

Ottawa, Monday, May 17, 1999

File No.: PR-98-042

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

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 section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian
International Trade Tribunal determines that the complaint is valid in part.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian
International Trade Tribunal awards Discover Training Inc. its reasonable costs incurred in relation to filing
and proceeding with its complaint under Article 1015(6) of the *North American Free Trade Agreement*.

Raynald Guay

Raynald Guay
Member

Michel P. Granger

Michel P. Granger
Secretary

Date of Determination: May 17, 1999

Tribunal Member: Raynald Guay

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Gilles B. Legault

Complainant: Discover Training Inc.

Government Institution: Canada Post Corporation

Counsel for the Government Institution: Randall J. Hofley
Justine Whitehead

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File No.: PR-98-042

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

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 1, 1999, Discover Training Inc. (Discover) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ (the CITT Act), concerning a procurement (Request for Proposal No. 4 NS 98 WGM U) by Canada Post Corporation (Canada Post) for the provision of: (1) retail training needs assessment, development and evaluation; and (2) delivery and administration of retail training programs.

Discover alleged that, contrary to Article 1015(6) of the *North American Free Trade Agreement*² (NAFTA), Canada Post refused to provide it with information on the evaluation of proposals and, contrary to Article 1014(3) of NAFTA, Canada Post failed to treat all suppliers equally or without discrimination by promoting the services of a competitor, InfoJ.E.D. Inc. (InfoJED), during this solicitation process.

Discover requested, as a remedy, compensation in the amount of \$400,000, representing the profit that it would have made, had it been awarded the contract.

On February 12, 1999, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the conditions for inquiry set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*³ (the Regulations).

MOTION

On March 12, 1999, Canada Post filed a motion with the Tribunal requesting the dismissal of part of the complaint, specifically the alleged violation of Article 1014(3) of NAFTA, on the basis that it was not filed within the time limits set out in section 6 of the Regulations. Canada Post also requested that the Tribunal allow it to file the Government Institution Report (GIR) required by rule 103 of the *Canadian International Trade Tribunal Rules*⁴ one week after the date on which the Tribunal decides the motion.

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1. R.S.C. 1985, c. 47 (4th Supp.).
 2. Done at Ottawa, Ontario, on December 11 and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).
 3. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.
 4. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912.

On March 16, 1999, the Tribunal postponed the date for the submission of the GIR in this matter and requested Discover to send its comments on Canada Post's motion to the Tribunal by March 24, 1999. Canada Post was requested to provide its response to Discover's comments by March 26, 1999. This was done.

In the motion, Canada Post submitted that Discover failed to make an objection or to file a complaint concerning the alleged breach of Article 1014(3) of NAFTA within 10 working days, as set out in subsections 6(1) and (2) of the Regulations.⁵ In the alternative, Canada Post submitted that, should the Tribunal find that Discover made an objection within the prescribed time frame, Discover, nevertheless, failed to file its complaint with the Tribunal within 10 working days after the day on which Discover had actual or constructive knowledge of the denial of any relief in respect of its objection.

The essence of Discover's allegation, covered by the motion, is that Canada Post breached Article 1014(3) of NAFTA in pursuing actions, i.e. the solicitation or facilitation by Canada Post's employees in the recruitment of Discover's employees in favour of InfoJED, which prevented a fair evaluation of the bids.

On or about August 31, 1998, at a meeting called by Discover to question the reasons why it was not awarded an interim contract, not the subject of this complaint, Discover indicated to Canada Post that some of Canada Post's personnel were recruiting Discover's consultants in favour of InfoJED. At the meeting, Discover indicated that it believed that this practice would jeopardize its competitive position for the RFP in favour of InfoJED. At the same meeting, Canada Post, without admitting the existence of the practice, reassured Discover that it would look into the matter and that, in any event, this would not compromise the fairness of the evaluation of proposals.

According to Discover, during the period from September 9 to December 19, 1998, Discover became aware of a number of new instances where some of its consultants were approached by or decided to work for InfoJED. According to Discover, these actions were facilitated by Canada Post's employees.

Discover submitted that it decided not to complain at that time because it was relying on Canada Post's commitment of August 31, 1998, because to have complained at the time would have been speculative, and because it discovered its ground of complaint on January 23, 1999, "when [Discover] found out that [InfoJED] had been selected, and when . . . a member of the evaluation committee, indicated that our consultants working for [InfoJED] played a role in [the decision to award the contract to InfoJED]." However, in its complaint of February 1, 1999, Discover stated that, "[w]hile [the alleged practice] developed over the last six months, Discover Training was not in a position to make this submission until

5. Subsections 6(1) and (2) of the Regulations read as follows:

6. (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.

very recently. Any movement on our part in this way would have jeopardized our position from a competitive bid perspective. . . . We believed all along that any appeal on our part would ensure that Discover Training was not awarded any further work with Canada Post Corporation.”

On December 21, 1998, Canada Post informed Discover by telephone that it was not successful in the solicitation and that InfoJED had been awarded the contract. On December 23, 1998, Discover called the member of the evaluation committee mentioned above. According to Discover, during the telephone conversation, the member of the evaluation committee “agreed that the fact that the technical evaluation committee believed that [InfoJED] would have access to Discover Training consultants did not help the competitive standing of Discover Training in the bid process.” However, that individual has indicated, in an affidavit to the Tribunal dated March 25, 1999, that, during the telephone conversation, he “never stated, nor implied in any way,” that Discover’s standing in the bid process was hurt by the alleged practice.

On January 4, 1999, Discover informed Canada Post of its intention to appeal the contract award decision, and a meeting was set with Canada Post for January 14, 1999, to review the matter.

The ground of complaint in this motion was discussed on January 14, 1999, at a meeting between Discover and Canada Post. Canada Post’s final decision not to provide relief in the matter was communicated to Discover on January 21, 1999, in part, as follows:

As promised, I have met with the appropriate people to address the two significant outstanding issues, namely . . . (b) perception that the technical evaluation may have been compromised.

With respect to the “perception” that the technical evaluation may have been compromised, I have discussed your concerns with the appropriate and involved parties who have clearly expressed to me that those concerns are wholly unwarranted. They are resolute in their position that the technical evaluation was completed in a fair, ethical and uncompromised manner.

In light of the above, the Tribunal found that Discover became aware of the ground of complaint subject to the motion, for the first time, in the middle of August 1998. Discover objected to the situation to Canada Post on or about August 31, 1998, at which time Canada Post, without recognizing the practice, indicated that it would look into the matter and make sure that it did not prejudice the evaluation of Discover’s proposal. The Tribunal also found that, during the period from September to December 1998, Discover became aware of several new incidents of the same nature as those raised in its objection to Canada Post on August 31, 1998. However, for the reasons stated above, Discover did not object to Canada Post and/or did not complain to the Tribunal at the time.

When it accepted Discover’s complaint for inquiry on February 8, 1999, the Tribunal, at that time, relying on Discover’s complaint, was of the view that Discover had known its ground of complaint on or about December 23, 1998, when it allegedly learned from a member of Canada Post’s evaluation committee that the evaluation of Discover’s proposal had been negatively influenced by the fact that InfoJED had proposed some of Discover’s consultants as part of its proposal. Based on the complaint, the Tribunal was also of the view that Discover objected in writing on January 4, 1999, to Canada Post, that Canada Post informed Discover that its objection was denied on January 21, 1999, and, thus, that both the objection of January 4, 1999, and the complaint to the Tribunal of February 1, 1999, were filed within 10 working days, the time limit prescribed to make an objection and to file a complaint.

Having now carefully examined all the evidence, including sworn evidence by Canada Post employees which was filed after the complaint was accepted for inquiry, the Tribunal found that Discover

simply became aware, on December 21 and 23, 1998, that a contract had been awarded to InfoJED and not that the evaluation of proposals had been adversely affected by Canada Post's alleged practice favouring InfoJED. In the Tribunal's opinion, learning about the award of a contract to a competitor does not, in itself, constitute a breach of NAFTA. The Tribunal found that Discover's ground of complaint with respect to Article 1014(3) of NAFTA became known to Discover for the first time in the middle of August 1998. On August 31, 1998, Discover objected to Canada Post about this practice. Without admitting the existence of the practice, Canada Post assured Discover that the alleged practice would not compromise the fairness of the evaluation of proposals. In the Tribunal's opinion, Discover did not act in its own best interest when it decided not to pursue the matter again with Canada Post or directly with the Tribunal during the period from September to December 1998 when, according to Discover, a number of incidents took place which clearly indicated that the alleged practice was continuing. Once a ground of complaint has been discovered or, as is the case here, re-discovered, a complainant is not entitled to put it aside and to wait and see how it will play out before filing a complaint. Complaints must be filed within the prescribed time frames set out in section 6 of the Regulations. This was not done and, therefore, the Tribunal found that this ground of complaint was late. Accordingly, on March 31, 1999, the Tribunal granted Canada Post's motion. Discover's ground of complaint in relation to Article 1014(3) of NAFTA was, therefore, dismissed.

On March 31, 1999, the Tribunal informed the parties of its decision and requested that Canada Post submit the GIR for the remaining ground of complaint to the Tribunal no later than April 9, 1999. This was done on time. On April 16, 1999, Discover submitted its comments on the GIR to the Tribunal.

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

PROCUREMENT PROCESS

On May 5, 1998, Canada Post issued an RFP for the subject requirement. The deadline for the submission of proposals of June 15, 1998, was subsequently extended to July 31, 1998.

The RFP includes, in part, the following:

PART II TERMS AND CONDITIONS AND COMMERCIAL REQUIREMENT

1.0 Terms and Conditions

- 1.3 The Corporation reserves the right to withhold all evaluation information.
- 1.4 It is understood that the lowest price quoted will not necessarily be accepted or does not constitute that it will be the quotation chosen.

A number of proposals were received in response to this solicitation, including one from Discover and one from InfoJED. Between September 21 and 25, 1998, the technical evaluation committee conducted the technical evaluation of the proposals. According to the GIR, both Discover's and InfoJED's proposals technically qualified for the delivery portion of the RFP. On October 1, 1998, the purchasing group conducted the commercial evaluation of Discover's and InfoJED's proposals. The commercial evaluation

included a comparison of the rates on the wide variety of services required by the RFP. InfoJED's proposal being less expensive than that of Discover, the contract was awarded to InfoJED.

On December 21, 1998, Canada Post informed Discover that InfoJED was the successful tenderer. On January 4, 1999, Discover requested a debriefing of its proposal by Canada Post. A meeting to that end took place on January 14, 1999. According to Canada Post, during the meeting, Discover requested a copy of the technical evaluation reports for the delivery side of the RFP. Canada Post, at the time, agreed to look into the matter and to let Discover know what information, if any, could be released. On January 21, 1999, Canada Post sent an E-mail to Discover stating, in part:

With respect to disclosure of technical evaluation information, Canada Post will not entertain the disclosure of any evaluation information regarding any tenders. This tender will not become an exception to this rule.

Discover filed its complaint with the Tribunal on February 1, 1999.

On March 11, 1999, Canada Post wrote to Discover concerning the disclosure of bid evaluation information. In that letter, Canada Post informed Discover that "[b]oth Discover and InfoJED technically qualified for the delivery portion of the RFP. It may be noted that InfoJED was given a higher overall score by the Technical Evaluation Committee. . . . In the end the contract was awarded to InfoJED on the basis of price. Discover's proposal was substantially more expensive than that of InfoJED."

VALIDITY OF COMPLAINT

Canada Post's Position

Canada Post submitted that it has met its obligations under Article 1015(6)(b) of NAFTA and has already provided Discover with the pertinent information as to why it was not awarded the contract and the relevant characteristics and advantages of InfoJED's winning tender. Canada Post submitted that Discover was informed, both before and after it brought its complaint to the Tribunal, that the contract was awarded, as required by Article 1015(4)(c) of NAFTA, to the lowest-priced technically qualified bidder. Canada Post submitted that NAFTA does not require, nor is it intended to require, the provision of detailed technical or commercial evaluation information in respect of any bidder. In any event, Canada Post submitted that both InfoJED and Discover were technically qualified to provide the services and that the contract was awarded solely on the basis of price. The technical evaluation reports are, therefore, not pertinent information with respect to why Discover was not awarded the contract.

Canada Post submitted, as an alternative, that the detailed evaluation information requested by Discover is exempt from disclosure pursuant to Article 1015(8) of NAFTA, as the disclosure of the information would prejudice the legitimate commercial interests of Discover's competitors (both present and future) and Canada Post and would also prejudice fair competition between suppliers.

Furthermore, Canada Post submitted that information, such as the proposals submitted in response to an RFP, is considered to be confidential commercial information on the individual bidders and that information derived from these proposals, such as the technical and commercial evaluation reports, should also be considered to be confidential commercial information specific to Canada Post and to the company.

Regarding the question of fair competition, Canada Post submitted that the disclosure of the technical evaluation reports would allow Discover to analyze, in a general manner, the relative strengths and

weaknesses of its competitors' offerings. Providing Discover with commercial evaluation information, such as the price offerings or the difference between the bidders in price (either as an amount or a percentage), would allow Discover to calculate its competitors' profit margins and allow Discover to calculate the price at which it should offer its services so as to be reasonably assured of undercutting the competition. Canada Post submitted that such results would clearly prejudice the legitimate commercial interests of individual bidders, as well as prejudice fair competition. Canada Post further submitted that the provision of such information simultaneously to all bidders would not be beneficial and would likely result in anti-competitive effects by lowering the pressure on price in future RFPs.

Canada Post further submitted that to give Discover access to detailed information about its own proposal while not providing it to other competitors, such as the weighting of categories of evaluation and the factors set out in each evaluation category, and to a detailed analysis of its own strengths and weaknesses would disadvantage competitors and unfairly bias future competition. Even if each bidder were to be provided with its own technical and commercial evaluation results, fair competition between suppliers would be prejudiced now and in the future because current bidders would have access to information not available to new competitors.

Canada Post further submitted that the provision of such information would also prejudice its own commercial interests, in that, if suppliers were informed of the price at which similar services had been supplied to Canada Post in the past, bidders would attempt to maximize profits and would not be motivated to submit proposals at their best prices. Similarly, the release of technical evaluation information would undercut the desire of future bidders to submit their best technical specifications, given that the precedent of what Canada Post has accepted in the past would be known.

Canada Post submitted that no monetary award for compensation is warranted in respect of Discover's complaint under Article 1015(6)(b) of NAFTA, in that Discover has not been prejudiced by any deficient disclosure. In the alternative, Canada Post submitted that, if complaint costs are awarded by the Tribunal, such costs should be limited to defending the ground of complaint relating to Article 1015(6)(b) of NAFTA.

Discover's Position

On April 16, 1999, Discover sent a facsimile to the Tribunal indicating that it had no comments on the GIR and requested that the case be decided on the existing record.

TRIBUNAL'S DECISION

Section 30.14 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, in part, that the Tribunal is required to determine whether the procurement was concluded in accordance with the requirements set out in NAFTA.

The only question to be decided by the Tribunal in this matter is whether Canada Post provided Discover with the information that it was entitled to receive under NAFTA with respect to the evaluation of proposals and the award of a contract.

Article 1015(6)(b) of NAFTA provides that an entity shall, “on request of a supplier whose tender was not selected for award, provide pertinent information to that supplier concerning the reasons for not selecting its tender, the relevant characteristics and advantages of the tender selected and the name of the winning supplier.”

Article 1015(7) of NAFTA provides, in part, that not later than 72 days after the award of a contract, an entity shall publish a notice that shall contain, among other information, the value of the contract, or the highest-priced and lowest-priced tenders considered in the process of awarding the contract.

Article 1015(8) of NAFTA provides, in part, that, “[n]otwithstanding paragraphs 1 through 7, an entity may withhold certain information on the award of a contract where disclosure of the information: (b) would prejudice the legitimate commercial interest of a particular person;⁶ or (c) might prejudice fair competition between suppliers.”

The Tribunal is satisfied that Canada Post has now discharged its obligations towards Discover with respect to Article 1015(6) of NAFTA. However, in the opinion of the Tribunal, this was not achieved until March 11, 1999, when Canada Post wrote to Discover to communicate additional information with respect to the evaluation of offers and the relative position of Discover’s proposal versus that of InfoJED, the contract awardee. Discover was entitled to this information on request and should not have had to file a complaint with the Tribunal to obtain it. For this reason, the Tribunal determines that the complaint is valid and awards Discover its reasonable costs for pursuing this ground of complaint.

The Tribunal is of the view that the broad pronouncements made by Canada Post with respect to the disclosure of information should be read with care. As a minimum, the requirement to protect the legitimate commercial interest of bidders and to preserve fair competition between suppliers should be carefully balanced at all times with the requirement to achieve transparency, one of the key principles set out in Article 102(1) of NAFTA.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines, in consideration of the subject matter of the complaint, that the procurement was not conducted in accordance with the requirements set out in NAFTA and that, therefore, the complaint is valid in part.

Pursuant to section 30.16 of the CITT Act, the Tribunal awards Discover its reasonable costs incurred in relation to filing and proceeding with its complaint under Article 1015(6) of NAFTA.

Raynald Guay

Raynald Guay

Member

6. Means a natural person or an enterprise. See Article 201(1) of NAFTA, “Definitions of General Application.”