



Ottawa, Friday, September 12, 2003

**File No. PR-2003-013**

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

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

### 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 not valid.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Canada Customs and Revenue Agency its reasonable costs incurred in relation to responding to the complaint, which costs are to be paid by Montage-DMC eBusiness Services, A Division of AT&T Canada.

Meriel V.M. Bradford

Meriel V.M. Bradford  
Presiding Member

Richard Lafontaine

Richard Lafontaine  
Member

James A. Ogilvy

James A. Ogilvy  
Member

Michel P. Granger

Michel P. Granger  
Secretary

Date of Determination and Reasons: September 12, 2003

Tribunal Members: Meriel V.M. Bradford, Presiding Member  
Richard Lafontaine, Member  
James A. Ogilvy, Member

Senior Investigation Officer: Peter Rakowski

Counsel for the Tribunal: Michèle Hurteau

Complainant: Montage-DMC eBusiness Services, A Division of AT&T Canada

Intervener: Cognos Incorporated

Counsel for the Intervener: Ronald D. Lunau  
Catherine Beaudoin

Government Institution: Canada Customs and Revenue Agency

Counsel for the Government Institution: David M. Attwater



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

## STATEMENT OF REASONS

### COMPLAINT

On April 30, 2003, Montage-DMC eBusiness Services, A Division of AT&T Canada (Montage) 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> The complaint concerned a procurement by the Canada Customs and Revenue Agency (CCRA) (Solicitation No. 1000160306) for the provision of a licensing and support arrangement for business intelligence software.

Montage submitted that the CCRA violated the provisions of the applicable trade agreements by failing to properly apply the published evaluation criteria, in that it incorrectly concluded that Montage's proposal was non-compliant. Montage also submitted that the CCRA failed to clearly identify the evaluation criteria by including language that was ambiguous or which allowed more than one reasonable interpretation in relation to requirements for "firm unit prices" and "incremental purchasing". Montage further submitted that the CCRA failed to follow the sequenced evaluation process identified in the tender documents and conducted the evaluation in a manner that failed to ensure equal access to the procurement for all Canadian suppliers.

Montage requested that the awarded contract be terminated and that the bids be re-evaluated. Montage also requested that, if, following the re-evaluation, its proposal is the highest-rated proposal, the designated contract be awarded to Montage. In the alternative, Montage requested that it be compensated by an amount equal to its lost profit and lost opportunity, and requested its costs incurred in preparing a response to the solicitation, as well as its costs relating to these proceedings.

On May 7, 2003, the Tribunal informed the parties that the complaint had been accepted for inquiry pursuant to subsection 30.13(1) of the *CITT Act* and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>2</sup> On May 23, 2003, the Tribunal granted Cognos Incorporated (Cognos) intervener status and, on May 26, 2003, following a request from the CCRA, the Tribunal granted an extension for filing the Government Institution Report (GIR). On June 9, 2003, the CCRA filed a GIR with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>3</sup>

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. S.O.R./91-499.

On June 16, 2003, Cognos filed its comments on the GIR and, on June 19, 2003, Montage filed its comments on the GIR.

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 December 18, 2002, the CCRA made a Request for Proposal (RFP) available through MERX, Canada's Electronic Tendering Service. The RFP was issued in order to acquire a licensing and support arrangement for business intelligence software.

Section 3.3.3 of the RFP reads, in part:

The following methodology will be employed in evaluating the proposals received. The evaluation process is subdivided into the following phases:

### **Phase 1: Terms and Conditions and Technical Proposal – Evaluation of Mandatory Requirements:**

- (a) Each proposal shall be reviewed for compliance with all mandatory requirements of this RFP by ensuring:
  - i). All mandatory requirements stated in Sections 1, 2, 4 and 5 of the main body of this RFP and in the SOR [Canada Customs and Revenue Agency, Statement of Functional (Business and Technical) Requirements] are met.
  - ii). The Technical Proposal narrative response for each article demonstrates and supports that the proposal meets the mandatory requirements of the SOR;
  - iii). a financial proposal has been completed in accordance with Annex "C". This will also be verified during the financial evaluation phase.
  - iv). the submission of all mandatory document(s) and mandatory information required in this RFP, including the SOR.
- (b) During any phase of the evaluation, if a mandatory requirement is not complied with, the proposal will be deemed non-compliant and will receive no further consideration. A proposal will be deemed non-compliant if it is not supported by proper and adequate information detailing how the response complies with the mandatory requirements.

Mandatory requirement M-106, found in section 3.11.1 of Annex A to the RFP, reads as follows:

The bidder must offer incremental purchasing of licenses up to a ceiling defined by the enterprise licensing model, at which threshold the enterprise licensing model will come into effect.

The solicitation closed on February 6, 2003. Five proposals were received from four different firms. On February 6, 2003, the contracting officer performed an initial review of the proposals for compliance with the mandatory requirements. Two proposals, including Montage's proposal, were found non-compliant with the mandatory requirements.

On April 14, 2003, the contract was awarded to Cognos. On that same date, Montage was advised that its proposal had been found non-compliant with the mandatory requirement to propose a firm unit price per unique user, as per Annex C to the RFP.

On April 24, 2003, a debriefing for Montage was held and, on April 30, 2003, Montage filed its complaint with the Tribunal.

## **POSITIONS OF PARTIES**

### **CCRA's Position**

The CCRA submitted that Montage's proposal was declared non-compliant in a manner consistent with the evaluation criteria stipulated in the RFP. According to the CCRA, the evaluation process, found at section 3.3.3 of the RFP, is divided into five phases. Phase 1, at paragraph 3.3.3(a), provides, in part:

Each proposal shall be reviewed for compliance with all mandatory requirements of this RFP by ensuring:

- iii). a financial proposal has been completed in accordance with Annex "C". This will also be verified during the financial evaluation phase.

The CCRA submitted that Phase 1 of the evaluation process included a review of the financial proposals to ensure that they were completed in accordance with Annex C to the RFP. The CCRA also submitted that paragraph 3.3.3(b) of the RFP allows for proposals to be deemed non-compliant at any phase of the evaluation if they do not comply with a mandatory requirement. Thus, according to the CCRA, the contracting officer performed an initial review of the financial proposals, as per subparagraph 3.3.3(a)iii), to ensure that they were completed in accordance with Annex C.

The CCRA submitted that the contracting officer reviewed Montage's proposal and determined that it was not completed in accordance with Annex C to the RFP and that it was in breach of mandatory requirement M-106 because it failed to follow the pricing structure of Annex C. The CCRA submitted that the proposal was not released to the technical evaluation team. The CCRA also submitted that paragraph 3.3.3(g) of the RFP required bidders to provide a "price or rate" (i.e. single price or rate) for all items in Annex C. The CCRA argued that the requirement of a single unit or lot price is confirmed by the column headings "FIRM UNIT PRICE" and "FIRM UNIT OR LOT PRICE" at Annex C. According to the CCRA, Montage's proposal provided two different rates for items 1 and 3 to 6 of Annex C and, thus, it was declared non-compliant with the mandatory requirements of the RFP. According to the CCRA, Montage revised Annex C by adding a new column, titled "Evaluated Price", and told the CCRA what the evaluated price should be. In addition, Montage's proposal used two different methods to calculate the evaluated price.

The CCRA argued that Montage's proposal demonstrated that it clearly understood how proposals were to be evaluated, since its financial proposal added the evaluated prices to calculate a total evaluated price. The CCRA submitted that, as per paragraph 3.3.3(h) of the RFP, the cost per point was calculated by "dividing the total evaluated price . . . by the total points awarded" and stated that no bidder requested clarification on the pricing structure of Annex C to the RFP.

The CCRA further submitted that paragraph 2.6.1(d) of the RFP ensures that the annual cost for maintenance and support under the enterprise licence, with more than 8,000 licence users, is relatively less than or equal to the annual cost for maintenance and support paid by the CCRA prior to it obtaining the enterprise licence. Paragraph 2.6.1(d) states:

It is mandatory that the Unit Cost for Maintenance and Support for items 7, 8, and 9 in Annex "C" be equal to or less than the lowest of the costs for Items 3, 4, 5 or 6 multiplied by 8,000.

According to the CCRA, for evaluation purposes, paragraph 2.6.1(d) of the RFP required the CCRA to multiply the firm unit price proposed by a bidder for items 3 to 6 by 8,000 and to compare the resulting product to the annual prices quoted by the bidder for items 7, 8 and 9. In the CCRA's view, paragraph 2.6.1(d) was reasonably understood by bidders to mean that they were required to submit a single firm unit price for all named items. Similarly, the formula for calculating the total evaluated price used to calculate the cost per point was further indication of the requirement to submit a single firm unit price for all items in Annex C to the RFP. Moreover, the CCRA submitted that paragraph 3.3.3(g), when considered within the entire context of the RFP, is reasonably interpreted to require either a single firm unit price, single firm lot price or single per diem rate per item of Annex C. Accordingly, the CCRA submitted, Montage's proposal was properly declared non-compliant with the mandatory requirement to provide a single firm unit price per unique user for item 1 and a single firm annual price per user ID for items 3 to 6 of Annex C.

The CCRA expressly denied that the RFP is ambiguous as to the requirement for a single firm unit or lot price. The CCRA submitted that, considered in context, the RFP does not reasonably allow for more than one price per item of Annex C to the RFP. In the alternative, the CCRA submitted, any ambiguity in the RFP is apparent on its face and, thus, Montage's complaint about ambiguity missed the filing deadline imposed by section 6 of the *Regulations*.

The CCRA submitted that Montage's proposal did not offer incremental purchasing of software licences, but rather requires the CCRA to pay for unlimited access, as with an enterprise licence, with the purchase of the first licence. According to the CCRA, Montage's proposal requires a single purchase of all software licences. Instead of offering incremental purchasing of software licences, Montage is selling an enterprise licence.

Finally, the CCRA requested that it be awarded its costs for responding to the complaint.

### **Montage's Position**

Montage argued that the CCRA applied criteria in a manner inconsistent with the criteria set out in the tender documentation when it evaluated its proposal. It submitted that the CCRA failed to clearly identify certain mandatory requirements and to follow the prescribed evaluation process. Finally, Montage submitted that the CCRA conducted the evaluation in a manner that did not ensure equal access to all suppliers.

Montage submitted that its proposal contains firm unit and firm lot pricing and that the key requirement in this case is set out at paragraph 2.6.1(a) of the RFP, which required bidders to quote "firm unit prices, firm lot prices or firm per diem rates for all items listed in Annex 'C'". Montage further submitted that the plain meaning of this provision is properly interpreted to require per unit pricing, under which pricing is fixed or certain. According to Montage, its proposal would have permitted the CCRA to fulfil all its operational and licensing requirements.

Montage further submitted that, if the CCRA required a single firm unit price per unique user, as is argued in the GIR, the CCRA should have incorporated language to this effect in the RFP. According to Montage, the GIR inserts the word "single" in front of references to "firm unit prices", which highlights the absence of this term from the RFP and illustrates the significance of its absence. Montage submitted that, if the CCRA required a single price per unique user, it should have so specified in the RFP. The failure to do so is not grounds to reject a bid that complies with the "firm unit prices" requirement.

Montage submitted that, in cases where there is doubt regarding the meaning of a particular term, it is a fundamental canon of contractual construction that the term in question should be construed *contra preferentem*, i.e. against the party that drafted the provision.

Montage submitted that, in this case, the meaning of “firm unit prices” and “firm lot prices” is clear and that its proposal complies with these requirements. However, in the event that the Tribunal finds the meaning ambiguous, Montage submitted, the Tribunal should apply the *contra preferentem* rule and find against the CCRA on this issue.

According to Montage, the pricing of its proposal was fixed at a set amount which permitted the CCRA to know in advance the exact cost of acquiring the licences, and the CCRA structured the evaluation criteria so that evaluation value used to calculate the lowest cost per point was based on the quantity specified in Annex C of the RFP.

Montage submitted that its proposal offered incremental purchasing and submitted that its proposal does allow for incremental purchasing. According to Montage, the CCRA substitutes the term “incremental purchasing” for “incremental pricing” in the GIR.

According to Montage, the issuance of separate invoices for each subsequent unique user up to the enterprise level is not “unreasonable” but, rather, necessary to authorize use of the licences by the CCRA, to track the number of licences acquired up to the enterprise level and for Montage to reconcile the licensing transactions with the software publisher, Business Objects.

According to Montage, the GIR mischaracterizes the legal structure of the pricing and licensing provided for in Montage’s proposal and, as a matter of law, it is incorrect to state that the CCRA acquires unlimited access to licences and maintenance with the purchase of the first licence. Thus, Montage submitted, to the contrary, the CCRA would be required to purchase each subsequent licence and the associated maintenance before becoming legally entitled to use the licence and acquire the associated maintenance. According to Montage, there is a financial incentive for the CCRA to proceed with the acquisition of subsequent licences up to the enterprise level. However, Montage submitted, this does not change the fact that its proposal allowed for incremental purchasing.

Montage submitted that the GIR raised new grounds of non-compliance relating to paragraphs 2.6.1(d) and 3.3.3(h) of the RFP and that they are not within the Tribunal’s jurisdiction. According to Montage, the GIR raised new and previously undisclosed grounds of non-compliance that were not communicated to Montage and are not related to the subject matter of the complaint. Montage stated that section 30.14 of the *CITT Act* stipulates that, “[i]n conducting an inquiry, the Tribunal shall limit its considerations to the subject-matter of the complaint.” Montage submitted that the CCRA is not permitted, in the context of an ongoing procurement inquiry, to advance *ex post facto* justifications for deeming a proposal non-compliant where the alleged non-compliance was never communicated to the supplier, and that this alleged ground of non-compliance is not included within the subject matter of the complaint. Montage submitted that all references contained in the GIR relating to paragraphs 3.3.3(h), regarding “Phase 4: Proof of Proposal”, and 2.6.1(d), regarding the cost formula for annual maintenance, should be disregarded in their entirety.

Alternatively, should the Tribunal determine that it does have jurisdiction to consider the CCRA’s claims regarding paragraphs 2.6.1(d) and 3.3.3(h) of the RFP, Montage submitted, its proposal complied with this provision. According to Montage, the annual cost for maintenance and support can be easily

calculated in accordance with the formula specified in paragraph 2.6.1(d), and the resultant price was included in its proposal. Montage also submitted that, in a previous case considering a similar issue, the Tribunal determined that the Crown could not deem a proposal non-compliant in such circumstances; to do so would be to permit form to prevail over substance.

Montage submitted that the CCRA failed to follow the evaluation process set out in the tender documents. According to Montage, the evaluation of the mandatory requirements found in section 3.3.3 of the RFP required the CCRA to review the proposals for compliance with all mandatory requirements of the RFP. Furthermore, Montage submitted, section 3.3.3 stipulated that, if, during any phase of the evaluation, a mandatory requirement was not met, the proposal “[would] be deemed non-compliant and [would] receive no further consideration.” If the CCRA had followed the methodology set out in the RFP, Montage argued, its proposal should not have been evaluated against Phases 3 and 4.

Montage expressly denied that its proposal was not compliant with all mandatory requirements of the RFP. Montage continued by stating that, when the CCRA decided that Montage’s proposal did not meet the requirements of Phase 1 of the evaluation process, the proposal should have received no further consideration, as section 3.3.3 of the RFP clearly stipulates. According to Montage, the subsequent assessment of its proposal against the evaluation criteria of Phases 3 and 4 is inconsistent with Article 506(6) of the *Agreement on Internal Trade*,<sup>4</sup> Article 1015(4)(c) of the *North American Free Trade Agreement*<sup>5</sup> and Article XII(4) of the *Agreement on Government Procurement*<sup>6</sup> and raises serious concerns about the conduct of the evaluation in this case.

### **Cognos’s Position**

Cognos submitted that Montage did not offer a firm unit price for items 1 and 3 to 6 of Annex C to the RFP, as required, but rather that Montage’s proposal essentially required the CCRA to buy an enterprise licence. Therefore, according to Cognos, Montage’s proposal was contrary to the requirements of the RFP.

### **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, it 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 case, are *NAFTA*, the *AIT* and the *AGP*.

Montage has alleged that the CCRA contravened the trade agreements in the following ways:

- The CCRA applied criteria in a manner inconsistent with the criteria set out in the tender documentation, contrary to Article 506(6) of the *AIT*, Article 1015(4)(d) of *NAFTA* and Article XIII(4)(c) of the *AGP*.

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4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [*AIT*].

5. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].

6. 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)> [*AGP*].



- Alternatively, the CCRA failed to clearly identify certain mandatory requirements, contrary to Article 506(6) of the *AIT*, Articles 1013(1)(h) and (j) of *NAFTA* and Articles XII(2)(h) and (j) of the *AGP*.
- The CCRA failed to follow the prescribed evaluation process, contrary to Article 506(6) of the *AIT*, Articles 1013(1)(h) and (j) of *NAFTA* and Article XIII(4)(c) of the *AGP*.
- The CCRA conducted the evaluation in a manner that did not ensure equal access to all suppliers, contrary to Article 501 of the *AIT*.

The Tribunal will address each of the grounds of complaint submitted by Montage.

With respect to Montage's allegation that the CCRA applied criteria in a manner inconsistent with criteria found in the tender documentation, the Tribunal has seen no evidence to support the conclusion that the criteria regarding "firm unit price" and "incremental purchasing" indicated in the RFP were applied in a manner inconsistent with the RFP. Furthermore, Annex C to the RFP, which bidders were required to complete as a mandatory requirement, clearly delineated the pricing elements on which bidders were required to provide information. The Tribunal also observes that paragraph 3.3.3(g) of the RFP states:

Failure, or refusal to provide a price or rate for any item in Annex "C" shall be considered as failing to meet a mandatory requirement of the RFP and therefore, the Bidder's proposal shall be given no further consideration.

Thus, the requirement to provide a price for all items in Annex C to the RFP is quite clear. Montage changed Annex C to fit its own pricing model and provided two prices in Annex C for item 1, "Data Exploitation Tool Solution License Agreement", for the firm price that was requested by the CCRA for each unique user. The Tribunal finds that the pricing model did not allow for bidders to provide two prices and that the requirement to provide a firm unit price that could be used for incremental purchasing was unambiguous. Given the structure of Montage's proposal with respect to this requirement and considering the requirements of the RFP in their entirety, the Tribunal is of the opinion that the CCRA did not act in a manner contrary to the RFP in declaring the proposal non-compliant. Accordingly, the Tribunal finds that Montage's complaint with respect to this ground is not valid.

Furthermore, with respect to Montage's alternative complaint that the CCRA failed to clearly identify certain mandatory requirements, the Tribunal is of the opinion that, if Montage had doubts regarding any of the mandatory requirements of this solicitation, it should have raised these questions during the bid process. Questions are permitted during the bid process stage for the purpose of assisting potential bidders in clarifying the requirements of the solicitation. Accordingly, the Tribunal is of the view that Montage had the opportunity to request the clarification of certain mandatory requirements and failed to do so. In addition, the Tribunal is of the view that Montage failed to file its complaint related to this ground within the time limits set out in subsection 6(1) of the *Regulations*. Thus, the Tribunal finds that this ground of complaint is late.

Montage has alleged that the CCRA gave Montage's proposal further consideration at Phase 3 of the evaluation process, despite the fact that it was found non-compliant at Phase 1 of the evaluation. According to Montage, this violates paragraph 3.3.3(b) of the RFP that stipulates that a proposal will be given no further consideration if it does not meet all the mandatory requirements. Thus, Montage alleges, CCRA did not follow the prescribed evaluation process. The Tribunal does not accept Montage's argument in this regard, since subparagraph 3.3.3(a)(iii) clearly indicates that each proposal, including a financial

proposal, shall be reviewed for compliance with all mandatory requirements. The Tribunal is of the view that the requirement to provide a price or rate is mandatory and that the proposal was properly reviewed to determine whether it met the requirement under paragraph 3.3.3(g). The Tribunal notes the CCRA's submission that it did not release the proposal to its technical evaluation team. The Tribunal is not convinced that the evidence on the record proves otherwise. Accordingly, the Tribunal finds that this ground of complaint is not valid.

Finally, Montage alleged that the CCRA conducted the evaluation in a manner that failed to ensure equal access to procurement for all suppliers, contrary to Article 501 of the *AIT*. No further particulars were provided. Upon review of Montage's allegation, the Tribunal finds that this ground is not supported by evidence. Accordingly, the Tribunal finds that this ground of complaint is not valid.

Given the above findings, the Tribunal does not consider it necessary to address the CCRA's claims regarding paragraphs 2.6.1(d) and 3.3.3(h) of the RFP.

In light of the foregoing, the Tribunal finds that the complaint is not valid.

The CCRA requested its costs of responding to this complaint. In response to the CCRA's request, the Tribunal awards the CCRA its reasonable costs incurred in relation to responding to this complaint.

#### **DETERMINATION OF THE TRIBUNAL**

Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards the CCRA its reasonable costs incurred in relation to responding to the complaint, which costs are to be paid by Montage.

Meriel V.M. Bradford

Meriel V.M. Bradford  
Presiding Member

Richard Lafontaine

Richard Lafontaine  
Member

James A. Ogilvy

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