

Cour d'appel fédérale



Federal Court of Appeal

Date: 20151130

Docket: A-498-14

Citation: 2015 FCA 272

**CORAM: TRUDEL J.A.
SCOTT J.A.
DE MONTIGNY J.A.**

BETWEEN:

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

Applicants

And

**CANADA POST CORPORATION, INNOVAPOST INC.,
WIPRO TECHNOLOGIES CANADA LTD.**

Respondents

Heard at Ottawa, Ontario, on October 14, 2015.

Judgment delivered at Ottawa, Ontario, on November 30, 2015.

REASONS FOR JUDGMENT BY:

SCOTT J.A.

CONCURRED IN BY:

**TRUDEL J.A.
DE MONTIGNY J.A.**

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REASONS FOR JUDGMENT

SCOTT J.A.

[1] Before this Court is an application for judicial review of a decision of the Canadian International Trade Tribunal (CITT or the Tribunal) rendered on October 9, 2014, in files PR-2014-015 and PR-2014-020. The Tribunal upheld in part a complaint brought by the applicants CGI Information Systems and Management Consultants Inc. (CGI) based on allegations that Canada Post Corporation (CPC) breached its obligations under Chapter 10 of the *North*

American Free Trade Agreement (NAFTA) in a procurement process conducted through Innovapost Inc. (Innovapost).

[2] The procurement process concerned the provision of data centre services that is -technology and facility-related components and activities required to support a data centre. It was a large procurement, both in scope and monetary value.

[3] CGI's application for judicial review before this Court asserts three errors in the Tribunal's decision. CGI claims that the CITT: a) erred in concluding that CGI's technical bid was fairly evaluated based on the evaluation criteria published in the Request for Proposals; b) erred in its determination that CGI's bid was not evaluated on undisclosed evaluation criteria; and c) erred in concluding that the principle of spoliation was not applicable in this case.

[4] The standard of review in this application for judicial review of the CITT's decision on the interpretation and application of the terms of the solicitation documents is the deferential standard of reasonableness.

I. **Background**

A. *The bid*

[5] On December 3, 2012, Innovapost issued an invitation to submit a response to a competitive Request for Proposal (RFP) for Data Center Services on behalf of the Canada Post Group of Companies.

[6] The RFP was divided in two phases. Further to Phase 1, four companies were selected to proceed to Phase 2; amongst them were CGI, and the respondent Wipro Technologies Canada Ltd. (WIPRO).

[7] The four companies received the "Phase 2 Selection Requirements and Information Package" on June 7, 2013. Phase 2 bidders were required to submit two separate envelopes; one for the Technical Proposal and one for the Pricing Proposal.

[8] The Technical Proposal was subdivided in stages 6 to 11 as follows:

- Stage 6: Phase 2 Proposal Response;
- Stage 7: Evaluation of Phase 2 Technical Proposal (excluding the Pricing Proposal);
- Stage 8: Evaluation of Oral Presentations and (Site Visits if required);
- Stage 9: Potential Phase 2 short-listing of Short-listed Proponents;
- Stage 10: Evaluation of Pricing Proposal;
- Stage 11: Overall Ranking and Final Selection.

[9] A maximum score of 58 was assigned to the Technical Proposal whereas the Pricing Proposal contributed the remaining 42 points for a total score of 100. It is to be noted that in order to reach Stage 10 and have its Pricing Proposal considered, a bidder needed to score at least 70% or 40.6 out of 58 on its Technical Proposal.

[10] In order to score the bids, a two-fold evaluation was conducted. First, four evaluators individually assessed each proposition using an evaluation grid that fragmented the requirements in different categories. A rating scale was also provided to the evaluators to offer some guidance.

Second, each of the four evaluators had to explain their respective scoring in a meeting held to reach consensus on each item. Experts who could comment on the scoring and assist them in coming to a consensus assisted them.

[11] CGI failed to meet the 70% threshold for its Technical Proposal. Consequently, its Pricing Proposal was never considered.

B. *The Debriefings*

[12] On October 21, 2013, CGI was informed that it was not the highest ranked Short-listed Proponent and therefore was not selected for contract award and advised that it was entitled to a debriefing.

[13] It is to be noted that, between October 21 and the end of November 2013, Ms. Walker, the Director of Sourcing Management at CPC, destroyed the individual scoring sheets used by the four evaluators in accordance with CPC's "Procurement Evaluator Guide".

[14] On December 6, 2013, WIPRO was awarded the contract. That information was published on MERXTM on December 13 and on that same date CGI requested a debriefing.

[15] A first debriefing took place on January 15, 2014. CGI considered the explanations provided during this first session to be inadequate and requested a second debriefing session. It was dissatisfied because no explanations were provided in writing and CPC withheld the scores of the other bidders.

[16] The second debriefing session was held on March 31, 2014. CGI was provided with its score regarding the technical aspects of the bid.

[17] On April 2, 2014, CGI requested in writing certain documents including the undisclosed weighing criteria provided to each of the evaluators, a breakdown of the total scores for CGI and WIPRO and an explanation of what CGI could have done to score maximum points under each of the rated criteria. It also requested some of WIPRO's bid information as required by article 1015(6)(b) of NAFTA. Finally it expressed its disappointment in view of CPC'S refusal to disclose the scoring documentation, the guidelines used by the evaluators, the individual scoring sheets and the procedure and methodology used at the consensus stage.

C. The complaints to the CITT

[18] CGI filed a first complaint with the CITT (Tribunal File PR-2014-006) on April 14, 2014 alleging that the debriefings provided had failed to meet the disclosure standard set by article 1015(6) of NAFTA and that CPC had departed from the published evaluation plan. There ensued an exchange of correspondence with CPC. As a result CGI filed a second complaint with the CITT on May 27, 2014 (Tribunal File PR-2014-015).

[19] That second complaint alleged that CPC's evaluation of CGI's bid was unreasonable and biased. The CITT accepted the complaint for inquiry on June 2, 2014. Motions requesting the production of certain documents accompanied these complaints and the CITT ordered the production of some documents. On June 30, 2014, when CPC filed its "Government Institution

Report" (GIR) in response to the complaints and some of the documents ordered by the CITT, it also disclosed that the evaluators' individual scoring sheets had been destroyed.

[20] The disclosure of the destruction of the evaluators' individual scoring sheets led to the filing of CGI's third complaint (Tribunal File PR-2014-020) on grounds that such action constituted a breach of CPC's obligation under Article 1017(p) of NAFTA. On July 15, 2014, the CITT informed the parties that this third complaint had been accepted for inquiry and was combined with Tribunal File PR-2014-015.

[21] At the onset of its decision, the CITT rejected CPC's objection to the effect that CGI's first complaint was untimely.

II. The Tribunal's jurisdiction

[22] The *Canadian International Trade Tribunal Procurement Inquiry Regulations* SOR/93-602 and sections 30.1 to 30.19 of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c.47 (the Act) set out the regime applicable to federal government procurements.

[23] In response to a complaint in relation to federal government procurements, the CITT is empowered under the Act and the Regulations to conduct an inquiry and recommend remedies.

- Sections 30.11 and 30.12 of the Act provide that a potential supplier can file a complaint with the CITT regarding any aspect of a federal government procurements process.

- Subsection 30.13(5) of the Act specifies that the CITT can decide to conduct an inquiry or not, after it has received a complaint.
- Subsections 30.13(1), 30.13(2), and 30.14(1) of the Act apply once the CITT has decided to conduct an inquiry. It must then advise the relevant government institution and interested parties. The CITT is free to hold a hearing or not.
- Subsection 30.14(2) of the Act requires the CITT to determine whether a complaint is valid based on specific grounds that is “whether the procedures and other requirements prescribed in respect of the designated contract or the class of contracts to which it belongs, have been or are being observed”.
- In the present case section 11 of the Regulations applies as it empowers the CITT to assess a complaint on other grounds namely NAFTA.

[24] The relevant provisions of NAFTA applicable in this case are set out in the appendix B to these reasons.

[25] Subsection 30.15(1) of the Act sets out the obligation of the CITT to issue findings and to make recommendations if it finds a complaint to be valid and to give reasons at the conclusion of any inquiry.

[26] Where, as in the present case, the CITT finds a complaint to be valid, whether in whole or in part, it may recommend remedies.

[27] Subsections 30.15(2) and 30.15(3) delineate the scope of the CITT's discretion in issuing recommendations and the factors that it must take into consideration.

[28] In *Canada (Attorney general) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203 [*Almon*], at paragraphs 22 and 23, this Court summarized the purpose of the regulatory regime and the role of the CITT. It should ensure fairness to competitors in the procurement system, competition among bidders, efficiency, and integrity.

III. The CITT's decision

[29] The CITT identified two main issues raised by CGI as to the merits of the complaints:

- 1) Whether the destruction of individual scoring sheets used in the solicitation was a breach of Article 1017(p) of NAFTA?
- 2) Whether CPC's evaluation of CGI's bid complied with Articles 1013(1) and 1015(4) of NAFTA?

[30] On the first issue, the CITT concluded that CPC's destruction of the individual scoring sheets used in the solicitation constituted a breach of Article 1017(p) of NAFTA based on its finding and Canada's Post admission to that effect, but concluded that it did not constitute spoliation.

[31] In finding that spoliation had not taken place in this instance, the CITT applied the criteria developed by the Alberta Court of Appeal in *McDougall v. Black & Decker Canada Inc.*, 2008 ABCA 353 [*McDougall*]. The CITT examined whether CPC destroyed the individual

scoring sheets intentionally while litigation was contemplated and whether it was reasonable to infer that the destruction was done to affect the outcome of the litigation (Tribunal's decision at paragraph 74).

[32] The CITT determined that it was only on June 30, 2014, that CPC first disclosed that the individual scoring sheets had been destroyed in accordance with its procurement policy. CPC's witness Ms. Walker testified that the procurement policy mandating the destruction of peripheral documents had been in place for a number of years prior to this solicitation for tenders. She also affirmed that when she destroyed the individual scoring sheets in late October or November, no litigation was contemplated (Tribunal's decision at paragraph 89).

[33] Weighing the evidence, the CITT concluded that spoliation had not been established on a balance of probabilities. On the facts of the present case, the mere possibility of a challenge by an unsuccessful bidder was not found to be sufficient to conclude that the destruction took place in contemplation of litigation or to affect such litigation (Tribunal's decision at paragraph 92).

[34] On the second issue, whether the evaluation of the bids was conducted in compliance with articles 1013(1) and 1014(4) of NAFTA, the CITT looked into three specific allegations brought forward by CGI. First, whether the rating scale used by the evaluators was inconsistent with the terms of the RFP. Then whether the proposals were evaluated on undisclosed preferences for certain characteristics and finally, whether the scores assigned to CGI's Technical Proposal were in accordance with the RFP (Tribunal's decision at paragraph 97).

[35] The CITT concluded that the first allegation was unfounded since the basis of the evaluation published in the RFP was broad enough to encompass different variations of rating scale, including the rating scale used by CPC which was found to be consistent with the RFP (Tribunal's decision at paragraphs 124 and 125).

[36] On the second allegation, the CITT rejected CGI's claim that its bid was evaluated on the basis of whether it included certain preferred characteristics that had not been disclosed in the tender documents. The scoring sheets identified certain characteristics as to what constituted excellent responses and these were not disclosed. The CITT concluded however that the characteristics in question were not used as evaluation criteria but only as guidance and that any inappropriate use by individual evaluators treating the characteristics as requirements would have been corrected in the consensus meetings. As a result, it rejected CGI's argument (Tribunal's decision at paragraph 135).

[37] Finally on the third allegation made by CGI, the CITT concluded there was no evidence of bias or apprehension of bias. It was satisfied that CPC provided reasonable explanations for the manner in which the consensus evaluation unfolded and more specifically as to why CGI received a lower score on specific subsections of its Technical Proposal (Tribunal's decision at paragraph 152).

[38] Having concluded that the complaint was well founded in part since article 1017(1)(p) of NAFTA had been breached, the CITT recommended that CPC and Innovapost implement

policies and procedures to ensure that complete documentation be maintained in all their future procurements and awarded CGI costs of \$4700 (Tribunal's decision at paragraphs 171 and 172).

IV. **The standard of review**

[39] The parties involved all acknowledged that the applicable standard of review of the CITT's decision is reasonableness.

[40] Notwithstanding the parties agreement on the applicable standard, it remains incumbent on the reviewing court to determine the applicable standard (see *Monsanto Canada Inc. v Ontario (Superintendent of Financial Services)*, 2004 SCC 54 [2004] 3 S.C.R. 152, and *Canada v. Long Plain First Nation*, 2015 FCA 177, at paragraph 86).

[41] In *Siemens Westinghouse Inc. v Canada (Minister of Public Works and Government Services)*, 2001 FCA 241, [2002] 1 F.C. 292, at paragraphs 21-22, this Court acknowledged the CITT's expertise in the subject matter at issue, namely "whether tender documents properly identified the requirements and evaluation criteria in the RFP and whether the procurement was conducted according to them and the applicable contracts, trade agreements and legislation. This complex exercise demands unique expertise and experience and is the everyday work of the Tribunal".

[42] It is unquestionable that the CITT possesses the expertise to determine whether a government institution has met its obligations when procuring goods and services that are subject to NAFTA. Section 11 of the Regulations empowers the CITT to conduct inquiries on

complaints from interested parties. That expertise commands a deferential standard of reasonableness. In *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, this Court has emphasized that matters of factual appreciation and specialized expertise entitle administrative tribunals to a wide margin of appreciation. In my view the CITT is entitled to such a margin in this case because the issues at stake fall squarely in its area of expertise.

V. **Analysis**

A. ***Evaluation of CGI's bid***

(1) ***Was CGI's bid conducted in compliance with articles 1013(1) and 1015(4) of NAFTA?***

[43] At the hearing, CGI referred to Articles 1013(1)(h) and 1015(4) of NAFTA and explained that the tender documents issued by CPC needed to contain all the information that would permit a bidder to submit a complete response to the RFP. It argued that CPC breached those provisions because the scoring methodology used was inconsistent with the RFP documentation.

[44] Relying on the CITT's decision in *MIL Systems (RE)*, [1999] C.I.T.T. No. 28, 1999 CanLII 14607, CGI underlined that the Tribunal has always recognized that the use of an undisclosed scoring methodology that cannot be inferred from the published RFP constitutes a breach of trade agreements because it undermines the entire bidding process. CGI also pointed to the decisions in *Med-Emerg International v. Department of Public Works and Government*, CITT File No. PR-2004-050 at paragraph 59, and *Deloitte & Touche LLP v. Department of Public Works*, CITT File No. PR-2005-044 at paragraphs 30 and 33, that stand for that principle.

[45] CGI relied also on *Prudential Relocation Canada Ltd.*, CITT File No PR-2002-070 page 8, to point out that even though the situation in that case was the exact opposite from the case before us in that the published criteria promised points for exceeding criteria but the instructions to evaluators did not allow that for all requirements. The Tribunal held that a discrepancy between the published evaluation criteria and the instructions for their application constituted a breach of NAFTA more particularly of Articles 1013(1)(h) and 1015(4).

[46] CGI then turned to this Court's statement on the purpose of the regulatory regime in *Almon* at paragraphs 22-23, and the role of the CITT as ensuring: fairness to competitors in the procurement system, competition among bidders, efficiency and integrity. It argued that CPC is framing the case as a private law dispute but there are public policy elements at play and it is the role of the CITT to ensure that bids issued by government institutions, Canada Post in this instance, comply with the applicable international agreements, namely NAFTA.

[47] CGI emphasized that CPC had not published the Score Definition and the Rating Guide to bidders. The scoring methodology was only disclosed to CGI a few days before the CITT's hearing. A copy of the Score Definition document is appended hereto as confidential Appendix A.

[48] Turning to the description of the Stage 7: Evaluation of Phase 2 Technical Proposal, CGI emphasized that the wording used clearly stated that bids would be evaluated on the basis of whether they met the Phase 2 rated requirements. CGI disputed the CITT's determination that the undisclosed Score Definition was consistent with what was indicated in the DCS Solicitation

because the Phase 2 Selection Requirements and Information Package (SRIP) advised bidders to submit detailed proposals that included substantiation.

[49] CGI argued that the requirements in solicitation documents for bidders to provide a detailed proposal including substantiation did not amount to informing bidders that they were required to exceed the requirements in order to reach the 70% threshold and qualify for contract award. A bidder could meet the requirement on the basis of the evaluation grid, but not attain the 70% threshold, unless they exceeded some requirements.

[50] It is CGI's position that the undisclosed scoring methodology consisted of two documents: the Score Definition document and the Rating Guide. The Score Definition document called for the bids to be evaluated and scored on a scale from 0 to 10. That document also contained a column entitled "criteria" which set the bench-mark that proposals had to meet in order to attain scores varying from 0 to 10. In CGI's view that undisclosed Score Definition document resulted in the improper use of the scoring methodology because evaluators were led to score on the extent to which bids exceeded the requirements rather than meeting the requirement. In CGI's view, the Score Definition document negated the instruction to bidders that there existed a 30% margin of error. In analysing the Score Definition document and the Rating Guide, it concludes that 30% of the points were only available if the bidder exceeded expectations of the various requirements.

[51] In response to this argument, CPC and WIPRO point to the fact that the RFP contained information regarding the basis on which the bids would be evaluated. The Phase 2 SRIP

presented the proposal requirements and the evaluation methodology. It included mandatory, rated, and pricing requirements. It also provided guidance to bidders advising them that their Technical Proposal should contain an executive summary and detailed statements of work that would allow CPC to fully appreciate functionality, capability and the application of the bidder's solution to each of the requirements identified in the detailed Statement of Requirements that was appended to the Phase 2 SRIP.

[52] The Phase 2 SRIP equally informed bidders that their technical bids would be evaluated on the extent to which they met Phase 2 requirements.

[53] CPC disputes CGI's contention that the RFP provided a 30% margin of error. In its view, this allegation of a 30% margin of error rests on a mischaracterization of the RFP which never mentioned a margin of error. The rating scale was applied in such a manner that higher scores for exceeding requirements were only available in instances where the requirements could be exceeded from a technological perspective. In other instances the degree of substantiation as stated was the key to scoring at the higher end of the scale.

[54] In CGI's view there is another fundamental inconsistency between the RFP documentation and the Score Definition in view of the fact that phase 2 SRIP advised bidders that their Technical Proposal would be assessed on the extent to which they meet the Phase 2 Rated Requirements. They were equally advised that their Technical Proposal should be detailed and substantiated. Section 5 of the Phase 2 SRIP provided more details on the specifics of the evaluation of different aspects of the proposal. Each subsection under Section 5 of the Phase 2

SRIP set out its own rated criteria. The word “exceeds” only appeared once in Section 5 of the Phase 2 RFP documentation. Section 5 was where the majority of points were awarded. Despite the fact that it was indicated that maximum points would be awarded if the Proposed Solution demonstrated and provided evidence for each of the service category, CGI submits that, from the Score Definition and rating guide, it is apparent that to obtain maximum points a bidder needed to provide exceptional details. It is CGI’s position that this is inconsistent with and does not reflect the terms of the RFP.

[55] Consequently CGI disputes the CITT’s finding that the RFP had repeatedly instructed bidders that details and substantiation needed to be included. It does not agree with the conclusion that the RFP was in fact advising bidders that CPC would evaluate their bids on the extent to which a bid met the requirements and more importantly that the quality of the substantiation would impact on the scoring.

[56] In coming to its determination that the bids were evaluated from the technological perspective in a manner consistent with the terms of the RFP, the CITT relied on the explanations provided by Mr. Bezanson, Director of Program Delivery at Innovapost. GCI disputes the CITT’s reliance on his testimony.

[57] CGI equally asserts that the CITT’s conclusion is inconsistent with the express requirements of NAFTA, which requires that all information necessary to permit suppliers to present complete proposals must be included in published solicitation documents.

Analysis

[58] As stated previously, section 30.14(2) of the Act specifies that the Tribunal, when investigating a complaint, must determine if it is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. In making its determination, the CITT must have in mind the following four principles that can be deduced from the regulatory regime: integrity, efficiency, fairness to competitors in the procurement process, and a level playing field on which bidders can compete.

[59] The complaint raised by CGI is at the core of the CITT's expertise since it must determine whether the RFP was conducted in accordance with the published requirements. Deference is owed to the findings of the CITT in such instances.

[60] Was it reasonable for the CITT to conclude that the evaluators applied a rating scale that was consistent with the published RFP? It is not disputed that NAFTA imposes such a requirement.

[61] As I review the Tribunal's decision, it is clear that the CITT recognised this principle and proceeded to investigate whether it was applied in the case of the procurement conducted by CPC. In making its assessment the CITT had in mind the appropriate question, which is whether there is unfairness to bidders because the evaluation criteria cannot be reasonably inferred from the tender documents.

[62] CGI is challenging the CITT's determination that in this instance the 10 point rating scale was reasonably related or could be reasonably inferred from the published evaluation criteria. CPC used a scale of 0 to 10 points to evaluate the rated requirements and provided the evaluators with a guideline as to the interpretation of the scores. That grid contained a general scoring definition and used descriptors such as good, very good, and excellent. It also contained more detailed parameters and a rated probability as to whether the solution proposed by a bidder would meet the stated requirements. The CITT found the rating scale used by CPC to be entirely consistent with what was indicated in the RFP.

[63] I note that the rating scale distinguishes between two elements of the response provided by bidders. Each score is attributed on whether the criteria are addressed and to what degree. The second part of each response is evaluated on substantiation. As such it is apparent that CGI could not obtain maximum scores for only meeting the requirement. The degree of substantiation always came into play. The Score Definition provided a spectrum, from information that did not address the criteria to information that demonstrated that the criteria was exceeded to reach the higher end of the rating scale beyond the 70% rating, a response needed to exceed the criteria identified where possible.

[64] GCI's argument that it could not be considered for contract award if it met the criteria is incorrect in my view because the rating scale also called for proper substantiation.

[65] At paragraph 110 of its decision, the Tribunal recognized that the rating scale contained the two considerations, the degree to which the criteria were met and the description, explanation and the substantiation of how in met the criteria.

[66] CGI challenged that conclusion on the grounds stated above. It claimed on its interpretation, that the published evaluation documents provided a 30% margin of error. Yet, the Tribunal found that the RFP clearly indicated that proposals would be evaluated on the level of details and substantiation.

[67] When I review the Tribunal statement of the applicable legal principle, there is no error. Its finding at paragraph 110 that the bidders understood that at least two considerations would enter into the evaluation of the bids: 1) the proposed technology and 2) the description, explanation and substantiation of the proposed technology, rests on the testimony of witnesses from CPC. That determination also rested on the testimony of Mr. Chartrand, an account executive with CGI, who acknowledged the importance of providing good documentation and that the quality of the responses provided in their proposals would impact on their scores (see Volume 5 page 1250). Consequently, the Tribunal's conclusion is reasonable as it is based on the evidence that was adduced.

[68] The Tribunal's determination in that regard is also based on the wording used in section 3.2.2 of the Phase 2 SRIP, which instructed bidders that their Technical Proposal needed to contain detailed responses and references to substantiating documentation. I cannot accept CGI's

contention that the Tribunal's conclusion is unreasonable since it is based on the wording used in the tender documents.

[69] I am also satisfied that it was not unreasonable for the Tribunal to conclude that the manner in which the bids were evaluated from the technological perspective reflected the express terms of the RFP. That conclusion rested primarily on Mr. Bezanson's testimony. In reviewing the transcript, more precisely pages 6441 and 6448 of Volume 20 of the Applicant's Record, I find that it was open to the Tribunal to reconcile this testimony with the wording used in the "Score Definition", which specified in brackets "if it can be exceeded" where it indicated that points would be given for exceeding a criteria.

(2) ***Was the rating scale used by the evaluators inconsistent with the terms of the RFP?***

[70] CGI also asserts that CPC evaluated its bid on the basis that it contained certain characteristics that were not divulged in the tender documents. A column on the evaluators scoring sheet identified "certain characteristics of an excellent response" for each criterion to be evaluated. The scoring sheet also indicated that the identified characteristics were a non-exhaustive list of examples. CGI argued that some of the characteristics of an excellent response were not included in the Phase 2 SRIP or in the Statement of Requirements that were given to bidders. CGI provided three examples in the evaluation of its bid that it considers to have been improperly influenced by undisclosed criteria.

[71] CGI also points to the destruction of the individual scoring sheets arguing that they would have established clearly how evaluators approached the Rating Guide.

[72] It argues that based on the evidence submitted it had made out a prima facie case of undisclosed preference and that the CITT's decision was unreasonable as it departed from established jurisprudence. The CITT made assumptions regarding how individual evaluators may have interpreted the 'characteristics of an excellent response' and how these would have been eliminated at the consensus stage of the evaluation.

Analysis

[73] As I review the CITT's decision on this issue of undisclosed preferences and undisclosed criteria in evaluating the bids, I must reject CGI's position for the following reasons.

[74] The reasonableness standard commands that this Court in such an application for judicial review must ensure that the Tribunal's conclusions were reasonably open to it based on the evidence.

[75] In my opinion, the CITT weighed all the evidence and relied on the testimony of Mr. Bezanson and the consensus scoring sheets in coming to the conclusion that the "characteristics of an excellent response" were not actually used as evaluation criteria. CGI is asking this Court to substitute its own judgement for that of the CITT. This is not our role. In this case, the margin of appreciation for the Tribunal's decision is substantial because such an issue rests at the very heart of the Tribunal's expertise.

[76] The CITT did not make assumptions regarding how individual evaluators could have been influenced by the “characteristics of an excellent response”. As I refer to paragraphs 133 and 134 of the Tribunal’s decision, the CITT concluded that based on the evidence proffered by Mr. Bezanson and Ms. Walker, it was satisfied that any fettering of discretion would have been weeded out at the consensus stage of the evaluations. That conclusion is not based on an assumption, but rather on the evidence adduced.

[77] CGI’s allegations that CPC assessed bids based on undisclosed criteria are contrary to the Tribunal’s findings of fact. The evidence on the record supported the conclusions reached by the CITT. Consequently, I must reject CGI’s position as it is asking this Court to re-investigate the facts that led to the Tribunal’s conclusion.

(3) *Was CGI’s bid evaluated fairly?*

[78] The Tribunal came to the conclusion that CGI’s bid was evaluated fairly. It rejected CGI’s contention that there were pervasive errors and trends in its consensus scoring that supported its view that CPC had adopted a policy to move its IT services away from CGI.

[79] CGI asserts that the CITT erred in coming to the aforementioned conclusion for the following reasons. Firstly, CPC failed to follow the published evaluation plan and misapplied and misinterpreted the rated requirements. Secondly, CPC’s deficient evaluation process can be attributed to its reliance on the undisclosed scoring methodology which was inconsistent with the scoring methodology described in the DCS. Thirdly CGI claims that it was treated prejudicially

during the evaluation since its scores resulting from the consensus meeting were below the average scores awarded by individual evaluators.

[80] CPC and WIPRO dispute these allegations. They point out that the Tribunal's conclusion on the scoring methodology adopted was in keeping with the published evaluation plan and that the rated requirements were properly assessed.

[81] With respect to the issue related to the consensus scoring, CPC asserts that CGI's position ignores the very nature and purpose of consensus scoring where the mathematical average individual scores are irrelevant. CPC points to the testimony of Mr. Bezanson who explained how the consensus evaluation unfolded. More precisely, he indicated that positive individual scores tended to increase as a result of consensus meetings and conversely low individual scores tended to decrease as a result of the process.

Analysis

[82] I note that the Tribunal addressed the claim that CGI was not evaluated fairly in paragraphs 139 to 153 of its decision. It reaffirmed its conclusion that the rating scale and the characteristics of an excellent response were not undisclosed criteria or were not applied as such.

[83] At paragraph 144 of its decision, the Tribunal rejected CGI's claim that it was treated prejudicially by CPC. In arriving at that conclusion the Tribunal considered the explanation provided by CPC witnesses for the obvious trends in the consensus scores. It was also satisfied that the consensus scores resulted from discussions on the technical merit of the bid. Finally, the

Tribunal accepted CPC's explanations that the individual score sheets were in fact the starting point for heated discussions and extensive debates. As such, it was reasonable that the scores that resulted would not always reflect the averages or medians of individual scores.

[84] The Tribunal equally addressed CGI's concerns with respect to the evaluations of subsections 5.2.1, 5.2.2, 5.2.3, 5.3.1, and 5.3.2, and their various subcomponents evaluated at Stage 7 of the evaluation plan, and the Oral Presentation at Stage 8. It came to the conclusion that CGI's technical presentation scored lower because it lacked details or explanations and because at times it failed to follow the RFP instructions to match with each requirement in all the sections of its bid that addressed the requirement. It also found that in some instances CGI's bid did not contain the same quality of information as WIPRO's.

[85] The Tribunal's findings rest in part on the testimony provided by two CPC's witnesses, Ms. Walker and Mr. Bezanson (see Applicant's Record, Transcript, Volume 20 at pages 6493-6502). The Tribunal considered the evidence and argument related to the results of the consensus scoring. I am not convinced that its conclusion is unreasonable in light of the evidence that was presented before the Tribunal. The explanation provided by CPC on the discussions held during the consensus meetings is rational and supports the Tribunal's conclusion in that respect.

[86] The Tribunal equally addressed CGI's concerns related to Stage 7 (Stage and Subsection Evaluations) and to Stage 8 (Oral Presentation score). Once again, as I review the evidentiary basis for the Tribunal's conclusion that CGI's complaint is unfounded I cannot find this outcome to be unreasonable. The Tribunal weighed the evidence and looked into the scores and was

satisfied by the explanations provided by CPC's witnesses Mr. Bezanson and Mr. Wilson (see Applicant's Record, Transcript, Volume 20 at pages 6498-6502). CGI has failed to adduce any evidence that points to the contrary. The Tribunal's determination at paragraphs 151 to 153 is clear and rests on the evidence. Consequently there is no reason for this Court to intervene.

B. *Spoliation*

[87] CGI claims that the CITT erred by not concluding that the test for spoliation was met as CPC intentionally destroyed individual score sheets as per its policy.

[88] According to CGI, the CITT failed to properly recognize the unique circumstances of the case. CPC adopted a policy that mandated the destruction of individual score sheets despite CPC's obligation under NAFTA to maintain all the documentation. The destroyed documents would have contained divergent views on the evaluation of the bids. CPC destroyed the documents in the context of a high value bidding process which was subject to the CITT's jurisdiction.

[89] CGI's takes the position that the CITT's analysis in applying the test for spoliation set out in *McDougall* is erroneous because litigation was contemplated when the individual evaluation sheets were destroyed. Relying on the testimony of the CPC employee who admitted having destroyed the individual evaluation sheets sometime between late October and mid-November in keeping with CPC's Evaluation policy, CGI claims that the destruction occurred at a time when CPC was aware that a procurement complaint could occur. CGI takes the position in the alternative that because the destruction of the documents was systemic. It meant that it would

invariably and by design fall short of the jurisprudential test for spoliation since it was always done before specific litigation could be contemplated. This, in CGI's view, is an unacceptable affront to the public policy interests underlying the doctrine of spoliation.

[90] The respondents dispute these arguments, claiming that CGI is actually seeking to re-litigate the CITT's findings of fact that underlie its conclusion that the test for spoliation was not met in the present case.

[91] The respondents point, in particular, to paragraph 89 of the CITT's decision where it referred to Ms. Walker's evidence regarding the circumstances surrounding the destruction of the individual evaluation sheets and accepted her explanation that it was "a purely administrative task" and that it had nothing to do with contemplated litigation.

Analysis

[92] The CITT concluded that the record did not support a finding that CPC had destroyed relevant evidence in order to influence a litigation that was contemplated.

[93] The CITT did find that CPC had breached Article 1017(1)(p) of NAFTA when it destroyed the evaluator's individual scoring sheets and recommended that Canada Post develop and implement procedures that ensure complete documentation is maintained regarding such procurements.

[94] As I examine the CITT's decision with respect to the allegation of spoliation brought forth by CGI against CPC, I note that the CITT made two key factual findings. Firstly, it determined that litigation was not contemplated by CPC when the documents were destroyed. That finding rests on Ms. Walker's testimony that CPC did not expect a bid challenge from CGI when the documents were destroyed. The CITT also found that there was no reason to believe that the documents were destroyed to influence the outcome of a potential bid challenge.

[95] These findings were made after the CITT considered the evidence adduced by the parties. CGI was advised on October 21, 2013, that it was not the highest ranked Short-listed Proponent. WIPRO was awarded the contract on December 6, 2013, and the information was made available on MERXTM on December 13, 2013 on which date CGI requested a debriefing. The evidence before the Tribunal established that the individual scoring sheets were destroyed sometime between mid-October and the end of November 2013. Ms. Walker testified that no complaint was filed at the time she destroyed the individual scoring sheets, nor that she expected any. There was no evidence adduced by CGI to contradict this testimony or to establish that the documents were destroyed to favour the outcome of the bid challenge. Consequently, the Tribunal's conclusion is not unreasonable. I see no reason to intervene as these determinations are well within the realm of reasonable outcomes. CGI has failed to point out any serious misapprehension of facts by the CITT.

[96] I must also underline that the Tribunal is not condoning the destruction of relevant documents, as alleged by CGI, since it did sanction CPC for the destruction of the individual score sheets pursuant to subsection 30.15(3) of the Act.

VI. **Conclusion**

[97] Consequently, I propose that this application for judicial review be dismissed with costs.

"A.F. Scott"

J.A.

"I agree.
J. Trudel J.A."

"I agree.
Yves de Montigny J.A."

APPENDIX B

RELEVANT LEGISLATIVE PROVISIONS :

Text of the North American Free Trade Agreement (NAFTA)

Article 1013 Tender documentation

1. Where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders, including information required to be published in the notice referred to in Article 1010(2), except for the information required under Article 1010(2)(h). The documentation shall also include:

(a) the address of the entity to which tenders should be submitted;

(b) the address to which requests for supplementary information should be submitted;

(c) the language or languages in which tenders and tendering documents may be submitted;

(d) the closing date and time for receipt of tenders and the length of time during which tenders should be open for acceptance;

(e) the persons authorized to be present at the opening of tenders and the date, time and place of the opening;

Texte de l'Accord de libre-échange nord-américain (ALÉNA)

Article 1013 Documentation relative à l'appel d'offres

1. La documentation relative à l'appel d'offres qu'une entité remettra aux fournisseurs devra contenir tous les renseignements nécessaires pour leur permettre de présenter des soumissions valables, notamment les renseignements devant être publiés dans l'avis mentionné au paragraphe 1010(2), exception faite des renseignements visés à l'alinéa 1010(2)h). La documentation contiendra également :

a) l'adresse de l'entité à laquelle les soumissions devront être envoyées;

b) l'adresse à laquelle les demandes d'information complémentaire devront être envoyées;

c) la langue ou les langues à employer pour la présentation des soumissions et documents d'accompagnement;

d) la date limite et le délai de réception des soumissions, ainsi que la période pendant laquelle les soumissions devront pouvoir être acceptées;

e) les personnes admises à assister à l'ouverture des soumissions, et la date, l'heure et le lieu de cette ouverture;

(f) a statement of any economic or technical requirements and of any financial guarantees, information and documents required from suppliers;

f) un énoncé des conditions de caractère économique ou technique à remplir, ainsi que des garanties financières, renseignements et documents exigés des fournisseurs;

(g) a complete description of the goods or services to be procured and any other requirements, including technical specifications, conformity certification and necessary plans, drawings and instructional materials;

g) une description complète des produits ou services demandés et de toutes autres exigences, y compris les spécifications techniques, la certification de conformité, les plans, les dessins et les instructions nécessaires;

(h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders and the cost elements to be included in evaluating tender prices, such as transportation, insurance and inspection costs, and in the case of goods or services of another Party, customs duties and other import charges, taxes and the currency of payment;

h) les critères d'adjudication, y compris tous les éléments, autres que le prix, qui seront pris en considération lors de l'évaluation des soumissions, et les éléments des coûts à prendre en compte pour l'évaluation des prix de soumission, tels que frais de transport, d'assurance et d'inspection et, dans le cas de produits ou services d'une autre Partie, droits de douane et autres frais d'importation, taxes et monnaie du paiement;

(i) the terms of payment; and

i) les modalités de paiement; et

(j) any other terms or conditions.

j) toutes autres modalités et conditions.

Article 1014 Negotiations disciplines

Article 1014 Règles de négociations

1. An entity may conduct negotiations only:

1. Une entité pourra mener des négociations uniquement

(a) in the context of procurement in which the entity has, in a notice published in accordance with Article 1010, indicated its intent to negotiate; or

a) à l'occasion d'un marché pour lequel elle aura indiqué, dans un avis publié en conformité avec l'article 1010, son intention de négocier, ou

(b) where it appears to the entity from the evaluation of the tenders that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set out in the

b) lorsque l'évaluation des offres fera apparaître qu'aucune offre n'est manifestement la plus avantageuse au regard des critères d'évaluation indiqués dans les avis ou dans la

notices or tender documentation.

documentation relative à l'appel d'offres.

2. An entity shall use negotiations primarily to identify the strengths and weaknesses in the tenders.

2. Les négociations serviront principalement à déterminer les avantages et les inconvénients des soumissions.

3. An entity shall treat all tenders in confidence. In particular, no entity may provide to any person information intended to assist any supplier to bring its tender up to the level of any other tender.

3. Une entité devra considérer comme confidentielles toutes les soumissions. Aucune entité ne pourra en particulier fournir à quiconque des renseignements en vue d'aider un fournisseur à présenter une soumission comparable à celle d'un autre fournisseur.

4. No entity may, in the course of negotiations, discriminate between suppliers. In particular, an entity shall:

4. Aucune entité ne pourra, durant des négociations, faire de discrimination entre les fournisseurs. Une entité devra en particulier

(a) carry out any elimination of suppliers in accordance with the criteria set out in the notices and tender documentation;

a) procéder à toute élimination de fournisseurs en conformité avec les critères énoncés dans les avis et dans la documentation relative à l'appel d'offres;

(b) provide in writing all modifications to the criteria or technical requirements to all suppliers remaining in the negotiations;

b) communiquer par écrit à tous les fournisseurs admis à participer aux négociations toutes les modifications apportées aux critères et aux exigences techniques;

(c) permit all remaining suppliers to submit new or amended tenders on the basis of the modified criteria or requirements; and

c) permettre à tous les fournisseurs non éliminés de présenter des soumissions nouvelles ou modifiées tenant compte des modifications apportées aux critères ou aux exigences; et

(d) when negotiations are concluded, permit all remaining suppliers to submit final tenders in accordance with a common deadline.

d) à la conclusion des négociations, permettre à tous les fournisseurs non éliminés de présenter des soumissions finales en vue d'une même échéance.

Article 1015: Submission, Receipt and Opening of Tenders and Awarding of Contracts

1. An entity shall use procedures for the submission, receipt and opening of tenders and the awarding of contracts that are consistent with the following:

(a) tenders shall normally be submitted in writing directly or by mail;

(b) where tenders by telex, telegram, telecopy or other means of electronic transmission are permitted, the tender made thereby must include all the information necessary for the evaluation of the tender, in particular the definitive price proposed by the supplier and a statement that the supplier agrees to all the terms and conditions of the invitation to tender;

(c) a tender made by telex, telegram, telecopy or other means of electronic transmission must be confirmed promptly by letter or by the dispatch of a signed copy of the telex, telegram, telecopy or electronic message;

(d) the content of the telex, telegram, telecopy or electronic message shall prevail where there is a difference or conflict between that content and the content of any documentation received after the time limit for submission of tenders;

Article 1015 : Présentation, réception et ouverture des soumissions et adjudication des marchés

1. Une entité appliquera, pour la présentation, la réception et l'ouverture des soumissions ainsi que pour l'adjudication des marchés, des procédures conformes à ce qui suit :

a) les soumissions seront normalement présentées par écrit, directement ou par la poste;

b) lorsqu'il est autorisé de présenter des soumissions par télex, télégramme, télécopie ou autre mode de transmission électronique, la soumission ainsi présentée devra contenir tous les renseignements nécessaires à son évaluation, notamment le prix définitif proposé par le fournisseur et une déclaration par laquelle le fournisseur accepte toutes les modalités et conditions de l'invitation à soumissionner;

c) une soumission présentée par télex, télégramme, télécopie ou autre mode de transmission électronique devra être confirmée dans les moindres délais par lettre ou par l'envoi d'une copie signée du télex, du télégramme, de la télécopie ou du message électronique;

d) le contenu du télex, du télégramme, de la télécopie ou du message électronique fera foi s'il y a divergence ou contradiction entre ce contenu et toute documentation reçue après l'expiration du délai fixé pour la présentation des soumissions;

(e) tenders presented by telephone shall not be permitted;

e) la présentation des soumissions par téléphone ne sera pas autorisée;

(f) requests to participate in selective tendering procedures may be submitted by telex, telegram or telecopy and if permitted, may be submitted by other means of electronic transmission; and

f) les demandes de participation à des procédures d'appel d'offres sélectives pourront être présentées par télex, télégramme ou télécopie, et, si cela est autorisé, par un autre mode de transmission électronique;

(g) the opportunities that may be given to suppliers to correct unintentional errors of form between the opening of tenders and the awarding of the contract shall not be administered in a manner that would result in discrimination between suppliers.

g) les possibilités qui pourront être accordées aux fournisseurs de corriger des erreurs de forme involontaires entre l'ouverture des soumissions et l'adjudication du marché ne seront pas administrées d'une manière qui aboutirait à une discrimination entre les fournisseurs.

In this paragraph, "means of electronic transmission" consists of means capable of producing for the recipient at the destination of the transmission a printed copy of the tender.

Dans le présent paragraphe, «mode de transmission électronique» désigne tout procédé apte à produire, au lieu de réception par le destinataire, un exemplaire imprimé de la soumission.

2. No entity may penalize a supplier whose tender is received in the office designated in the tender documentation after the time specified for receiving tenders if the delay is due solely to mishandling on the part of the entity. An entity may also consider, in exceptional circumstances, tenders received after the time specified for receiving tenders if the entity's procedures so provide.

2. Aucune entité ne pourra pénaliser un fournisseur dont la soumission, par suite d'un retard imputable uniquement à l'entité, est reçue après l'expiration du délai par le service désigné dans la documentation relative à l'appel d'offres. Les soumissions reçues après l'expiration du délai pourront également être prises en considération dans des circonstances exceptionnelles si les procédures de l'entité concernée en disposent ainsi.

3. All tenders solicited by an entity under open or selective tendering procedures shall be received and opened under procedures and conditions guaranteeing the regularity of the opening of tenders. The entity shall retain the information on the

3. Toutes les soumissions demandées par une entité dans le cadre de procédures d'appel d'offres ouvertes ou sélectives seront reçues et ouvertes conformément à des procédures et conditions garantissant la régularité de l'ouverture. Les renseignements

opening of tenders. The information shall remain at the disposal of the competent authorities of the Party for use, if required, under Article 1017, Article 1019 or Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures).

4. An entity shall award contracts in accordance with the following:

(a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation;

(b) if the entity has received a tender that is abnormally lower in price than other tenders submitted, the entity may inquire of the supplier to ensure that it can comply with the conditions of participation and is or will be capable of fulfilling the terms of the contract;

(c) unless the entity decides in the public interest not to award the contract, the entity shall make the award to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is either the lowest-priced tender or the tender determined to be the most advantageous in terms of the specific evaluation criteria set out in the notices or tender documentation;

découlant de l'ouverture des soumissions seront conservés par l'entité concernée; ils seront à la disposition des autorités compétentes de la Partie dont elle relève, qui les utiliseront au besoin en vertu des articles 1017 et 1019 ou du chapitre 20 (Dispositions institutionnelles et procédures de règlement des différends).

4. L'adjudication des marchés s'effectuera conformément aux procédures suivantes :

a) pour être considérée en vue de l'adjudication, une soumission devra être conforme, au moment de son ouverture, aux conditions essentielles spécifiées dans les avis ou dans la documentation relative à l'appel d'offres, et avoir été présentée par un fournisseur remplissant les conditions de participation;

b) si une entité a reçu une soumission anormalement inférieure aux autres soumissions présentées, elle pourra se renseigner auprès du fournisseur pour s'assurer qu'il est en mesure de remplir les conditions de participation et qu'il est ou sera apte à satisfaire aux modalités du marché;

c) sauf si elle décide, pour des raisons d'intérêt public, de ne pas passer le marché, l'entité adjudgera au fournisseur qui aura été reconnu pleinement capable d'exécuter le marché et dont la soumission sera la soumission la plus basse ou celle qui aura été jugée la plus avantageuse selon les critères d'évaluation spécifiés dans les avis ou dans la documentation relative à l'appel d'offres;

(d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation; and

(e) option clauses shall not be used in a manner that circumvents this Chapter.

5. No entity of a Party may make it a condition of the awarding of a contract that the supplier has previously been awarded one or more contracts by an entity of that Party or that the supplier has prior work experience in the territory of that Party.

6. An entity shall:

(a) on request, promptly inform suppliers participating in tendering procedures of decisions on contract awards and, if so requested, inform them in writing; and

(b) 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 1017: Bid Challenge

1. In order to promote fair, open and impartial procurement procedures, each Party shall adopt and maintain bid challenge procedures for procurement covered by this Chapter

d) l'adjudication des marchés sera conforme aux critères et aux conditions essentielles spécifiées dans la documentation relative à l'appel d'offres; et

e) les clauses optionnelles ne pourront être utilisées de façon à contourner le présent chapitre.

5. Aucune entité d'une Partie ne pourra subordonner l'adjudication d'un marché à la précédente obtention par le fournisseur d'un ou de plusieurs marchés d'une entité de ladite Partie, ou à la justification par celui-ci d'antécédents sur le territoire de cette Partie.

6. Une entité devra,

a) sur demande, informer les fournisseurs participants, dans les moindres délais, des décisions relatives à l'adjudication des marchés, et les en informer par écrit s'ils en font la demande;

b) sur demande, communiquer aux fournisseurs dont la soumission n'a pas été retenue des renseignements pertinents concernant les raisons du rejet, et les informer des caractéristiques et des avantages relatifs de la soumission retenue, ainsi que du nom de l'adjudicataire.

[...]

Article 1017: Contestation des offres

1. Afin de favoriser des procédures équitables, ouvertes et impartiales en matière de marchés publics, chacune des Parties adoptera et maintiendra des procédures de contestation des offres pour les marchés visés par le présent

in accordance with the following:

chapitre, en conformité avec les points suivants

(...)

[...]

(p) each Party shall ensure that each of its entities maintains complete documentation regarding each of its procurements, including a written record of all communications substantially affecting each procurement, for at least three years from the date the contract was awarded, to allow verification that the procurement process was carried out in accordance with this Chapter.

p) chacune des Parties fera en sorte que ses entités conservent des documents complets sur tous les marchés, y compris un registre de toutes les communications ayant influé sur chaque marché, pendant une période minimale de trois ans à compter de la date d'adjudication, afin qu'il soit possible de vérifier si le processus de passation des marchés aura été appliqué d'une manière conforme au présent chapitre.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DE MONTIGNY J.A.

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