



Ottawa, Monday, November 27, 2000

File No.: PR-2000-024

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

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

### DETERMINATION OF THE TRIBUNAL

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

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services, in evaluating the proposals received in response to solicitation No. U6158-000401/A and in identifying a successful bidder to be recommended for contract award, ignore the pricing proposals that take into consideration the transition costs prescribed in Article 23.8.2 of the Request for Proposal and, instead, evaluate the alternate pricing proposals (PRICING PROPOSAL "B") already submitted by potential suppliers pursuant to Article 19.2.1.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards AT&T Canada Corp. its reasonable costs incurred in filing and proceeding with this complaint.

Patricia M. Close  
Patricia M. Close  
Presiding Member

Pierre Gosselin  
Pierre Gosselin  
Member

Richard Lafontaine  
Richard Lafontaine  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

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

Date of Determination: November 27, 2000  
Date of Reasons: December 14, 2000

Tribunal Member: Patricia M. Close, Presiding Member  
Pierre Gosselin, Member  
Richard Lafontaine, Member

Investigation Manager: Randolph W. Heggart

Investigation Officer: Paule Couët

Counsel for the Tribunal: Philippe Cellard

Complainant: AT&T Canada Corp.

Counsel for the Complainant: Gordon LaFortune  
Peter Clark

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: David M. Attwater



Ottawa, Thursday, December 14, 2000

**File No.: PR-2000-024**

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

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

### STATEMENT OF REASONS

On July 13, 2000, AT&T Canada Corp. (AT&T) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning the procurement (Solicitation No. U6158-000401/A) by the Department of Public Works and Government Services (the Department) for the provision of asynchronous transfer mode (ATM)<sup>2</sup> services for the Department of Industry (Industry Canada).

AT&T alleged that, in conducting this procurement, the Department has violated several provisions of the *North American Free Trade Agreement*,<sup>3</sup> the *Agreement on Internal Trade*<sup>4</sup> and the *Agreement on Government Procurement*.<sup>5</sup> AT&T alleged that, contrary to Article 1008(1)(a) of NAFTA and Article VII(1) of the AGP, the Department has failed to apply the tendering procedures in a non-discriminatory manner, specifically with respect to the treatment of certain cancellation costs relating to the early termination of an existing contract with the incumbent service provider and to staff overtime charges alleged to be associated with the award of the contract to a new supplier. AT&T also alleged that the Department's decision not to extend the time to submit bids by four weeks, as it requested, was discriminatory. AT&T further alleged that, contrary to Article 506(5) of the AIT and Article XI(1) of the AGP, the Department failed to provide non-incumbent bidders with a reasonable period of time to submit bids. Finally, AT&T alleged that the Department, in violation of Article 506(6) of the AIT, has taken into consideration discriminatory criteria. AT&T submitted that the decision to allow the incumbent bidder to determine how its bid should be evaluated with respect to the application, or non-application, of cancellation costs is a significant advantage which is only extended to the incumbent bidder and constitutes a clear violation of reciprocal non-discrimination. With respect to staff overtime costs, AT&T submitted that the decision to impose those costs on non-incumbent bidders and the fact that those costs are apparently inflated also constitute a clear violation of reciprocal non-discrimination.

AT&T requested, as a remedy, that the Tribunal direct the Department to amend and reissue the Request for Proposal (RFP) and, in so doing, remove the "transition costs" identified at Articles 23.8.2.a and 23.8.2.b of the RFP and extend the time period to prepare and submit proposals by four weeks. AT&T

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. ATM is an International Telecommunication Union Telecommunication Standardisation Sector (ITU-T) standard protocol for cell relay wherein information for multiple service types, such as voice, video or data, is conveyed in small, fixed-size cells.
3. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
4. As signed at Ottawa, Ontario, 18 July 1994 [hereinafter AIT].
5. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [hereinafter AGP].

requested that the Tribunal order the postponement of the award of any contract in relation to this solicitation until the Tribunal completes its review of the matter. AT&T requested its costs associated with this complaint.

On July 18, 2000, 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*.<sup>6</sup> That same day, the Tribunal issued an order postponing the award of any contract in relation to this solicitation until the Tribunal determined the validity of the complaint.

On August 3, 2000, the Department filed a motion with the Tribunal requesting that the Tribunal dismiss the complaint. On August 14 and September 8, 2000, AT&T filed submissions on the Department's motion with the Tribunal. On August 25 and September 18, 2000, the Department filed submissions in response. On September 27, 2000, the Tribunal dismissed the motion. On October 12, 2000, the Department filed a GIR with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>7</sup> On October 24, 2000, AT&T filed comments on the GIR with the Tribunal.

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 June 12, 2000, the Department issued an RFP dated June 8, 2000, under the Supply Arrangement for Telecommunication Services to obtain firm rates for ATM services at the 68 sites operated by Industry Canada. The RFP was open to all qualified ATM service providers under the Supply Arrangement for Telecommunication Services.

The RFP, as amended, includes the following provisions relevant to this case:

[Part A, "Instructions and Information for Bidders", Article 7.2]

**(MANDATORY)** Should any ATM Services currently be provided to Industry Canada by the winning Bidder, such services shall immediately and automatically become eligible for inclusion under any contract resulting from this RFP. No implementation or service charge shall apply as a result of such inclusion.

[Article 7.3]

**(MANDATORY)** Should the incumbent supplier of any Frame Relay and/or leased line services provided to Industry Canada be the successful bidder, any such Frame Relay and/or leased line services provided by the incumbent shall immediately and automatically become eligible for migration to the ATM services to be provided under any contract resulting from this RFP. The incumbent shall have the option of either:

- a. waving all cancellation charges or contractual obligations associated with the migration of those frame relay and/or leased line services to the ATM services provided under any resulting contract; OR
- b. the transition costs identified in Part A article 23.8.2.a, shall be applied to the incumbent's proposal in the same manner in which they are applied to proposals submitted by non-incumbents.

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6. S.O.R./93-602[hereinafter Regulations].

7. S.O.R./91-499.

Any proposal submitted by the incumbent shall indicate which of the above two options shall be applied.

[Article 17.1.2]

**(MANDATORY)** Bidders may submit more than one proposal, but each proposal shall be submitted as a **PHYSICALLY SEPARATE** proposal package, clearly marked as a separate proposal, and shall follow the format specified herein. Each proposal will be evaluated independently with no reference to any other proposal.

[Article 19.2, "Alternate Pricing Proposal (MANDATORY)", sub-article 19.2.2]

Bidders shall prepare **PRICING PROPOSAL "B"** **without** taking into consideration the transition costs identified in Part A, Article 23.8. For the purposes of **PRICING PROPOSAL "B"**, the incumbent supplier shall disregard the requirement identified in Part A, Article 7.3, as added in Amendment 007 to the solicitation.

[Article 23.5.3]

Bidders shall provide firm, itemized monthly flat and/or usage-based rates, in accordance with Part A, Article 23.4, and one-time installation charges **based on the award of a three year contract for service, with options to extend for one additional period of two years, and two additional periods of one year each** for the following types of ATM Service components.

[Article 23.8, "Transition Costs" (as amended by amendment No. 016 issued August 4, 2000)]

23.8.1 Industry Canada currently subscribes to existing network services. In the event that a contract is awarded to a supplier other than the incumbent, Industry Canada will incur transition-specific costs, that would not be incurred if a contract for the ATM Services described in this RFP is awarded to the incumbent. Accordingly, the transition-specific costs will be added to all Bidders' bids, except for a bid provided by the incumbent, when calculating the evaluated bid price in the price evaluation.

23.8.2 The following transition-specific costs will be added to bids from Bidders who are not the incumbent supplier:

- a. **Existing Frame Relay and DS-1 Services Cancellation Costs.** If the existing Industry Canada Frame Relay and DS-1 Services are canceled prior to 31 January, 2001, Industry Canada will be obligated to pay service cancellation charges to the supplier of these services. It is assumed that the new ATM Network Service will be accepted on 30 November 2000. If the order to cancel the incumbent service is placed on November 30, 2000, the incumbent service cancellation will be effective December 31, 2000 and will require Industry Canada to pay monthly recurring charges of \$87,439.00 for the month of December 2000, and early service cancellation charges of \$38,679.92; and
- b. **Staff Overtime to Support Implementation.** Industry Canada's ATM Service maintenance windows generally occur once each week from Saturday at 6pm to Sunday at 9am. The testing of the new ATM Service shall be performed during these maintenance windows. It is estimated that three (3) Industry Canada personnel will be required for 6 full maintenance windows to effect the cut-over from the existing service to the new service. The average hourly rate for the required personnel is \$100/hour and a 15 hour shift is assumed. Therefore, the total estimated staff overtime cost for implementation is \$100/hour \* 15 hours \* 3 persons \* 6 maintenance windows = \$27,000.

[Article 24.2.6]

The Bid Price will be the sum of Year 1 through Year 7 totals provided by the Bidder in the pricing response spreadsheets (Annex D to this RFP). Transition costs will be added, as applicable to the Bid Price in order to arrive at the Total Evaluated Bid Price.

[Article 25.1]

The selection of the successful Bidder will be made on the basis of best overall value, where best overall value is defined as the highest combined rating of price and technical merit as determined using the Selection Methodology detailed below.

[Article 25.2.1]

The selection of the winning Bidder is determined by a 90/10 ratio of the price and technical score respectively.

[Part B, "Terms and Conditions of any Resulting Contract and Service Orders", intended to form the basis of any resulting contract]

[Article 5.1]

The Contract period during which Orders may be placed against this Contract, shall be for a period of three (3) years from the date specified at page 1 of this Contract.

On June 22, 2000, AT&T objected in writing to the Department about the inclusion of "transition costs" in the evaluation of non-incumbent bidders' proposals.

On June 28, 2000, the Department answered question 6c in amendment No. 005 as follows:

[Q6c] If, for whatever reason, the award of the contract slips beyond the anticipated date, such that the current contract cannot be cancelled on October 31, 2000,<sup>[8]</sup> will all bids be re-evaluated to remove the imposed transition costs?

[A6c] It is not anticipated that the contract award will slip beyond the anticipated date. However, in the event that the date slips, bids will not be re-evaluated to remove or revise the imposed transition costs, as it is not anticipated that the imposition of transition costs will provide an unfair advantage to the incumbent.

## MOTION

In its motion, the Department made extensive submissions concerning the Tribunal's jurisdiction to consider this complaint under the AIT, NAFTA and the AGP. In the Tribunal's opinion, the complaint raised by AT&T can be decided completely under the AIT. Although the Tribunal requested parties' submissions on the applicability of the AGP and NAFTA, it does not believe that it has sufficient information to address whether the provisions of these two trade agreements apply to this procurement. Accordingly, only the submissions made by the parties in relation to the Tribunal's jurisdiction under the AIT are summarized below.

With respect to AT&T's allegation that the imposition of "transition costs" on non-incumbent bidders constitutes a breach of Articles 504 and 506 of the AIT, the Department submitted that Article 504(2) of the AIT does not prohibit measures that are provincially and regionally neutral. Furthermore, the Department submitted that adding "transition costs" to the proposals of non-incumbent bidders, as such, is geographically neutral and, therefore, allowable under the AIT. The Department further

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8. This question was asked prior to the issuance of amendment No. 016 that postponed the anticipated date of cancellation to November 30, 2000.

submitted that, because AT&T has not alleged that adding “transitions costs” to the proposals of non-incumbent bidders discriminates against those non-incumbent bidders on the basis of province or region, AT&T’s complaint in this regard cannot establish a breach of the AIT. Therefore, this ground of complaint should be dismissed.

In its response, AT&T submitted that Articles 101(3) and 501 of the AIT require that the AIT obligations be interpreted so as to ensure that all potential bidders are treated equally. AT&T argued that, when read together, Articles 504 and 506(6) of the AIT also require that all suppliers of goods and services receive equal treatment and that regional bias is not a necessary or relevant consideration. AT&T submitted that the Department’s narrow interpretation of Article 504 of the AIT would allow the federal government to adopt virtually any discriminatory measure in a procurement, so long as the measure was geographically neutral.

In the alternative, AT&T submitted that the facts set out in its complaint make it clear that the RFP discriminates against suppliers on the basis of province or region by only imposing “transition costs” on non-incumbent bidders. AT&T submitted that the obligation to provide reciprocal non-discrimination, like national treatment, is absolute.

Article 504(1) of the AIT provides, in part, that, with respect to measures covered by Chapter Five, each party shall accord to the goods and services of any other party treatment no less favourable than the best treatment that it accords to its own such goods and services and shall accord the suppliers of goods and services of any other party treatment no less favourable than the best treatment that it accords to its own suppliers of such goods and services.

Article 504(2) of the AIT indicates that, with respect to the federal government, Article 504(1) means that it shall not discriminate: (a) between the goods or services of a particular province or region and those of any other province or region; or (b) between the suppliers of such goods or services of a particular province or region and those of any other province or region.

As indicated above, in the context of the Department’s motion filed on August 3, 2000, two opposite views of the scope of Article 504(2) of the AIT have been advanced by the parties. According to the Department’s position, Article 504(2) is limited to prohibiting discrimination based on province or region. It does not prohibit measures that are provincially or regionally neutral. AT&T, for its part, submitted that it is measures that have discriminatory effects that are prohibited.

In the Tribunal’s opinion, Article 504(2) of the AIT must be read in the context of Chapter Five of the AIT. Article 501 provides, in part, that, consistent with the principles set out in Article 101(3),<sup>9</sup> the purpose of Chapter Five is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency. Article 500 indicates that Article 403 applies to Chapter Five. Article 403 provides, in turn, that each party shall ensure that any measure that it adopts or maintains does not operate to create an obstacle to internal trade.

These provisions must be read together. They must also be read in a way that promotes the attainment of the objectives and purposes of the AIT and Chapter Five. Such an interpretation conforms to the principles of interpretation of domestic legislation<sup>10</sup> as well as to the principles of interpretation of

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9. Article 101(3) provides, in part, that, in the application of the AIT, the parties shall be guided by certain principles, notably that they will not establish new barriers to internal trade and will facilitate the cross-boundary movement of persons, goods, services and investments within Canada and that they will treat persons, goods, services and investments equally, irrespective of where they originate in Canada.

10. *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12.

international treaties.<sup>11</sup> The thrust of these provisions clearly favours an interpretation of Article 504(2) of the AIT under which measures that discriminate between goods, services or suppliers are prohibited, whether these measures are provincially or regionally neutral or not. Indeed, discrimination, even if not based on location criteria and provincially and regionally neutral, may prevent equal access for all Canadian suppliers.

This interpretation of Article 504(2) of the AIT is supported by Article 504(3), which provides an illustrative list of measures that are inconsistent with Article 504(2). The examples comprised in that list clearly demonstrate that it is the measures that have discriminatory effects that are prohibited by Article 504(2). One such example is found in Article 504(3)(g), which prohibits the unjustifiable exclusion of a supplier from tendering. In the Tribunal's view, the scope of Article 504(3)(g), a broad provision, cannot be limited to exclusions based on the location of a supplier. This is demonstrated by the existence of Article 504(3)(a) that already covers such exclusions based on the location of a supplier.<sup>12</sup> Given the existence of Article 504(3)(a), to be meaningful, Article 504(3)(g) must cover situations where discrimination is not based on location.

The broad purview of the prohibition against discrimination is also highlighted by the existence of Article 504(3)(b) of the AIT. That article prohibits the biasing of technical specifications in favour of, or against, particular goods or services, or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of Chapter Five. To limit this prohibition against technical bias to cases where such discrimination results in discrimination along provincial or regional lines would be unsupported. This would mean that a government institution could use blatantly restrictive technical specifications in order to favour one specific supplier over all the others. Such a behaviour, if it were permissible, would render meaningless the other provisions of Chapter Five aiming at transparent and effective procurements.

Therefore, given the purpose of Chapter Five and in light of Article 504(3) of the AIT, it is the Tribunal's view that Article 504(2) prohibits discrimination whether or not provincially or regionally neutral.

## **VALIDITY OF THE COMPLAINT**

### **Department's Position**

The GIR indicated that Industry Canada currently operates 68 sites that are affected by the procurement in issue. This includes 14 regional backbone sites and 54 district offices. Currently, the 14 regional backbone sites are using ATM services, and the 54 district offices are using Frame Relay and DS-1 leased line services for their telecommunication requirements. The facilities management contract for ATM services was scheduled to expire on October 31, 2000.<sup>13</sup> The service agreement for the Frame Relay is secured on a month-to-month basis, while the DS-1 leased line service agreement will expire on January 31, 2001.

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11. Article 31 of the *Vienna Convention on the Law of Treaties* provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. See *Brookfield LePage Johnson Controls Facility Management Services* (6 September 2000), PR-2000-008 and PR-2000-021 (CITT) at 17.
  12. Article 504(3)(a) of the AIT prohibits, as inconsistent with Article 504(2), the imposition of conditions on the invitation to tender, registration requirements or qualification procedures that are based on the location of a supplier's place of business or the place where the goods are produced or the services are provided or other like criteria.
  13. Treasury Board has agreed to a short-term extension to the period of contract for the ATM services under the Facilities Management Contract as a result of delays incurred due to the procurement complaint and inquiry.



According to the GIR, it is necessary for Industry Canada to upgrade its telecommunication services to ATM speeds to resolve operational difficulties. In this context, according to the GIR, the timing of this solicitation was designed to avoid potential problems associated with year-end holidays, keeping in mind Industry Canada's network requirements during fiscal year end and its desire to avoid any disruption associated with the transition to new telecommunication services. Therefore, October 31, 2000, was identified as the anticipated cancellation date for the existing Frame Relay and DS-1 leased line services. Furthermore, again according to the GIR, because Industry Canada did not budget for the extra costs associated with moving away from the incumbent supplier of the telecommunication services, it has decided to include the costs for such change in the solicitation documents in the form of "transition costs" to be considered in evaluating proposals, thereby, effectively, amortizing them over the seven-year life of the new contract.

The Department submitted that the tendering procedures, including the treatment of "transition costs", were applied in a non-discriminatory manner. The Department indicated that it was assumed that the incumbent supplier's financial proposal would be structured to absorb the Frame Relay and DS-1 services cancellation costs, just as other bidders' financial proposals would be structured to absorb the transition costs, over the seven-year life of the contract. As for the staff overtime costs, the Department submitted that they represent the costs for private sector contractors that will be incurred by Industry Canada for the transition from the incumbent-supplied ATM services at Industry Canada's 14 backbone sites to ATM services being provided at these sites by a successful non-incumbent bidder. The Department submitted that, if the incumbent supplier were the successful bidder, there would be no costs associated with the transition of ATM services at the backbone sites. The Department asserted that the "transition costs" were minimized and indicated that they represent significantly less than 0.5 percent of the estimated value of the seven-year contract.

The Department submitted that Article 504 of the AIT does not prohibit the imposition of "transition costs" on non-incumbent bidders. The Department reiterated the position that it stated in its motion. Because the addition of "transition costs" to the proposals of non-incumbent bidders is geographically neutral, it does not breach Article 504, and such measures can be taken into account in the evaluation of tenders, as allowed by Article 506(6) of the AIT.

The Department submitted that one means of reducing purchasing costs, while maintaining a competitive procurement process, is to have non-incumbent bidders absorb the "transition costs" associated with moving away from an incumbent supplier. The Department argued that Article 501 of the AIT constitutes a direction to contracting authorities to reduce purchasing costs and that transition costs are a way to achieve this goal within the framework of competitive bidding. Accordingly, it argued that the Tribunal should exercise its discretion in a manner that recognizes the cost reduction objective stated in Article 501.

The Department submitted that the Tribunal in File Nos. PR-98-012 and PR-98-014.<sup>14</sup> PR-96-037,<sup>15</sup> PR-98-033<sup>16</sup> and PR-98-039<sup>17</sup> has recognized that the consideration of "transition costs" in the evaluation of proposals is a relevant and acceptable aspect of reducing purchasing costs and does not constitute a discriminatory practice. The Department asserted that transition costs include the additional costs incurred by government when moving from one product (the incumbent product) to a new product, which additional costs would not be incurred if the government procured more of the incumbent product. Similarly, transition costs include the additional costs incurred by government when moving from one supplier (the incumbent supplier) to a new supplier, which additional costs would not be incurred if the

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14. *Corel Corporation, Determination* (26 October 1998), *Statement of Reasons* (6 November 1998) (CITT).

15. *Sybase Canada, Determination* (30 July 1997) (CITT).

16. *Polaris Inflatable Boats (Canada), Determination* (8 March 1999) (CITT).

17. *Wescam, Determination* (19 April 1999) (CITT).

incumbent supplier continued to supply the required goods or services. In this context, the Department submitted that Industry Canada would only incur the transition costs in issue if a non-incumbent supplier of ATM services were the successful bidder.

### **AT&T's Position**

In addressing the Department's assertion that the "transition costs" only represent a very small portion of the estimated value of the contract, AT&T submitted that the obligations in the trade agreements do not include a *de minimis* threshold of permissible discrimination that would justify the application of modest transition costs. In addition, AT&T noted that the Department's statement about the importance of the transition costs appears to be inconsistent with the Department's Transition Cost Policy, which indicates that "transition costs" are to be added if they are considered "significant". AT&T further submitted that it operates in a highly competitive environment where price competition is extremely important and price consideration plays a major role in preparing and submitting bids.

Moreover, AT&T submitted that the imposition of "transition costs" on non-incumbent bidders will clearly discriminate against all non-incumbent bidders. AT&T argued that, in this instance, "transition costs" are misnamed because these costs will be imposed on non-incumbent bidders regardless of whether they are actually incurred by Industry Canada.

With respect to the cancellation costs, AT&T submitted that Article 7.3 of the RFP allows the incumbent supplier to choose to maintain the competitive advantage of imposing transition costs on non-incumbent bidders. With respect to the staff overtime costs, AT&T submitted that the statement in the GIR that these costs relate to services to be provided by private sector contractors is at odds with the wording of Article 23.8.2.b of the RFP, which talks about "Industry Canada personnel". AT&T submitted that no details were provided by the Department to explain the amount of the staff overtime costs. AT&T claimed that those costs are excessive, should not be incurred as overtime charges and cannot legitimately be imposed only on non-incumbent bidders because they will be incurred regardless of which potential supplier actually wins the RFP.

AT&T submitted that the application of "transition costs", *prima facie*, violates the obligations of the trade agreements. Therefore, AT&T submitted, their use must be strictly controlled to ensure that their application does not result in a violation of the trade agreements. AT&T, recognizing that the Tribunal has considered that "transition costs" may be permissible in particular cases, submitted that the issue is to determine under what circumstances "transition costs" can legitimately be imposed. Based on its analysis of previous Tribunal decisions, AT&T submitted that "transition costs" may only be imposed on non-incumbent suppliers if the procurement could result in goods or services being procured from a non-incumbent supplier which differ from the goods or services currently supplied by the incumbent supplier and if actual costs are associated with the transition from the old to the new goods or services. AT&T submitted that a third condition should apply, namely, that "transition costs" should only be permitted in cases where such costs will actually be incurred.

AT&T submitted that the above circumstances do not apply to this case because it concerns a possible shift from one supplier to another in a case where government is procuring a new service, regardless of whether the service is procured from the incumbent supplier or from a non-incumbent supplier. The cancellation costs set out in the RFP are not comprised of real costs that will be incurred by government, but include potential costs associated with the early termination of a contract, a matter entirely within the government's control. As regards the staff overtime costs, they are inflated and would be incurred in any event. Therefore, AT&T submitted that the "transition costs" set out in Article 23.8.2 of the RFP should not be considered legitimate transition costs.

## TRIBUNAL'S DECISION

Section 30.14 of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its consideration to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the AIT.

As indicated in the section of this statement of reasons dealing with the motion filed by the Department on August 3, 2000, in the Tribunal's opinion, Article 504(2) of the AIT prohibits discrimination, regardless of geographic neutrality. As regards the procurement in issue, it is the Tribunal's view that the provisions of Articles 23.8.2.a and 7.3 of the RFP concerning cancellation costs are discriminatory in their effects. The Tribunal understands that Industry Canada may incur costs in terminating the Frame Relay and DS-1 leased line service agreements that bind it to the incumbent. The Tribunal also understands that Industry Canada is looking towards recovering certain of these costs over the duration of the new contract. However, in the Tribunal's opinion, factoring into an upcoming procurement, obligations derived from a previous contract with the incumbent supplier, particularly when the incumbent is competing for the upcoming contract, is an exercise that warrants great care under the AIT, which mandates transparency and equal access and treatment for all bidders.

The Tribunal is of the view that the provisions of Article 23.8.2.a of the RFP, as clarified in the Department's answer 6c and amended Article 7.3 of the RFP, are discriminatory. These provisions, in fact, establish two classes of bidders. The incumbent bidder knows with certainty that all the proposals of non-incumbent bidders will be increased by a fixed amount for evaluation purposes, knows that the fixed amount will apply, in full, to their proposals whether or not any cancellation charges are incurred by Industry Canada and has the ability to decide whether to waive the cancellation costs in formulating its pricing proposal. On the other hand, the bidders in the non-incumbent class will not know before bid closing which option the incumbent bidder will use in formulating its pricing proposal. Furthermore, the non-incumbents will not know the full impact of the cancellation charges in formulating their pricing proposals, given the uncertainty of the contract award date. As a result, a non-incumbent bidder finds itself at a clear disadvantage due to the strategically advantageous position afforded the incumbent bidder by the choice that it has by virtue of Article 7.3 of the RFP. In the Tribunal's opinion, the effects of Articles 7.3 and 23.8.2.a and answer 6c are discriminatory in the context of Chapter Five of the AIT.

The Tribunal notes as well that the cancellation costs described in Article 23.8.2.a of the RFP are not "transition costs" as this expression has been used by the Tribunal in File Nos. PR-98-012, PR-98-014, PR-98-033 and PR-98-039. The above references concern instances where the Tribunal stated that potential suppliers, offering products or services different from those already possessed by the requisitioning entity, could be required to absorb certain costs in an attempt to offset the impact on their bids of material advantages gained by government entities through the previous acquisitions of such goods and services, advantages which government entities value and can elect to consider as part of their statement of requirements and evaluation criteria. These references demonstrate the fact that in public procurements, government entities often proceed with their acquisitions from an existing goods and/or services base commonly referred to as the "installed base" that has value to them. They need not and frequently choose not to ignore that installed base in formulating their requirements and the criteria to identify a successful proposal. Awarding a contract to a non-incumbent bidder would mean a departure from that "installed base" that could give rise to additional costs that the buying department is under no obligation to absorb and may wish to pass on to the non-incumbent supplier. The Tribunal has characterized these costs as "transition costs" and has acknowledged their validity.

In the Tribunal's opinion, the cancellation costs referred to in Article 23.8.2a of the RFP are not "transitions costs". In this instance, Industry Canada does not want to maintain the system that it already possesses, but wants to do away with the incumbent's outdated and inefficient Frame Relay and DS-1 leased line services. Furthermore, the early date for the initiation of the present contract was the choice of Industry Canada and, as such, is not, in the view of the Tribunal, a legitimate transition cost to be borne by non-incumbent suppliers. Consequently, in the Tribunal's opinion, the cancellation costs described in Article 23.8.2a of the RFP are not transition costs. Because these costs are discriminatory, they constitute a breach of Article 504(2) of the AIT.

In the Tribunal's opinion, the provisions of Articles 7.3 and 23.8.2.a of the RFP also breach the provisions of Article 506(6)<sup>18</sup> of the AIT. First, they prescribe as an evaluation criterion certain costs that are not directly related to the procurement at hand. In fact, they relate to a previous contract for Frame Relay and DS-1 leased line services and not the procurement of ATM services. Second, the approach set out in Article 7.3 of the RFP is not clear for all bidders. The non-incumbent bidders do not know which option the incumbent bidder will choose. Considering that the solicitation at issue is essentially a competition for the provision of fixed rates among qualified ATM service providers, a highly competitive industry, in the Tribunal's opinion, knowledge of this choice amounts to significant information in bidding. To further exacerbate the situation, the rules governing the selection of the successful bidder in Article 25.2.1 of the RFP specify a 90/10 ratio favouring price over technical scores.

With respect to the "staff overtime costs" referred to in Article 23.8.2.b of the RFP, in the Tribunal's opinion, these costs could have been viewed as "transition costs" if they represented additional costs that would be incurred by Industry Canada if it were to depart from the "installed base". These costs could legitimately be assigned to non-incumbent bidders in offsetting advantages that Industry Canada has by virtue of its "installed base" for ATM services at its 14 regional backbone sites. However, in the Tribunal's opinion, the nature of the services to be provided and the quantum of related costs have not been properly substantiated, contrary to the transparency requirements of Articles 501 and 506(6) of the AIT.

With respect to the appropriate remedy in the present case, the Tribunal is aware of the special provisions that the Department introduced late in the bidding process, concerning the formulation by all potential suppliers of alternate pricing proposals (PRICING PROPOSALS "B"). Article 19.2.1 and Articles 24.2.7.1 and 2 of the RFP relate to those alternate pricing proposals and require that the submission of alternate proposals not take into consideration the provisions of Articles 7.3 and 23.8.2 of the RFP relating to the cancellation costs and staff overtime costs. Since these provisions are in breach of the AIT, they should not be taken into account by the Department in evaluating the proposals. Therefore, the Tribunal recommends, as an appropriate remedy, that, in identifying a successful bidder for this solicitation and recommending it for award, the Department evaluate the PRICING PROPOSALS "B" submitted by the bidders.

The Tribunal notes that, as acknowledged by the parties, the ground of complaint relating to the Department's refusal to grant the request by AT&T to extend the time to submit the proposals by four weeks is now moot. This is a consequence of the Department's decision, taken after the filing of the complaint, to extend the deadline for the submission of proposals. There has been an important exchange of correspondence between the parties on the matter of the costs with respect to the ground of complaint relating to the refusal to grant the requested time extension. Given that the Tribunal has determined that the complaint is valid, AT&T will be awarded its costs, including those relating to that ground of complaint.

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18. "In 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."

**DETERMINATION OF THE TRIBUNAL**

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

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that the Department, in evaluating the proposals received in response to this solicitation and in identifying a successful bidder to be recommended for contract award, ignore the pricing proposals that take into consideration the transition costs in Article 23.8.2 of the RFP and, instead, evaluate the alternate pricing proposals (PRICING PROPOSAL "B") already submitted by potential suppliers pursuant to Article 19.2.1 of the RFP.

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

Patricia M. Close  
Patricia M. Close  
Presiding Member

Pierre Gosselin  
Pierre Gosselin  
Member

Richard Lafontaine  
Richard Lafontaine  
Member