

Ottawa, Tuesday, July 24, 2001

File No. PR-2000-073

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

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

DETERMINATION OF THE TRIBUNAL

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

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Library of Parliament either amend the Request for Proposal and provide all potential suppliers a reasonable period of time in which to submit a responsive bid or, if it cannot amend the Request for Proposal, that the Library of Parliament issue a new solicitation that incorporates the Canadian International Trade Tribunal's determination and is in accordance with the *Agreement on Internal Trade*.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards P&L Communications Inc. its reasonable costs incurred in filing and proceeding with the complaint.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will follow at a later date.

Date of Determination:	July 24, 2001
Date of Reasons:	August 13, 2001
Tribunal Member:	Pierre Gosselin, Presiding Member
Investigation Manager:	Randolph W. Heggart
Investigation Officer:	Paule Couët
Counsel for the Tribunal:	Michèle Hurteau
Complainant:	P&L Communications Inc.
Counsel for the Complainant:	Paul M. Lalonde Jason Yustin
Government Institution:	Library of Parliament
Counsel for the Government Institution:	David M. Attwater

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

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STATEMENT OF REASONS

COMPLAINT

On March 14, 2001, P&L Communications Inc. (PL Com) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a procurement (Solicitation No. RFP 01-0205) by the Library of Parliament (the Library) for the provision of an electronic news monitoring service for approximately 750 clients working in the Parliamentary Precinct in Ottawa, Ontario.

PL Com alleged that, contrary to Articles 504(3)(b) and (g) and Articles 506(5) and (6) of the *Agreement on Internal Trade*² and Articles 1007(3), 1012(2) and 1013 of the *North American Free Trade Agreement*,³ the Library had failed to respond to basic information requests by either completely ignoring the requests or providing inadequate, partial and incomplete answers. PL Com further alleged that the Library had specified bid requirements that are unclear, ambiguous, contradictory and, in some instances, incomprehensible. In addition, PL Com alleged that the Library had promulgated a set of so-called technical information technology (IT) standards in the Request for Proposal (RFP) that were discriminatory with regard to PL Com's Infolyntx system and biased in favour of Microsoft products. Finally, PL Com alleged that the Library confused "technical standards" with a list of product brand names that were not, properly speaking, standards as are established from time to time by the industry or various national and international standards organizations.

PL Com requested, as a remedy, that further action in this solicitation be suspended pending the results of the Tribunal's inquiry. PL Com also requested that the RFP be cancelled and re-issued to bring it into compliance with the trade agreements. In the alternative, PL Com requested compensation for its lost profits. In any event, PL Com requested compensation for the prejudice caused to the integrity of the procurement process and the award of its reasonable costs incurred in proceeding with the complaint.

On March 20, 2001, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the CITT Act and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.⁴ That

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
3. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
4. S.O.R./93-602 [hereinafter Regulations].

same day, the Tribunal issued an order postponing the award of any contract in relation to this procurement until the Tribunal determined the validity of the complaint. On April 4, 2001, the Library filed a notice of motion with the Tribunal, pursuant to rule 23.1 of the *Canadian International Trade Tribunal Rules*,⁵ requesting that the Tribunal dismiss the complaint and rescind its postponement of award order or grant an extension of time to file the Government Institution Report (GIR). On April 19, 2001, PL Com filed comments on the motion with the Tribunal and requested that the motion be dismissed. On April 26, 2001, the Library filed comments in response. On May 10, 2001, the Tribunal issued an order dismissing the Library's motion. The Tribunal also requested that the Library file the GIR in this matter by May 22, 2001. The Library filed its GIR with the Tribunal in accordance with rule 103 of the CITT Rules by the set date. On June 8, 2001, PL Com filed comments on the GIR with the Tribunal. On June 14, 2001, the Library filed additional submissions with the Tribunal and, on June 27, 2001, PL Com filed comments in response.

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

PROCUREMENT PROCESS

On February 28, 2001, a Notice of Proposed Procurement (NPP) for this solicitation was published on Canada's Electronic Tendering Service (MERX). The Library also issued an RFP with a closing date of March 20, 2001. The NPP indicated that the AIT applied to this procurement. It also identified the services being procured as falling into the category "Communications, Photographic, Mapping, Printing and Publication Services" and identified the applicable goods and services identification number as being "T004K MEDIA MONITORING SERVICES".

On March 2, 2001, PL Com, in a letter addressed to the Library, raised seven questions relating to the statement of requirements published in the RFP. On March 13, 2001, the Library posted on MERX, and PL Com received by facsimile, answers to questions four, five and six.

On March 14, 2001, PL Com filed its complaint with the Tribunal.

On March 16, 2001, the Library forwarded to MERX, as part of amendment No. 002 to the RFP, the answer to PL Com's question seven. The answer was posted on MERX on March 19, 2001. That same day, the Library forwarded to MERX amendment No. 003 to the RFP, which included the answers to PL Com's questions one, two and three. Amendment No. 003 to the RFP, which also extended the bid closing date to March 26, 2001, was posted on MERX on March 20, 2001. On March 21, 2001, the Library received a copy of PL Com's complaint from the Tribunal. On March 23, 2001, the Library faxed amendment No. 004 to the RFP to all potential suppliers advising that, due to the fact that the Library was working on clarifications and/or modifications to the RFP, the bid closing date was extended to May 14, 2001. On May 10, 2001, the Library faxed amendment No. 005 to the RFP to potential suppliers, extending the bidding period to June 1, 2001. On June 1, 2001, the closing date for the period in which to file proposals was further extended to July 31, 2001.

Motion

The Library submitted that the Tribunal lacks jurisdiction to hear the complaint because the services at issue are classified under the Common Classification System (CCS) for services under Code T004, which

5. S.O.R./91-499 [hereinafter CITT Rules].

includes media relations. The Library submitted that media monitoring services are classified under the trade agreements as “Public Relations Services”. Public relations services, the Library submitted, are excluded from the AIT pursuant to Article 502(1)(b) and Annex 502.1B. In the alternative, the Library submitted that the value of the procurement is less than \$100,000. Therefore, pursuant to Article 502, the AIT does not apply to this solicitation.

Specifically, the Library asserted that it is not a government entity or enterprise listed for Canada in either NAFTA or the *Agreement on Government Procurement*⁶ and that, therefore, its procurements are not subject to the provisions of those agreements.

On the question of the proper classification of the services at issue, the Library submitted that the media monitoring services, also called electronic news monitoring services, are properly characterized as public relations services within the meaning of Annex 502.1B of the AIT and, therefore, are excluded from the application of the AIT.

The Library submitted that the various trade agreements⁷ are all incorporated by reference into the CITT Act and create a single regulatory regime, are *in pari materia* and should be construed together in a consistent and harmonious manner to the extent that their express language permits. Furthermore, the Library argued that any undefined term, subjective element or ambiguity within a trade agreement, whether express or latent, must be interpreted or clarified having regard to the relevant provisions of the other trade agreements. In this context, the Library submitted that the expression “public relation services”, as used in Annex 502.1B of the AIT, is not defined and must be interpreted having regard to the relevant provisions of NAFTA and the CCS.

Code T004 of the CCS covers:

Public Relations Services (incl. Writing Services, Event Planning and Management, Media Relations, Radio and TV Analysis, Press Services).

The Library submitted that the expression “public relation services” in Annex 502.1B of the AIT must be interpreted consistently with Code T004 of the CCS, as used in NAFTA. Therefore, the Library argued, public relations services, as used in the AIT, include press services.

The Library, referring to a statement of the Supreme Court of Canada in *R. v. Nowegijick*,⁸ indicated that “[a]dministrative policy and interpretation are not determinative but are entitled to weight and can be an ‘important factor’ in case of doubt about the meaning of legislation”.⁹ In this context, the Library submitted that, in 1992, the Department of Supply and Services (predecessor to the Department) published a guide,¹⁰ for services and construction work, in which, under Code T004, “Public Relations Services” were described as:

(incl. Writing Services, Event Planning and Management, Media Relations, Radio and TV Analysis, Press Services).

6. April 15, 1994, online: World Trade Organization http://www.wto.org/english/docs_e/legal_e/final_e.htm [hereinafter AGP].

7. AIT, NAFTA, the AGP and the *Canada-Korea Agreement on the Procurement of Telecommunications Equipment*.

8. [1983] 1 S.C.R. 29.

9. *Ibid.* at 37.

10. *Suppliers' Guide: Doing business with Supply and Services Canada*, Minister of Supply and Services Canada 1992.

The Library further submitted that, in 1995, when Parliament implemented the AIT into domestic legislation as part of a single regulatory regime governing government procurement, it intended that services, subject to and exempt from the trade agreements, would be classified consistently with its earlier and continuing practice. Furthermore, the Library submitted that there is nothing to suggest that services under the AIT should be classified differently than under NAFTA.

The Library submitted that, because the AIT does not expressly prescribe a system for classifying goods or services, those services must be classified according to the CCS. It argued that the Tribunal was in error in finding in File No. PR-99-040¹¹ that services under the AIT should be classified differently from those under NAFTA. To the extent that its express language permits, in the Library's view, the AIT must be interpreted consistently with NAFTA and the other trade agreements, and the express language of the AIT permits the use of the CCS to classify services. The Library submitted that, while consistency, transparency and predictability are strong policy reasons why the Tribunal must recognize that services under the AIT should be classified according to the CCS, the Tribunal articulated no countervailing reasons in *Brent Moore* for which the AIT could not and should not use the CCS to classify services.

The Library submitted that the media monitoring services, also called "electronic news monitoring services", being procured are properly characterized as press services, as included under Code T004 of the CCS, and are, therefore, services that deliver newspaper and other media content to the Library.

On the question of the estimated value of the procurement, the Library submitted that the NPP does not specify any estimated value. Using IT budget information for the year 2000-2001, the Library argued that the estimated value of the procurement was less than the AIT \$100,000 monetary threshold applicable to the procurement of services.

In its comments of April 19, 2001, PL Com noted that the Library's motion is a reversal of the position that it took in the NPP and the RFP, which both indicate that this solicitation is subject to the AIT. Furthermore, PL Com agreed that the Library is not a government entity covered by NAFTA or the AGP.

PL Com submitted that the procurement at issue relates to a turnkey computer system which offers users the ability to retrieve news data. It submitted that the RFP itself, in many instances, describes the procurement as a system and noted that the potential suppliers on this solicitation are firms that design, develop and sell computer systems that are optimized to process data in binary format, including news data, and that they are not in the business of supplying public relations services. Moreover, the system being procured processes data from newspaper publishers and other related media content suppliers, but the system itself does not perform media monitoring services.

PL Com submitted that, under Article 502 and Annex 502.1B to the AIT, "advertising and public relation services" are clearly an exception to the general rule that all services are covered and that, therefore, the exception should be construed narrowly. PL Com argued that another fundamental principle of interpretation is that, in the absence of a clear contrary intent by Parliament (or the parties to the AIT), the expression "public relations" must be given its ordinary meaning. Furthermore, where words in a statute could bear a technical and a non-technical meaning, the courts have presumed that the ordinary, non-technical meaning was intended.

11. *Re Complaint Filed by Brent Moore & Associates* (4 May 2000) [hereinafter *Brent Moore*].

Citing several dictionary definitions of the term “public relations”, PL Com submitted that, at best, a media monitoring system might provide a useful tool to someone involved in public relations but that the delivery of such a computer system is manifestly not the provision of public relations services.

Moreover, PL Com argued that the AIT does not refer, in any way, to the CCS and that NAFTA and the CCS antedate the AIT. As such, PL Com submitted, the parties to the AIT could very easily have chosen to incorporate the CCS by reference into the AIT, but they did not do so. Therefore, PL Com submitted, the Library’s attempt to limit the scope of application of the AIT by reference to the CCS is untenable.

PL Com submitted that NAFTA and the AIT are entirely separate and very different agreements negotiated between different parties. Many topics addressed in one agreement are not covered, or are covered very differently, in the other. PL Com submitted that the Tribunal correctly took this approach in *Brent Moore*.

Recognizing that consistency, transparency and predictability are important considerations, PL Com submitted that such general policy considerations can never override legislative intent or fundamental principles of interpretation, such as the strict construction of exceptions and the rules of ordinary meaning. PL Com further submitted that the legal references cited by the Library are not on point and can be distinguished.

With respect to the Library’s argument that a media monitoring system is included in “Press Services” under Code T004 of the CCS, PL Com submitted that the expression refers, rather, to the type of task carried out by press secretaries, i.e. handling queries from the media, providing them with information, ensuing the distribution of releases, etc., and does not encompass a media monitoring system.

With respect to the monetary threshold issue, PL Com submitted that the Tribunal should draw an adverse inference from the Library’s limited and selective disclosure on this point and conclude that the contract is worth more than \$100,000.

PL Com asserted the value of the proposed procurement based on procurements for similar services for a news retrieval system. The contract for similar news retrieval services for 500 users had a value of \$96,750. Therefore, PL Com reasoned, a similar contract for 750 users would be greater than the \$100,000 threshold.

PL Com submitted that, even if the value of the contract is less than \$100,000 (which is not admitted), the preponderant proportion of this contract is properly classified as a procurement for goods and is manifestly valued at more than \$25,000, the AIT monetary threshold applicable to the procurement of goods.

PL Com submitted that the procurement is for the acquisition of a media monitoring system that includes various components, such as hardware, software (a search engine, a database engine and various middleware, and software utilities) and some related services (installation, technical support and training). Recognizing the importance of the software component of this acquisition and further recognizing that software constitutes goods, not a service, PL Com submitted that the solicitation at issue relates to a procurement for goods that is above the applicable minimum value threshold.

In its response of April 26, 2001, the Library submitted that its solicitation was for the provision of electronic news monitoring services and not for equipment, and that the RFP cannot be characterized

according to certain alleged attributes of one possible solution that may be offered by PL Com. The Library submitted that the use of the term “system” in the RFP does not transform the required services into goods. At best, the Library argued, the use of the term recognizes that the required services will be delivered through a network and not through the ether of space. In any event, the Library submitted that it is procuring news-monitoring services, not the means by which those services may be delivered.

The Library submitted that the alleged fundamental principle of interpretation that words must be given their common meaning has no application to the interpretation of the technical meaning of the services identified in the AIT.

The Library argued that consideration of the AIT in the context of Canada’s historic use of the CCS and the use of the CCS in the other trade agreements support the conclusion that services under the AIT are to be defined according to the CCS. In this context, the Library, citing the home page of Bowdens Media Monitoring Limited, submitted that “press clipping service” and “press services” are synonymous and that news or media monitoring is a press service.

On the question of the monetary threshold, the Library submitted that the alleged value of PL Com’s proposal is irrelevant, as the value of a designated contract is that established by the procuring entity. Moreover, the Library argued that the unrefuted evidence that it tendered is that, on February 19, 2001, just nine days prior to the NPP being posted on MERX, the Library established a value for the designated contract below \$100,000.

Decision on the Motion

In its order of May 10, 2001, the Tribunal dismissed the motion, as it had not been persuaded by the Library’s arguments that the Tribunal lacked the jurisdiction, pursuant to the AIT, to conduct an inquiry into the procurement for an electronic news monitoring service and that the value of the procurement was below the applicable AIT monetary threshold.

The Tribunal has given careful consideration to the submissions made by the parties and has based its decision on the following findings and considerations. On the issue of the classification of the media monitoring services being procured as public relations services or press services, which should be excluded pursuant to paragraph 1(f) of Annex 502.1B of the AIT, the Tribunal does not find the arguments to be persuasive. The Tribunal is not persuaded by the Library’s argument that a technical definition should be ascribed to these terms. The Tribunal agrees with PL Com that the exception found at paragraph 1(f) of Annex 502.1B should be construed narrowly and that, consequently, the expression “public relation services” must be given its ordinary meaning. As the Tribunal stated in *Brent Moore*, the concept of public relations involves a form of advocacy. Nothing in this procurement indicates to the Tribunal that the media monitoring services being procured by the Library provide for services supporting an advocacy function. Although the Tribunal is of the view that public relations services may include press services, such services are geared towards handling queries from the public or ensuring the distribution of press releases. They would not, in the Tribunal’s view, be media monitoring services. The Tribunal finds that the services that are being procured are data storage and retrieval services whereby the system processes data from newspapers and other media content suppliers, but does not, itself, perform media monitoring services. Consequently, as media monitoring services are not public relations services but data storage and retrieval services, which are not excluded from the AIT, the Tribunal has the jurisdiction to inquire into the matter.

The Library also argued that the various trade agreements are incorporated by reference into the CITT Act and create a single regulatory regime, are *in pari materia* and should be construed together in a

consistent and harmonious manner to the extent that their express language permits. In support of its argument, the Library submitted that the expression “public relation services”, which is not defined in the AIT, must be interpreted having regard for the CCS, as it is defined in NAFTA, and that there is nothing to suggest that services under the AIT should be classified differently from those under NAFTA. The Tribunal is not persuaded by the Library’s argument that, in this context, the expression “public relation services”, as used in the AIT, must be interpreted in accordance with the CCS, as the term is defined in NAFTA. First, the Tribunal finds that the meaning of words must be derived from their context and one must be careful when shifting the meaning of words from one agreement to another without making the adjustments dictated by the context. In the words of Duff J. in *Miln-Bingham Printing v. The King*:¹²

No doubt, for the purpose of ascertaining the meaning of any given word in a statute, the usage of that word in other statutes may be looked at, especially if the other statutes happen to be *in pari materia*, but it is altogether a fallacy to suppose that because two statutes are *in pari materia*, a definition clause in one can be boldly transferred to the other.¹³

Furthermore, the Tribunal is of the opinion that, had Parliament wanted to incorporate terms or concepts by reference, such as to the CCS, from one trade agreement to another or to include such terms or concepts in a trade agreement, it would have expressly done so. The Tribunal reiterates its position in *Brent Moore* that the trade agreements, while referring to the same subject matter, i.e. procurement, are legally separate one from the other. Each trade agreement is very different, in that one agreement may cover certain goods or services, entities or areas of trade, while another may not; each trade agreement was negotiated between different parties.

With respect to the monetary threshold for services under the AIT, the Tribunal has carefully reviewed the IT budget for 2000-2001¹⁴ submitted by the Library and submissions relating to similar recent contracts for news retrieval services. The Tribunal notes that the budget document provides for commitments for the past budget year and not for the current budget year in which the procurement of the services would be made. Therefore, this document is of little assistance to the Tribunal. The Tribunal also notes that a recent contract for a news retrieval service for 500 users, offering a service similar to the one at issue, had a value of \$96,750. The Tribunal does not find it unreasonable, therefore, that the estimated procurement value for such services to be provided to 750 users would be \$100,000 or greater. Moreover, the Tribunal notes that the news monitoring service being procured is, in fact, a composite of goods and services, that the monetary threshold for the procurement of goods under the AIT is \$25,000 and that the Library, itself, advertised this solicitation on MERX as being covered by the AIT. Consequently, the Tribunal finds that the procurement falls within the applicable monetary threshold prescribed by the AIT.

DETERMINATION ON THE MERIT - PARTIES’ POSITIONS

Library’s Position

The Library submitted that the AIT does not require it to provide responses to PLCom’s seven questions by March 13, 2001. It added that all of PL Com’s seven questions were answered prior to bid closing. Furthermore, as some of the questions were answered close to the original bid closing, the Library extended the bidding period to March 26, 2001. The Library submitted that the complaint with respect to unanswered questions as of the date of the complaint was premature and, in any event, moot. The Library

12. [1930] S.C.R. at 282.

13. *Ibid.* at 283.

14. Motion to dismiss, 4 April 2001, Confidential Tab 6.

submitted that it is better to have well-considered answers in both official languages, with appropriate amendments to the RFP, than to have quick answers.

With respect to PL Com's complaint about the time period in which to bid, the Library submitted that it extended the bidding period to June 1, 2001, to accommodate bidders. As such, the Library argued, this point is moot. In any event, noting that bidders were provided a 93-day period in which to bid, the Library submitted that such a period meets the requirements of Article 506(5) of the AIT.

With respect to PL Com's allegation that certain so-called IT standards in the RFP are brand- and vendor-specific, the Library submitted that, with respect to the federal government, Article 504 of the AIT is limited to prohibiting discrimination based on a province or region. In this context, the Library submitted that soliciting for an electronic news monitoring service that conforms to the Library's installed base of server equipment and operating systems does not discriminate between goods, services or their suppliers based on province or region. In the alternative, the Library argued that the RFP did not impose a requirement that blatantly discriminates against competing products, as the IT standards listed in Appendix A to the RFP are merely a reference to the Library's installed base of server equipment and operating systems. Citing the Tribunal's determinations in File Nos. PR-98-012 and PR-98-014¹⁵ and in File No. PR-2000-037¹⁶ in support, the Library submitted that it has a right to procure services that work with its installed base.

With respect to PL Com's allegation that the specification is biased in favour of Microsoft products, the Library submitted that section 2.1 of Section B of the RFP and Appendix A to the RFP do not limit the solicitation to the equipment of any particular manufacturer. Rather, these provisions merely require that proposals be technically compliant with the Library's installed base. The Library further submitted that, to the extent that there existed a bias in favour of applications running as an NT service (which it denies), amendment No. 003 to the RFP clearly indicated that "[a]ny application running on the server must run as an NT service or equivalent." Concerning the alleged ambiguity of the RFP in respect of the above requirement, the Library submitted that, reasonably interpreted by a specialized service provider such as PL Com, the RFP is not ambiguous. In any event, it argued that this ground of complaint was rendered moot by amendment No. 003 to the RFP.

The Library submitted that, reasonably understood, the term "frame", as used to describe the user requirements in the RFP, is properly understood in its grammatical and ordinary sense. This must be distinguished from frames technology, which is a technical means of achieving a split-screen format. The Library submitted that the RFP set out a functional requirement without specifying the technology or method to achieve that function. It added that the requirement that proposals provide for a split-screen format is clear and unambiguous and that PL Com has attempted to misconstrue the requirement to support its complaint.

With respect to the point rating system applicable to this RFP, the Library submitted that Appendix C to the RFP, provided to potential suppliers before bid closing, clearly and unambiguously identified the criteria to be used in the evaluation of bids and the weight to be assigned to each criterion. Specifically, the Library submitted that the mandatory requirements were clearly stated in the RFP and that the fact that a mandatory requirement may also include a point rating system recognizes that evaluating bids is not always a matter of simple binary logic, e.g. while different proposed systems may all interoperate with the Library's installed base, some systems may interoperate better than others.

15. *Re Complaint Filed by Corel* (26 October 1998).

16. *Re Complaint Filed by Computer Talk* (26 February 2001).

Furthermore, the Library submitted that, under Article 506(6) of the AIT, it has the right to consider the financial capacity of a supplier to fulfill the requirements of the proposed contract. In this context, the Library submitted that the use of a financial ratio analysis is a legitimate means of gaining an understanding of the financial capacity of bidders.

With respect to the requirement that source codes be placed in escrow, the Library submitted that this requirement was clearly communicated to bidders in amendment No. 002 to the RFP and that PL Com was not prejudiced by the time that the Library took to communicate this requirement. This ground of complaint, the Library submitted, is moot.

Under the circumstances, the Library asked for its complaint costs. In the alternative, it asked to reserve the right to make further submissions with respect to the award of costs in the matter.

In its additional submissions of June 14, 2001, the Library submitted that it would have been a breach of the AIT to have selectively provided information on the RFP to one bidder. This is the reason why it declined to provide information in response to PL Com's alleged telephone communication during the week of February 19, 2001, and in response to PL Com's correspondence of February 27, 2001, or to engage in negotiations with PL Com during the solicitation process. Furthermore, the Library submitted that such communications were not required, since the RFP provided for a process of seeking clarifications and amendments.

With respect to PL Com's ongoing complaint that it lacks information to bid, the Library submitted that, if PL Com legitimately requires further information, the bidding period is still open and that it can use the mechanism set out in the RFP to seek additional clarifications and information. The Library argued that PL Com's refusal to use that avenue suggests that it does not have an actual need for additional information.

The Library submitted that the requirement in the RFP, as amended, for financial statements are clear and that, if PL Com has a legitimate, as opposed to a theoretical, concern in that regard, it can communicate in writing with the contracting officer.

The Library added that PL Com has raised new grounds of complaint in its response to the GIR (i.e. the support cost issue, the omission of Solaris from the House of Commons' installed base and certain aspects of the requirement for financial statements) and that these grounds of complaint are late and, therefore, should not be considered on the merit.

Specifically, with respect to the Solaris issue, the Library submitted that, although the House of Commons' firewall is based on Solaris and the Library uses the House of Commons' firewall and Intranet connections, the Library itself has only Windows NT/2000 computers in its installed base. It submitted that the House of Commons' Solaris installation is a legacy system deployed in a limited environment and is due to be retired within six months. Furthermore, the Library indicated that the House of Commons has allowed the number of resources capable of managing, supporting and administering UNIX systems to dwindle to the point where it can no longer reliably support this kind of environment.

PL Com's Position

PL Com submitted that it is gratified that some of its concerns have been addressed since the filing of its complaint and that the GIR provides some modest clarifications. In particular, PL Com conceded that, by now, the Library has provided responses to all seven questions and that the extensions of the deadline for

submitting bids granted by the Library rendered moot its allegation that the time period to bid was unreasonably short.

PL Com submitted that, given the long history of this case, the Library's failure to provide, in the GIR, even limited disclosure of its files, including technical documentation relating to its Microsoft NT requirements, its relationships with current system providers and the background to this solicitation, is disappointing and should be considered by the Tribunal in evaluating the credibility and strength of the Library's position.

With respect to observations made by the Library concerning PL Com's behaviour in the matter, PL Com submitted that it had no obligation whatsoever to advise the Library that it had filed a complaint with the Tribunal. Furthermore, it submitted that the Library cannot reasonably suggest, as it did, that, because PL Com did not follow up on the Library's responses, the Library could, therefore, conclude that its responses were acceptable to PL Com. Moreover, the fact that PL Com did not follow up on the Library's answers cannot be interpreted to mean that PL Com's complaint was premature. In fact, PL Com submitted that it filed its complaint as and when it did because it was mindful of the very tight time frames in which complaints must be filed and of the strict approach of the Tribunal to its jurisdiction in this regard.

With respect to the Library's argument that it has the right, under Article 504 of the AIT, to impose discriminatory standards so long as those standards are geographically neutral, PL Com cited File No. PR-2000-060¹⁷ and submitted that this argument has no merit and has already been squarely rejected by the Tribunal.

With respect to the IT standards set out in the RFP, PL Com submitted that it recognizes the Library's right to ensure that any new system works well with its existing installed base. However, PL Com argued that the installed base could not be used as an excuse to discriminate. PL Com submitted that, in the present case, the Library's requirements are over-reaching, needlessly restrict competition beyond what is necessary to ensure compatibility and impose on non-Microsoft suppliers a burden that is not borne by suppliers of Microsoft-based systems. Indicating its satisfaction that the Library has recognized, in the GIR, that the term "IT standards" in this RFP refers to the installed base and not IT standards proper, PL Com submitted that such usage is ambiguous and misleading in this instance.

Furthermore, PL Com submitted that, although the Library has permitted bidders to propose non-Windows platforms, it has not, as such, withdrawn the requirement to conform to the alleged IT standards. Instead, PL Com argued, the Library has instituted additional requirements in the form of extra support costs for the so-called non-standard platforms. These additional support costs are tantamount to disqualification and are discriminatory against non-Windows systems and solutions and the suppliers thereof.

PL Com submitted that the Library has an obligation to explain and justify how a Linux-based server connecting to the Local Area Network (LAN) via TCP/IP (RFC 793)¹⁸ over Ethernet (Institute of Electrical and Electronics Engineers Standard 802.3) is, in any way, less compatible with the Library's installed base than the solution required in the RFP. PL Com argued that an Intranet server does nothing that necessitates that it run on a particular platform, as its functionality can easily be defined by well-established open standards. Referring to two recent procurements for exactly the same kind of systems as in the present case and for which it was the successful bidder, PL Com indicated that, in those instances, no listing of the

17. *Re Complaint Filed by Foundry Networks* (23 May 2001) [hereinafter *Foundry Networks*].

18. TCP/IP: transmission control protocol/internet protocol; RFC: request for comment.

products comprising the installed base was provided in the RFPs, even though the said installed bases were very similar to that of the Library. PL Com argued that the Library has failed to justify the need for or relevance of the IT standards in the RFP and that these standards can only be indicative of the Library's continued bias in favour of a Microsoft-based system and its hostility to UNIX and Linux-based systems.

PL Com asserted that the Library is willing to absorb all the administrative and support costs associated with a Windows-based solution, but requires non-Microsoft proponents to absorb all such costs. This approach, PL Com submitted, imposes a new, unjustified and discriminatory burden on bidders offering other than Microsoft products. Furthermore, PL Com submitted that this uneven approach to support costs is particularly galling, given that the Library is already running, administering and supporting a heterogeneous operating systems environment, including current-wide non-Windows NT/2000 server operating systems, such as the UNIX-based Solaris 2.7 and DEC-based VMs 7.

Moreover, PL Com argued that, because Solaris 2.7 is listed in the RFP as "current-wide" and Windows NT/2000 is listed as "current-limited", it seems abundantly clear that a UNIX solution would be more compliant with and more easily integrated into the Library's existing installed base than a Windows NT/2000 solution. Yet, PL Com submitted, a Windows NT/2000 solution would not have to bear the burden of any so-called extra support costs.

Referring to the mixed nature of the operating systems environment, the costs for tape backup, the reliability of the Linux operating system, the ease of installation of a Linux Intranet server on a Microsoft network, the Library's current literacy in UNIX-based operating systems and the disaster recovery issues, PL Com submitted that there is every reason to believe that the implementation of a Linux-based system, such as PL Com's Infolynx, would be cheaper and no more burdensome for the Library than the installation of a Microsoft-based system.

PL Com submitted that the costs required to be supported by non-Windows proponents, as set out in amendment No. 003 of the RFP, are not only discriminatory but open-ended and have not been clearly defined. PL Com submitted that potential suppliers have no way of estimating, with reasonable precision, the costs of providing an equivalent backup, archival and disaster recovery solutions or the costs of staffing and/or training personnel to support a new platform. In addition, PL Com assumed that, on the basis of the Library's response to its second question, the Library is willing to absorb all the costs of backing up and archiving a Windows NT/2000 solution, but not a Linux-based solution. PL Com submitted that this requirement and other similar ones, are discriminatory and violate Articles 501 and 504(3)(b) and (f) of the AIT.

With respect to the split-screen issue, PL Com submitted that the use of the expression "split-screen format" in the context of an Intranet application, of necessity, means using frames technology.

Concerning the requirement for financial statements to evaluate a bidder's capacity to perform the requirement, PL Com submitted that this requirement, as amended, is still ambiguous and overly demanding on small companies and fails to properly disclose the criteria on which a bidder's capacity will be evaluated. Similarly, PL Com alleged that the ratio analysis that the Library proposes to use in this instance is not clearly set out in the RFP, as amended. PL Com submitted that bidders are entitled to know precisely how they will be evaluated and to know beforehand the details of the analysis to be performed so that the Library does not manipulate different ratios to the benefit of particular bidders.

PL Com indicated that it is satisfied with the Library's response with respect to the requirement that certain source codes be held in escrow and that the Library's clarification with respect to the rating of the mandatory requirements of the RFP was useful.

In its submission of June 27, 2001, PL Com indicated that it did not raise new grounds of complaint in its comments on the GIR and that the Library's characterization of PL Com's submissions, if accepted by the Tribunal, would lead to absurd results, in fact, barring from Tribunal consideration any government institution acts or behaviour occurring after the filing of a complaint, short of filing a new complaint. In addition, PL Com submitted that the Library could not reasonably argue, at the same time, that the complaint is both premature and late.

On the subject of the missing information, PL Com submitted that it is astonishing that the Library continues to claim that PL Com has not done enough to seek information and clarification. The fact that the bidding process is still open, PL Com submitted, in no way limits PL Com's right to seek redress from the Tribunal. The reality is that PL Com has taken extraordinary measures to communicate with the Library both prior to and following the filing of its complaint with the Tribunal. In any event, PL Com submitted that the burden to ensure clarity in solicitation documents, as found in Article 506(6) of the AIT, rests with the government. It indicated that it recognizes that the Department must be fair to all bidders in its dealing with any potential supplier but that, in the circumstances, a bidder conference, for example, would have been a proper way to provide additional information to all bidders.

On the issue of the installed base, PL Com submitted that listing a number of software brands is an exceedingly poor substitute for listing requirements in terms of functional performance and recognized true technical industry standards. Furthermore, PL Com submitted that an installed base is not a licence to discriminate, particularly not by forcing the addition of so-called extra support costs without proper substantiation, clear delineation and quantification of those costs.

PL Com argued that the support costs issue is highly relevant to its complaint, since such costs are central to the question of whether the Library has, as it claims, removed the discrimination and bias from the solicitation. Therefore, PL Com submitted, this issue is not a new issue.

On the question of the omission of information concerning Solaris, PL Com submitted that this information should have been revealed up front in answering its questions or in the GIR and not at such a late date. PL Com argued that the Library is attempting to draw a distinction between the House of Commons' installed base (Solaris) and its installed base (Windows NT/2000). However, PL Com submitted, this distinction is false and only serves to further confuse the issue. More importantly, it is unnecessary and irrelevant, since the parliamentary Intranet is Ethernet and TCP/IP-based.

With respect to the Library's assertion that plans exist to retire UNIX from the House of Commons' installed base, PL Com submitted that the Library is not authorized to speak on behalf of the House of Commons on these matters and that the Library's claim, in this respect, is not substantiated or supported by any evidence. In any event, PL Com submitted, Intranet is platform-independent, and there are no incompatibilities between a Linux-based Intranet server and the Library's Windows NT/2000 computers on a technical level. PL Com further submitted that the only incompatibility alleged by the Library relates to IT staff qualifications and is not supported by credible evidence.

In conclusion, PL Com submitted that, even in the absence of a UNIX server, in a Windows NT/2000-only environment, Infolynx would integrate seamlessly on the local Intranet-based LAN. Furthermore, any system administrator modestly qualified in Windows NT/2000 network administration

would have a sufficiently solid understanding of Ethernet and TCP/IP networking, DOS/Windows batch files and Microsoft's "command.com" shell to manage PL Com's Infolyx system. There would be little or no difficulty maintaining a Linux Intranet server on the Library's network, with a negligible amount of training. Any complex operating system-level administration related to the application server would be managed by PL Com as part of the service agreement portion of the RFP, just as it would by any other bidder offering Microsoft operating system-based solutions.

TRIBUNAL'S DECISION

Subsection 30.14(1) of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements which, in this instance, is limited to the AIT.

The Library has submitted that certain aspects of PL Com's complaint were premature, e.g. the alleged refusal by the Library to provide meaningful answers to PL Com's questions and related issues, whereas other aspects were late or related to new issues, e.g. the requirement that certain source codes be held in escrow, the financial statements required to assess a bidder's capacity to deliver the contract, the so-called extra support costs relating to non-Microsoft-based systems and the Solaris issues, none of which the Tribunal should address on the merit. The Tribunal finds that there is no merit to these arguments.

In the Tribunal's opinion, PL Com's fundamental difficulty with this solicitation, from the outset, is the manner in which the RFP was drafted, including the statement of requirements and the evaluation criteria and methodology therein and the manner in which the Library has responded or failed to respond to PL Com's repeated requests for information and clarification. These actions led PL Com to believe that, contrary to the provisions of the AIT, there existed two classes of bidders on this solicitation: those offering Microsoft-based systems or solutions and the others.

The Tribunal is of the view that all the issues raised by PL Com in this complaint are directly related to the above fundamental difficulty. As such, PL Com raised no new issues during these proceedings. As to the prospective nature of certain grounds of complaint or lateness in filing certain others, the Tribunal notes that PL Com was and remains under no obligation to engage in protracted discussions with the Library before it can file a complaint with the Tribunal. In this instance, the Tribunal is satisfied that, having chosen to raise its concerns first with the Library, PL Com did so diligently, in a clear and detailed manner, and it provided the Library a reasonable period of time to respond. PL Com was concerned that waiting any longer for a satisfactory answer to all its questions from the Library might compromise its ability to file a complaint with the Tribunal within the prescribed time frames. In the Tribunal's opinion, PL Com cannot be criticized for acting as it did, particularly considering that the bid-closing date announced at that time was fast approaching.

PL Com has also indicated, in its submissions, that the issues relating to the insufficient period of time afforded potential suppliers to bid and the Library's failure to respond to its seven questions have been overtaken by events. Moreover, PL Com has indicated that the issue of the source codes to be held in escrow and the issue relating to the meaning of the term "NT Service" in the Library's response to PL Com's third question, have been addressed to its satisfaction. Accordingly, the Tribunal will not address these issues on their merits.

Article 501 of the AIT provides that all Canadian suppliers must have equal access to procurement. In this context, Article 504(3) sets out a number of measures that are inconsistent with the principle of non-discrimination or equal access. Furthermore, Article 506(6) provides that, “[i]n evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. 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.”

PL Com alleged that the Library’s position with respect to (1) the display format for certain information, the frame/split-screen issue, (2) the ambiguous and confusing evaluation criteria and methodology set out in the RFP as amended, including the point rating of certain mandatory requirements, (3) the setting out in the RFP of requirements for financial statements and their use in the evaluation of bidders and of their proposals, and (4) the introduction during the bidding process of so-called extra support costs for bidders offering systems equivalent to but other than Microsoft-based systems discriminates in favour of bidders offering Microsoft-based systems to the detriment of PL Com’s Infolyntx system. The Tribunal finds that the Library’s position on the latter three issues amounts to discrimination. However, in the Tribunal’s opinion, there is no merit to PL Com’s allegation that the Library’s requirement for some form of split-screen display constitutes discrimination.

The Tribunal is of the view that, considered in context, the requirement for “frame”, as set out in the RFP, does not require frames technology. Rather, the term conveys the Library’s requirement to display certain information using a split-screen format. The Tribunal does not find this request discriminatory or unreasonable.

On the question of the evaluation criteria and methodology set out in the RFP, the Tribunal is of the view that they are both unclear and biased. In particular, the criteria set out in the RFP at Section B, “Statement of Reference”, on which proposals are to be point rated as per stage 4 of the evaluation process, are, at best, vague. The Tribunal understands that the same requirement can be evaluated on a pass/fail basis as a mandatory requirement for minimum performance and/or contents, and be further evaluated as a rated requirement to assess the same contents and/or performance in terms of how they exceed that minimum requirement. In this instance, however, there is no indication in the RFP, other than the maximum number of points allowed per item evaluated, of how points will be assigned to the different proposals. For example, it is unclear how many points, if any, a proposal will receive for meeting a mandatory requirement or how the points will be attributed to the various items afterwards. In the Tribunal’s opinion, this lack of clarity is contrary to Article 506(6) of the AIT and discriminates among bidders, since it involves a greater risk for bidders offering non-Microsoft-based systems, due to the fact that greater subjectivity is involved in assessing equivalent solutions in comparison to assessing solutions identical to that required by the RFP. Furthermore, for the same reason, given the nature of the award formula selected by the Library in this instance (best value = total points divided by price), the RFP’s lack of clarity in the evaluation criteria and methodology for awarding points is more open to discretion and, therefore, more risky to bidders offering non-Microsoft-based solutions.

With respect to the requirement for financial statements in the RFP and for their use in the assessment of a bidder’s capacity to deliver the contract, the Tribunal finds that they are not clearly set out in the RFP. In the Tribunal’s opinion, bidders are entitled to know, beforehand, what specific use the Library will make of this information and, more particularly, what kind of ratio analysis that the Library intends to use to assess their capacity to perform the contract. The Tribunal is also perplexed, given the size and value of this procurement, by the importance accorded to financial statements in this instance.

With respect to the extra support costs in the RFP, as amended, the Tribunal finds that this requirement, as stated, discriminates in favour of bidders offering Microsoft-based solutions to the detriment of those that do not. In the Tribunal's opinion, this difficulty stems from the Library's improper understanding of what constitutes transition costs and the conditions governing their use where an installed base exists.

The Library, in formulating its requirements, can take into consideration its installed base and demand that any solution proposed by bidders be compatible with it. The parties agree with this. It is also acceptable, in situations where equivalent solutions are allowed, that bidders proposing equivalent solutions may have to include in their proposals, and assume, as an added competitive factor, certain additional costs, e.g. training, file conversion, technical adaptation, that the government would not have incurred if the successful proposal offered a solution that corresponded to the installed base. These additional costs, commonly referred to as transition costs, are allowable and represent a hurdle that bidders offering a solution equivalent to but other than the resident solution, i.e. the installed base, have to face.

Transition costs obviously could make it more difficult for bidders offering equivalent solutions, i.e. other than the one in place, to be successful. Therefore, in the Tribunal's opinion, in order to preserve competition, the government must, where transition costs apply, ensure that such costs are limited to transition costs only and that the basis upon which (type, nature, frequency, quantity, quality, etc.) such transition costs are to be included by bidders in their proposals and used in evaluating proposals is clearly set out in the tender documents.

The Tribunal finds that the extra support costs referred to in the RFP include costs that are not transition costs in nature. Furthermore, the basis for assessing whatever legitimate transition costs might exist in this procurement has not been properly set out and/or documented in the RFP, making it difficult for bidders to estimate and allow for such additional requirements in their bids. For example, the Tribunal is of the view that it is unacceptable to impose on bidders of non-Microsoft-based systems only a requirement that they absorb in their bid price certain ongoing maintenance, archiving and backup costs applicable to any previously installed or new systems. Similarly, the Tribunal is of the view that the additional training costs referred to as extra support costs in the RFP are not clearly defined nor well supported. Moreover, as for the requirement for financial statements, the Tribunal has some difficulty understanding the importance accorded by the Library to the extra support costs or true transition costs, considering the low dollar value of this procurement.

In the Tribunal's opinion, the above mentioned issues, separately and taken together, document several material instances where the RFP, as amended, lacks clarity. In these instances, the Library is in breach of Article 506(6) of the AIT. Moreover, in the Tribunal's opinion, although the RFP allows equivalent solutions to be proposed (a situation with which PL Com claimed it can live in this instance), the Library, in setting out the requirements of the RFP, relied extensively on trade names as a proxy for performance specifications, when recognized open standards exist, and introduced unallowable and/or unsupported and non-documented extra support costs for bidders offering non-Microsoft-based solutions, thereby structuring an RFP that favours one class of bidders, those offering Microsoft-based solutions, over the other bidders. In the Tribunal's opinion, this amounts to discrimination.

The Library argued that, if the Tribunal finds discrimination in this instance, such a state of affairs should not constitute a breach of the AIT, which only prohibits discrimination on the basis of province or region. The Library submitted that there is no evidence on the record that discrimination of that kind took place in this instance, let alone the fact that PL Com made no allegation to that effect in its complaint. The Tribunal finds that there is no merit to this argument.

In File No. PR-2000-024¹⁹ and *Foundry Networks*, the Tribunal determined that the AIT prohibits all forms of discrimination, including discrimination based on province or region. The Tribunal adopts the reasoning in these cases and, on this basis, determines that the discrimination shown by the Library in structuring the RFP is contrary to the provisions of Article 504 of the AIT.

In determining the most appropriate remedy, the Tribunal is cognizant that the period for submitting proposals in this solicitation is set to close at the end of July 2001. In recognition of this fact and further recognizing that it may be possible to correct this solicitation to conform with this determination and the provisions of the AIT, the Tribunal will recommend that the Library revise the RFP as per this determination, and continue with this solicitation according to the provisions of the AIT, subject to providing bidders with a reasonable period of time in which to react to the Library's changes and to submit responsive bids. In the alternative, the Tribunal recommends that the Library cancel the solicitation and issue a new one in accordance with the provisions of the AIT.

DETERMINATION OF THE TRIBUNAL

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

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that the Library either amend the RFP and provide all potential suppliers a reasonable period of time in which to submit a responsive bid or, if it cannot amend the RFP, issue a new solicitation that incorporates the Tribunal's determination and is in accordance with the AIT.

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

Pierre Gosselin
Pierre Gosselin
Presiding Member

19. *Re Complaint Filed by AT&T Canada* (27 November 2000).