide the names of the affiliated companies. The Tribunal finds that, based on the wording in the RFP, bidders could not reasonably anticipate the information that Canada Post sought. The Tribunal therefore finds that Canadian North's complaint is valid on this ground.

128. Having found that the grounds raised by Canadian North in its complaint of September 21, 2006, demonstrate that evaluation criteria not disclosed in the tender documents were used in the evaluation of proposals, the Tribunal considers that there is sufficient evidence to demonstrate that DIAND, through Canada Post, violated 506(6) of the *AIT*. Even though the evidence leads the Tribunal to believe that the second ground of complaint may also have merit, for the sake of judicial economy, the Tribunal will not address the issue of whether the evaluation criteria were applied inconsistently in evaluating the two competing proposals. For the same reason, the Tribunal will not address the additional allegations raised by Canadian North in its January 16, 2007, submission.

REMEDY

129. Having found the complaint to be valid, the Tribunal must now recommend a suitable means of redressing the harm that the deficiencies in the evaluation process caused to Canadian North.

130. In this connection, the Tribunal is governed by subsection 30.15(3) of the *CITT Act*, which reads as follows:

- (3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including
 - (a) the seriousness of any deficiency in the procurement process found by the Tribunal;
 - (b) the degree to which the complainant and all other interested parties were prejudiced;
 - (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
 - (d) whether the parties acted in good faith; and
 - (e) the extent to which the contract was performed.

131. The Tribunal considers that using criteria which were not specified in the RFP and could not reasonably be inferred from the RFP is a serious deficiency in the procurement process. Furthermore, this is not a case of misinterpreting the criteria in the RFP or incorrectly applying a single criterion. In this case, at least three of the six non-pricing rated requirements of the RFP - "Commercial", "Service Capability" and "Facilities" were affected by the deficient evaluation. The instances of misuse of the evaluation criteria were so pervasive that, in the Tribunal's view, they amounted to a general disregard for the criteria in the RFP. The Tribunal also believes that such a serious deficiency in the evaluation of proposals prejudices the integrity and efficiency of the competitive procurement system. However, the evidence concerning the

ground of complaint considered by the Tribunal does not indicate that DIAND or Canada Post was acting in bad faith.

132. The procurement at issue has led to a contract between Canada Post and First Air, based on the Agreement between Canada Post and DIAND that directed the awarding of the contract. The pervasive nature of the evaluation errors strongly suggests that the RFP may not have been written in a way that truly reflected the requirements of the procurement. Accordingly, the Tribunal does not consider that it would be appropriate to recommend a re-evaluation of the proposals to determine which party would have been the winning bidder based on the proper evaluation criteria. In order to effectively address the harm inflicted upon Canadian North, the Tribunal recommends that DIAND commence a new procurement for the conveyance of Food Mail as expeditiously as possible, and that DIAND provide monetary compensation to Canadian North on the basis outlined below.

133. The Tribunal considers that the potential prejudice to Canadian North is serious enough to warrant a significant monetary remedy. The contract is valued at over \$150 million and is for an extended period of time. Although it is not clear what the result would have been had Canadian North's proposal been evaluated correctly, the information on the record suggests a probability greater than 50 percent that Canadian North would have submitted the winning proposal. Although the points lost were not large in absolute terms, they were very significant in terms of the evaluation as a whole. The Tribunal therefore recommends that Canadian North be compensated by an amount equal to 60 percent of the profit that it would have earned for Food Mail from the date on which the current contract was entered into by Canada Post and First Air (according to Canada Post, on January 24, 2006,) to the date on which the replacement contract is signed. If no new contract is entered into, Canadian North should be compensated in the amount of 60 percent of its reasonable lost profits for Food Mail for the duration of the current contract between Canada Post and First Air.

Costs

134. The Tribunal awards Canadian North its reasonable costs incurred in preparing and proceeding with the complaint. The Tribunal has considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings (Guideline)*. In this instance the Tribunal believes that the circumstances surrounding the complexity of the complaint proceedings were particularly complex, involving, among other things, an intervener, another involved party, more than 15 motions and other procedural requests to the Tribunal, responses to these motions and requests, and additional submissions made by other parties throughout the proceeding. This unusually high degree of complexity requires that the Tribunal exceed the amounts contemplated by the *Guideline*. Therefore, the Tribunal awards Canadian North \$10,000 for costs related to preparing and proceeding with the complaint.

DETERMINATION OF THE TRIBUNAL

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

136. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that DIAND commence a new procurement for the conveyance of Food Mail as expeditiously as possible. The Tribunal also recommends that DIAND compensate Canadian North by an amount equal to 60 percent of the profit that it would reasonably have earned for Food Mail from the date on which the current contract was entered into by Canada Post and First Air to the date on which the contract for the new procurement is signed. If no new contract is entered into, Canadian North should be compensated in the amount of 60 percent of its reasonable lost profits for Food Mail for the duration of the contract between Canada Post and First Air. The

Tribunal recommends that, based on the preceding information, the parties develop a joint proposal for compensation, to be submitted to the Tribunal within 30 days of the date of publication of this determination.

137. Should the parties be unable to agree on the amount of compensation, Canadian North shall file with the Tribunal, within 40 days of the date of the publication of this determination, a submission on the issue of compensation. DIAND will then have 7 working days after the receipt of the submission to file a response. Canadian North will then have 5 working days after the receipt of DIAND's reply submission to file any additional comments.

138. The joint proposal for compensation or the submissions for compensation, as the case may be, shall take into account the actual length of time of the contract between First Air and Canada Post, the actual volume of Food Mail that has been delivered, an estimate of the volume of Food Mail that will be delivered until the contract for the new procurement is entered into, the applicable profit margins contained in Canadian North Inc.'s proposal, and the date and method of compensation. The joint proposal or the submissions shall include a prorated scheme that will allow the parties to determine the amount of compensation for the full life of the contract between First Air and Canada Post, or any part thereof, so that the amount of compensation can be adjusted to accommodate the actual time period until the contract for the new procurement is entered into. The Tribunal reserves its jurisdiction to recommend the amount of compensation that DIAND should pay to Canadian North following receipt of the submissions.

139. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Canadian North its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by DIAND. The Tribunal's preliminary indication of the amount of the cost award is \$10,000, as the level of complexity is beyond what would normally be contemplated as level 3 complexity. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated by the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Elaine Feldman
Elaine Feldman
Presiding Member

Ellen Fry
Ellen Fry
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member

IN THE MATTER OF a complaint filed by Canadian North Inc., under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47.

AND FURTHER TO a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN**CANADIAN NORTH INC.****Complainant****AND****THE DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN
DEVELOPMENT****Government
Institution****CORRIGENDUM**

At paragraph 8, the last sentence should read: “On January 22, 2007, Canadian North, First Air and DIAND submitted their respective responses to the other parties’ comments of January 16, 2007.”

At paragraph 66, the heading of the last column of the table entitled “**EXCERPT FROM ATTACHMENT 1—STATEMENT OF REQUIREMENTS**” should read: “ANNUAL VOLUME MAIL”.

By order of the Tribunal,

Susanne Grimes
Acting Secretary