Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

# Procurement

## DETERMINATION AND REASONS

File No. PR-2004-061

MTS Allstream Inc., Call-Net Enterprises Inc. and TELUS Communications Inc.

v.

Department of Public Works and Government Services

*Determination and reasons issued*
*Friday, August 5, 2005*

*Corrigendum issued*
*Friday, September 30, 2005*

Canada

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IN THE MATTER OF a complaint filed by MTS Allstream Inc., Call-Net Enterprises Inc. and TELUS Communications Inc. 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*.

**BETWEEN**

| | |
|---|---|
| **MTS ALLSTREAM INC., CALL-NET ENTERPRISES INC. AND TELUS COMMUNICATIONS INC.** | **Complainants** |

**AND**

| | |
|---|---|
| **THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES** | **Government Institution** |

## 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 terminate the existing tendering process and initiate a new solicitation as expeditiously as possible. The Canadian International Trade Tribunal further recommends that the new solicitation provide bidders with adequate information to allow them to submit responsive proposals and include time frames that do not unduly restrict the bidders' opportunity to submit proposals based on their own capabilities and expertise.

In the alternative, the Canadian International Trade Tribunal recommends that MTS Allstream Inc., Call-Net Enterprises and TELUS Communications Inc. be compensated by an amount that recognizes the opportunity that they have lost collectively or separately to participate meaningfully in the procurement as a result of the Department of Public Works and Government Services' breaches. If the Department of Public Works and Government Services elects to compensate the complainants for lost opportunity and the parties are unable to agree on an amount to be paid or the distribution thereof, then, within 30 days of notifying the Canadian International Trade Tribunal in accordance with section 13 of the *Canadian International Trade Tribunal Regulations* of their intention to do so, the parties may apply to the Canadian International Trade Tribunal for a determination of the amount of compensation.

Pursuant to subsection 30.15(4) of the *Canadian International Trade Tribunal Act,* the Canadian International Trade Tribunal awards all bidders that submitted proposals in response to solicitation No. EN994-045668/B their reasonable costs incurred in preparing their proposals.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards MTS Allstream Inc., Call-Net Enterprises Inc. and TELUS Communications Inc. their reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Public Works and Government Services. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 3, and its preliminary indication of the amount of the cost award is $4,100. If any party disagrees with

the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated by the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Zdenek Kvarda
Zdenek Kvarda
Member

Hélène Nadeau
Hélène Nadeau
Secretary

| | |
|---|---|
| Place of Hearing: | Ottawa, Ontario |
| Dates of Hearing: | May 12 and 13, 2005 |
| Tribunal Members: | James A. Ogilvy, Presiding Member<br>Pierre Gosselin, Member<br>Zdenek Kvarda, Member |
| Research Director: | Marie-France Dagenais |
| Investigation Officer: | Michael W. Morden |
| Counsel for the Tribunal: | Reagan Walker |
| Assistant Registrar: | Gillian E. Burnett |
| Complainants: | MTS Allstream Inc., Call-Net Enterprises Inc. and TELUS Communications Inc. |
| Counsel for the Complainants: | Kirsten Embree<br>Y. Monica Song<br>Amy McKinnon |
| Interveners: | Bell Canada<br>Cisco Systems Canada Co. |
| Counsel for Bell Canada: | Ronald D. Lunau<br>Catherine Beaudoin |
| Counsel for Cisco Systems Canada Co.: | Gordon LaFortune |
| Government Institution: | Department of Public Works and Government Services |
| Counsel for the Government Institution: | Susan D. Clarke<br>Alexander Gay<br>Elinor Hart<br>Christianne M. Laizner<br>Ian McLeod<br>Derek Rasmussen |

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# STATEMENT OF REASONS

## COMPLAINT

1. On March 23, 2005, MTS Allstream Inc., Call-Net Enterprises Inc. and TELUS Communications Inc. (TELUS) (collectively MTS) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.[1] The complaint concerned the procurement (Solicitation Nos. EN994-045668/A and EN994-045668/B) by the Department of Public Works and Government Services (PWGSC) of Local Access Services (LAS)[2] for Government of Canada (GoC) locations in the National Capital Area (NCA).

2. MTS alleged that PWGSC drafted portions of the Request for Proposal (RFP) in such a fashion as to ensure that all potential competing suppliers, apart from the incumbent, Bell Canada (Bell),[3] would be unable to submit compliant proposals and would therefore be excluded from consideration. Specifically, it alleged that the mandatory dialling plan requirement could not be satisfied by any supplier other than Bell; that the mandatory requirement to have approximately 177,000 directory numbers transitioned to the new supplier's network by the specified date of December 20, 2005, could not be satisfied, from any reasonable business perspective, by any supplier other than Bell; and that the RFP contained numerous other biases favouring Bell. MTS claimed that the combined effect of these grounds of complaint was to discourage meaningful competition and leads to the conclusion that the solicitation was designed to ensure that Bell continued to be the sole supplier of LAS to the GoC in the NCA.

3. MTS requested, as interim relief, that the Tribunal issue notices directing PWGSC not to consider any bids submitted by any bidder until the Tribunal had completed its review of the matter and directing PWGSC to postpone the award of any contract under the solicitation until the Tribunal had completed its review of the matter. It requested, as relief in the Tribunal's determination, that PWGSC cancel the existing RFP and issue a new solicitation. In the alternative, it requested that the Tribunal recommend that PWGSC amend the existing RFP by removing the discriminatory requirements or, in the further alternative, that PWGSC compensate MTS for lost opportunity. It also requested that the Tribunal award MTS its costs for preparing and proceeding with the complaint and such other relief as the Tribunal deemed appropriate. In addition, it requested that the Tribunal's process be expedited through the use of the express option in accordance with rule 107 with the *Canadian International Trade Tribunal Rules*.[4]

4. On April 4, 2005, the Tribunal informed the parties that the complaint had been accepted, having 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*.[5] The complaint was accepted on all grounds, and the Tribunal agreed to apply the express option to the proceedings. The same day, the Tribunal issued a postponement of award order. The Tribunal granted intervener status to Bell on April 14, 2005, and to Cisco Systems Canada Co. (Cisco) on April 27, 2005.

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. The Request for Proposal defined these services as including, among other things, a set of line features and functionality (call display, call waiting, voice mail, etc.), a dedicated dialling plan that reserves numbers commencing with a "9", a dialling plan that supports interoperability between Government of Canada numbers, retention of all assigned Government of Canada numbers, maintenance and support of the system, network management, call centre support, training and end-user documentation, and customer support.
3. In telecommunications parlance, Bell is known as an ILEC or "incumbent local exchange carrier". A competitor attempting to enter an area is known as a CLEC or "competitive local exchange carrier".
4. S.O.R./91-499.
5. S.O.R./93-602 [*Regulations*].

5. The parties submitted the following documents on the specified dates:

| | |
|---|---|
| April 13, 2005 | PWGSC requested that the deadline for filing the Government Institution Report (GIR) be extended until April 21, 2005. The Tribunal granted this request and, in accordance with paragraph 12(*c*) of the *Regulations*, extended the date to render its determination to 135 days from the date of filing of the complaint, i.e. by August 5, 2005. |
| April 21, 2005 | PWGSC submitted the GIR. |
| April 29, 2005 | MTS and Cisco submitted their respective comments on the GIR. |
| May 3, 2005 | MTS submitted its reply to Cisco's comments on the GIR. |
| June 9, 2005 | All parties submitted their post-hearing submissions. |
| June 13, 2005 | All parties submitted their comments on the other parties' June 9, 2005, submissions. |
| June 23, 2005 | MTS submitted its final comments. |

6. On May 12 and 13, 2005, the Tribunal held a hearing for the purpose of gathering information regarding some of the technical aspects and the regulatory framework affecting the subject solicitation. The Tribunal called two witnesses, MTS and PWGSC each called their own witnesses, and the parties were afforded the opportunity to cross-examine all witnesses. The Tribunal will now dispose of the complaint based on the written information and the testimony heard at the hearing.

**PROCUREMENT PROCESS**

7. A Letter of Interest (LOI) (EN994-045668/A) was published on MERX[6] on February 10, 2005. It stated that it was not a bid solicitation and that it was merely a means for PWGSC to provide information to the industry and to give advance notice that PWGSC was intending to publish a competitive requirement, seeking a single service provider to provide LAS throughout the NCA. There were two amendments, the second of which, dated February 18, 2005, cancelled the LOI, as the information contained in the RFP (EN994-045668/B), which was posted on MERX that same day, superseded the information in the LOI.

8. Solicitation No. EN994-045668/B was published on MERX on February 18, 2005, with a due date for receipt of bids of March 29, 2005, which was subsequently extended to June 14, 2005.

9. The RFP sought to award a contract to a single supplier capable of implementing feature-rich LAS by December 20, 2005, for approximately 177,000 GoC directory numbers in the NCA. The contract would initially be for three years, ending on December 19, 2008, and would include an option, to be exercised at PWGSC's discretion, for a further three years, until December 2011.

10. Following the release of the RFP, MTS submitted numerous questions and clarifications to PWGSC, which responded either by way of amendments to the RFP or by direct answers.

11. On March 23, 2005, MTS filed its complaint with the Tribunal.

6. Canada's electronic tendering service.

## POSITIONS OF THE PARTIES

**First ground of complaint: The mandatory dialling plan requirement could not be satisfied by any supplier other than Bell.**

12. MTS claimed that the mandatory dialling plan requirement biases the technical specifications of the procurement in favour of the incumbent, Bell, thereby precluding all other potential suppliers from submitting a compliant bid, contrary to Article 504(3)(b) of the *Agreement on Internal Trade*.[7] First, MTS submitted, the obligation to use "8" as a prefix for outgoing calls, the 7-digit restriction for in-government calls, etc., conformed so precisely to Bell's present system as to make competition unfair. Second, the obligation to maintain the dialling plan throughout the entire transition precluded the CLECs from using facility-based solutions and confined them to resale and leasing options only.

13. Regarding the maintenance of the dialling plan, the RFP stated in part:

> A.22 Technical Proposal
>
> (g) **Implementation Plan (Rated)**:
>
> Bidders should provide an Implementation Plan for the transition from the current LAS service to the proposed LAS service. This should include, at a minimum:
>
> (vii) A detailed description of how the Bidder will maintain the dialing plan at all times during the implementation phase (see the Statement of Work, Section 5), including a description of the impact each proposed Service Delivery Methodology will have on the dialing plan.

14. Section 5 of the Statement of Work stated:

> 5.1.7 The contractor **SHALL (M)** maintain the dialing plan at all times regardless of implementation and/or service delivery methodology.

15. Regarding Service Delivery Methodologies (SDMs), the RFP stated in part:

> A.22 Technical Proposal
>
> The CRTC has identified three types of facilities and/or services (each a "**Service Delivery Methodology**") used by carriers to provide local access service:
>
> (A) Owned facilities – self-provisioned loop facilities;
>
> (B) Leased facilities – such as unbundled loops or loop–equivalent facilities leased from a facilities-based telecommunications provider; and
>
> (C) Resold services – such as Centrex or its equivalents, purchased from a local exchange provider.
>
> A Bidder may propose to use any one Service Delivery Methodology or any combination of the three to deliver the LAS.

### MTS

16. MTS alleged that it is technically impossible for any CLEC to maintain the existing dialling plan at all times during a transition or migration phase from the existing Bell network to another network. MTS alleged that the existing dialling plan is based on a closed, Bell-proprietary Centrex platform that does not

7. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/index_en/ait.htm>.

interwork with service platforms of competing suppliers. MTS alleged that this makes it impossible for any company, other than Bell, to "talk" to the existing system, thus precluding any type of gradual switchover and the ability to maintain the existing services seamlessly during switchover, as is required by the RFP.

17. MTS noted that a report prepared for the Department of Industry in February 2002 by MacPherson Telecom Consulting Inc.[8] stated that the Centrex interworking issue represented "a serious barrier to competitors gaining access to users currently on the closed system".[9] MTS noted that the MacPherson Report stated that doing away with the dialling plan on either a temporary or permanent basis would not represent a significant loss of functionality for the end users. At the hearing, on May 12, 2005, Mr. Chris Schmitt[10] stated that MTS Allstream Inc. was not aware that the dialling plan requirement was to be included in the RFP and that MTS Allstream Inc. had thought that "[g]iven the MacPherson report, . . . it was pretty clear that the private dialling plan was going to be a huge impediment to competitors bidding on that project."[11]

18. MTS submitted that, although the RFP allows bidders to propose multi-SDM or "hybrid" networks to deliver LAS, users on the resold Bell Centrex platform would not be able to communicate using the same dialling plan as users on the CLEC's platform. MTS submitted that that there is no procedure able to "trick" the Bell Centrex platform into treating a call placed from a CLEC's platform as an internal call and that calls from users on the CLEC platform would therefore be treated as outside calls by the Bell Centrex platform and vice versa. It submitted that this scenario would fail to meet the prescribed dialling plan requirements of the RFP. MTS submitted that all CLEC proposals will be forced to include the reselling of a portion of Bell's network because Bell, as the ILEC, owns the telecommunications network throughout the NCA and there were a significant number of GoC sites each having relatively few lines[12] identified in the RFP that would have to be resold because it would not be economically feasible for the CLEC to build facilities in each of those sites.

19. MTS submitted that PWGSC has failed to demonstrate why all the features of the dialling plan are legitimately required to fulfill the GoC's needs. It further submitted that flexibility in the GoC's dialling plan requirement would involve no loss of features or functionality, nor the ability to access private networks. It submitted that the only impact would be a transitional period where subscribers within the organization would have to learn to dial in a new way and that there was no reason why a company could not provide assistance and training to GoC users on a new dialling plan.

**PWGSC**

20. PWGSC submitted that maintaining its dialling plan, which segregates the internal network of GoC numbers from the public telephone network, is a legitimate operational requirement and that there is no provision in the *AIT* requiring it to abandon its legitimate operational requirements. It submitted that this plan allows certain departments (e.g. the Department of National Defence, the Department of Foreign Affairs and the Royal Canadian Mounted Police) to communicate directly with other private networks to fulfill their respective mandates. PWGSC submitted that it is the dialling plan that differentiates between internal and external calls, which in turn allows for direct access to these private networks. In addition,

8. *Local Telephone Competition and Service to Government Departments, A Report on Options and Strategies for the Industry Canada Telecommunications Policy Division* [MacPherson Report].
9. MacPherson Report at 14.
10. Director, Network Optimization, Regulatory Affairs, MTS Allstream Inc., appearing as a witness for MTS.
11. *Transcript of Public Hearing*, Vol. 1, 12 May 2005, at 178.
12. Less than 6 lines per site.

PWGSC submitted that the current plan will allow GoC users to continue making local internal calls to the government by dialling only seven digits after all telephone customers in Ottawa, Ontario, and Gatineau, Quebec, become subject to a new 10-digit public dialling plan for local calls.

21. PWGSC submitted that the term "Centrex" is short for "Centralized Private Exchange", which involves switches located on the telephone company's premises being used to deliver the service. It submitted that the switches can be those of several different manufacturers and that neither the term "Centrex" nor the platform itself is proprietary to Bell. It also submitted that the mandatory dialling plan described in the RFP is not unique to the Centrex platform and is provided by TELUS and MTS Allstream Inc. to the GoC in British Columbia, Alberta and Manitoba.

22. PWGSC submitted that, based on its own research and testing, there would be no technical impediment to maintaining the GoC dialling plan during a transition to a non-incumbent bidder, whether the bidder chooses to use its own facility, resells another carrier's services or uses some combination of the two. It submitted that switches from two companies can be programmed to communicate with one another and that, during a trial that took place for PWGSC's LAS solicitation for Nova Scotia and Prince Edward Island, two companies, an ILEC using a Centrex network and a CLEC providing the service from its own facilities, were able to provide the same dialling plan functionality in the same office tower.

**Second ground of complaint: The mandatory requirement to have approximately 177,000 directory numbers undergo a transition to the new supplier's network by the specified date of December 20, 2005, could not be satisfied, from any reasonable business perspective, by any supplier other than Bell.**

23. MTS claimed that the time frames imposed by the RFP make it impossible for a bidder other than the incumbent, Bell, to submit a compliant bid, contrary to Article 504(3)(d) of the *AIT*. There are two aspects to this ground of complaint. The first is the April 12, 2005, deadline for submitting bids. The second is the four-month implementation period, ending December 20, 2005.

24. MTS submitted that PWGSC was aware, or ought to have been aware, of the complexity of the procurement and that, by waiting until March of the same year in which the GoC's contract with Bell was set to expire and requiring that submissions be filed no later than April 12, 2005,[13] it was either guilty of poor planning or it never really intended to have a competitive bid process.

25. Regarding the transition period, the RFP stated in part:

> **A.1 Background and Description of Requirement**
>
> PWGSC is seeking to contract with a single supplier . . . [that] can demonstrate by providing a detailed implementation plan that it is capable of implementing the services by December 20, 2005 for all GoC's directory numbers in the NCA.
>
> The current arrangement will expire on **December 19, 2005**.
>
> As a result, the transition of **all lines in the NCA** must be completed by **12:00:01AM on December 20, 2005.**
>
> **Procurement Schedule**
>
> - Publication of RFP — February 18, 2005
> - Bid Closing Date — March 29, 2005
> - Award of Contract — August 19, 2005

13. As a result of amendment No. 24 to the RFP, the date was extended to June 14, 2005.

**MTS**

26. MTS submitted that PWGSC did not allow for an adequate period of time for CLECs to make the transition of all 177,000 lines to a new system. It submitted that the four-month period from the contract award date of August 19 to December 20, 2005, is insufficient, especially taking into account the Centrex issue stated above. It submitted that the implementation times for two recent, smaller LAS solicitations were relatively longer. In each case, the number of lines was 15,000, and the implementation time frames were four months and six months. MTS also noted that, in a memorandum dated December 7, 2004, PWGSC itself had proposed a six-month implementation time frame. MTS submitted that, to the extent that there are implementation issues not otherwise attributable to PWGSC, a supplier should not be punished or precluded from bidding because of PWGSC's lack of planning and resulting deficiencies in the procurement process.

27. MTS submitted that it would reasonably take between 12 and 18 months to fully make the transition of 177,000 lines, using a hybrid solution that involved reselling a portion of Bell's services and providing the remainder on a CLEC network. At the hearing,[14] Mr. Earl Elliott[15] estimated that the time required to build a new network would be approximately six months longer than the ILEC/CLEC hybrid solution and, if a complete rebilling of the 177,000 lines from Bell to MTS Allstream Inc. were contemplated, it would take roughly a year to implement such a change.

28. MTS was concerned that the RFP should require bidders to provide, as of December 20, 2005, the percentages, by SDM, that they were going to be using to provide LAS in the NCA. It submitted that, while the RFP allowed for a 5 percent margin of error in the estimates of owned, leased and resold lines, any further changes to these percentages following final acceptance could only be made with the approval of the technical authority, which provided no guarantee that the proposed changes would be accepted. It submitted that this injected a high degree of uncertainty into the bidders' cost structure, network roll-out and customer migration programs. It submitted that the RFP thus forces hybrid providers to finalize and fully implement all of their migration programs before December 20, 2005, which is unreasonable.

29. MTS submitted that the RFP does not allow CLECs the flexibility that they require to complete the transfer of services from the incumbent's network to that of the CLECs. It submitted that PWGSC's position, with which MTS did not agree, that the Enhanced Exchange Wide Dial (EEWD) tariff cannot be extended, required that all bidders would have to fully implement their service implementation plans by the expiry date of the EEWD tariff, as opposed to merely commencing service on that date. MTS submitted that a CLEC could take over as the customer of record of the EEWD tariff upon the commencement of service and then use the tariff to fill in "gaps" in its own facilities coverage until it was able to bring its own network on-line, i.e. to fully implement LAS. It also submitted that the GoC could subscribe to Bell's regular Centrex service during the change-over and that these costs could be considered as "transition costs", which, it noted, are not referenced in the RFP at all. MTS submitted that allowing for "transition costs" would enable all bidders to address them as part of their financial proposals, rather than being automatically found non-compliant if the implementation deadline could not be met.

30. MTS disagreed with PWGSC's characterization of the LAS as "commercial off-the-shelf", instead submitting that each LAS is a unique service designed specifically for one customer in one location, governed by a unique Canadian Radio-television and Telecommunications Commission (CRTC) tariff. It submitted that CLECs will be able to deliver LAS in the NCA, but only if a number of steps are first allowed to occur, including the design and implementation of the service. It submitted that PWGSC has

14. *Transcript of Public Hearing*, Vol. 1, 12 May 2005, at 174-77.
15. Manager, Telco Cost Optimization, MTS Allstream Inc., appearing as a witness for MTS.

argued, in previous cases before the Tribunal,[16] that a product that does not exist cannot be considered off-the-shelf.

31. MTS submitted that PWGSC did not provide the CLECs with the necessary volumetric, grouping and civic address information relating to the various sites around the NCA. It submitted that Bell, as the ILEC, had all these data and that the late, or incomplete, provision of this necessary information exacerbates the situation, making it less likely for any other bidder to submit a responsive proposal in the four months initially allotted for bid submissions.

**PWGSC**

32. PWGSC submitted that the timing aspects of this procurement must be viewed in light of the CRTC's telecommunications regulatory framework. PWGSC submitted that, for local telephone services like those that are the subject of this complaint, the CRTC attempts to achieve a balance between the ILECs, which have an established infrastructure and customer base, and the CLECs attempting to enter the local market. One manner in which it does this is through the use of tariffs—which are granted after a public hearing and govern, among other things, the services to be provided, the length of the service term, under what conditions the services are to be provided and the "charge-out" rates.

33. Bell's NCA LAS are being provided under the provisions of the CRTC-approved tariff[17] for EEWD service. PWGSC submitted that, as an ILEC, Bell is only allowed to provide service to the NCA strictly in accordance with the CRTC-approved tariff. In other words, until the tariff expires or is otherwise terminated, Bell is not able to deviate from the terms of the tariff, even if it should want to, without first going back to the CRTC and obtaining an amendment or waiver. PWGSC submitted that the current EEWD tariff expires on December 19, 2005, and that new services under this tariff can be obtained only by entering into a new contract for a further three years.

34. PWGSC submitted that it has not, in a manner contrary to the *AIT*, deliberately imposed a delivery schedule designed to prevent suppliers from meeting the requirements of the proposal. It submitted that the transition period is dictated by the terms of the tariff, which resulted from a public process in which MTS was able to participate. PWGSC noted that MTS was aware that the existing contract was set to expire in December 2005 and did not raise any concerns when, on December 8, 2004, PWGSC informed potential suppliers that it planned to post the LAS requirement on MERX in mid-February 2005.

35. PWGSC submitted that MTS's proposal that the existing EEWD tariff be extended for a few months or another year to allow for a longer transition phase is not possible under the current tariff arrangement—it is either three more years or not at all. PWGSC also submitted that extending the tariff and then gradually phasing out, eventually cancelling, the existing Bell-supplied services as the new supplier took over would be cost prohibitive, with wind-down and termination costs to the government estimated at over $20 million.

36. PWGSC submitted that, in September 2004, TELUS "respectfully request[ed] a contract award date no later than March 31, 2005",[18] which, PWGSC submitted, indicated that TELUS anticipated an 8-1/2-month transition period as opposed to the 12- to 18-month period that MTS is now claiming is necessary. PWGSC also submitted that TELUS, in a letter dated February 28, 2005, when requesting an extension of the closing

16. *Complaint Filed by Array Systems Computing Inc.* (16 April 1996), PR-95-023 (CITT).
17. Broadcasting Decision CRTC 2002-466 (20 December 2002).
18. TELUS letter to PWGSC dated September 22, 2004.

date for the submission of bids, indicated that extending the bidding period would have "no adverse [effect] . . . [on] the Bid Evaluation end-state where on December 20, 2005 all lines must be transitioned or re-signed to the existing tariff", which, PWGSC claimed, implied that TELUS believed itself capable of completing implementation within the 4-month period contemplated by the RFP.

37. PWGSC submitted that the implementation period provided for in the RFP is sufficient and that potential suppliers knew for several months prior to the RFP being issued that an implementation period of a year or more would not be available, since the publicly approved tariff did not allow for a lengthy transition without cost implications. It also submitted that, regarding commercial off-the-shelf goods, the *AIT* does not require it to include sufficient time, prior to the delivery of those goods, to allow a supplier to build a factory in which to manufacture them. Rather, potential suppliers are those that have the existing capacity to do the work.

38. PWGSC submitted that the RFP was originally posted on MERX for four months, but that by the time PWGSC submitted the GIR (April 21, 2005), it had already been extended for an additional 28 days to April 26, 2005. At the time that it submitted the GIR, PWGSC was in the midst of extending the due date for the receipt of bids an additional 20 days to May 16, 2005, resulting in the RFP being posted for 88 days.[19] This amount of time, it claimed, was sufficient as well as consistent with other PWGSC voice telecommunications requirements.

**Third ground of complaint: The RFP contained numerous other biases favouring Bell.**

**MTS**

39. MTS alleged that: (1) contrary to Article 504(3)(a) of the *AIT*, PWGSC has unfairly discriminated against MTS by stipulating that compliance testing must take place in the NCA on Bell's ubiquitous network, thereby putting the competitors at Bell's mercy in terms of cooperating for set-up arrangements; and (2) contrary to Article 504(3)(b), the informational demands imposed upon the non-incumbent potential bidders favoured the incumbent, Bell, because, if the latter proposed to continue its current method of providing the LAS, it would automatically be assured of winning 430 points out of the 800 points to be allocated in the technical portion of the bid.

40. Regarding compliance testing, section A.29(e) of the RFP (as amended) reads as follows:

> **Phase 4—Compliance Testing**:
>
> (i) As part of the evaluation process and before award of a contract, Canada reserves the right to request that the top-ranked Bidder demonstrate any or all features, functionality and capabilities described in this solicitation or in the Bidder's proposal, in order to verify compliance with the requirements of this solicitation (referred to as "**compliance testing**"), at the Bidder's sole cost.
>
> (ii) If Canada requires compliance testing, the Technical Authority will:
>
> (A) identify between 5 and 10 locations in the NCA representing a total of no more than 3,200 stations where compliance testing will be done; and
>
> (B) outline the compliance testing plan (i.e., the features and functionality that will be tested).

19. Amendment No. 24, issued on May 24, 2005, further extended the due date for the receipt of proposals to June 14, 2005, or 117 days from the initial posting on MERX.

41. MTS submitted that the RFP unfairly required all CLECs to perform compliance testing in the NCA on the ubiquitous Bell network. It submitted that, although the RFP states that the technical authority will identify the lines to be tested, there is no incentive for Bell to transfer the required 3,200 lines within the 20-day window required by the testing regime of the RFP. MTS submitted that the compliance testing should be based on the experience of existing customers that obtain comparable services, regardless of where the customers are located.

42. Regarding the informational requirements, section A. 22(c) of the RFP reads in part as follows:

> PWGSC is seeking to contract with a supplier that has experience in delivering complex, feature-rich local access service to large-scale customers using the Service Delivery Methodology(ies) it is proposing to use to deliver the LAS.
>
> To demonstrate its experience, for **each** Service Delivery Methodology identified by the Bidder as forming part of its proposed solution, the Bidder must identify:
>
> (i) one (1) customer (which may be any private sector or public sector entity) in Canada for which the Bidder provided local access service during a consecutive 12-month period;
>
> (ii) the number of directory numbers for which the Bidder provided services to that customer, which must be no less than 26,000 multiplied by the percentage proposed by the Bidder for that Service Delivery Methodology; and
>
> (iii) the telephone number and name of an individual within that customer's organization who must confirm, if contacted by PWGSC:
>
> (A) that the Bidder provided the organization with local access services during a consecutive 12-month period;
>
> (B) the relevant Service Delivery Methodology was the primary method (at least 66%) used by the Bidder to provide the local access service to the organization; and
>
> (C) the number of directory numbers in Canada for which the Bidder provided local access service.

43. Sections A.22(d), (f) and (g) of the RFP read as follows:

> **(d) Quality and Similarity of Previous Service Offerings (Rated):**
>
> PWGSC is seeking to contract with a supplier that has previously delivered high-quality, complex, feature-rich local access service to large-scale customers using the Service Delivery Methodology(ies) it is proposing to use to deliver the LAS. The references provided by the Bidder for demonstrating their Experience Using Proposed Service Delivery Methodology(ies) (see above) will be contacted to evaluate this aspect of the Bidder's proposal. Therefore, no additional information is required to be submitted for this requirement.
>
> **(f) Risk Management Plan (Rated):**
>
> PWGSC is seeking to contract with a supplier that can identify the risks associated with its delivery of the LAS (including risks associated with each Service Delivery Methodology) and demonstrate that it can manage and reduce these risks. The Bidder should submit a Risk Management Plan that describes:
>
> (i) the risks associated with labour disruptions and its strategy for mitigating and managing performance issues associated with those risks;
>
> (ii) the risks associated with events such as power failure or fire or other catastrophic events and its strategy for mitigating and managing those risks;

(iii) the risks associated with and its systems and processes for maintaining the security of Client data;

(iv) if it is proposing to use multiple Service Delivery Methodologies, the risks associated with this approach and the Bidder's strategy for mitigating and managing those risks in order to ensure seamless operation of all Service Delivery Methodologies as a single solution. **[Note: Any Bidder proposing to use 100% of any single Service Delivery Methodology will be awarded the full 40 points.]**

**(g) Implementation Plan (Rated):**

Given the number of directory numbers to be transitioned, PWGSC has identified implementation and transition as one of the most significant risk areas for this requirement. Bidders should provide an Implementation Plan for the transition from the current LAS service to the proposed LAS service. This should include, at a minimum:

(i) A detailed description of the Bidder's implementation strategy, including the identification of all key work items and activities (including interim acceptance testing - see Model Contract) required to be completed in order to implement all 177,000 directory numbers by 12:00:01AM on December 20, 2005, taking into account the following constraints:

(A) before October 20, 2005, the Contractor may transition all the directory numbers except 100,000 directory numbers;

(B) beginning October 20, 2005, the Contractor may transition the balance of the directory numbers;

(C) the implementation will be phased, and phase 1 must include between 26,000 and 30,000 directory numbers, which can be selected by the Bidder, provided that the directory numbers:

(1) must include all directory numbers (other than Minister's offices) located at Place du Portage Phase III (11 Laurier Street, Gatineau), Place du Portage Phase 1 (50 Victoria, Gatineau), and 300 Slater St. (Ottawa);

(2) cannot include directory numbers from the Department of National Defence, the Department of Foreign Affairs, Canada Revenue Agency, the: Department of Human Resources and Social Development, the Royal Canadian Mounted Police, the House of Commons, the Senate or any Minister's office.

(ii) A detailed description of areas of risk that may affect Clients as a result of the implementation strategy and how the Bidder intends to mitigate and manage those risks, including issues regarding the interoperability of the Bidder's Service Delivery Methodologies (if more than one).

(iii) A detailed Work Breakdown Structure (WBS) that:

(A) identifies all key work items and activities to be completed and the associated schedule; and

(B) identifies milestones/deliverables involving review by the Technical Authority (either because review is required by the Model Contract or because the Bidder considers such review necessary or desirable to meet project objectives).

(iv) A detailed description of the Bidder's problem reporting and escalation processes, timeframes, and contacts, together with the necessary logistical information such as contact telephone and cell numbers.

(v) A detailed description of the Bidder's approach to completing the inventory of the services, equipment, location data and any other data necessary to complete or facilitate the implementation, which:

(A) identifies the processes and procedures for site surveys and station reviews if necessary; and

(B) identifies the Bidder's proposed approach for ensuring the inventory remains up to date.

(vi) A detailed description of how the Bidder will monitor Client satisfaction during implementation, coordinate the exchange of information, and discuss progress during the implementation period (see the Model Contract under the section entitled "**Implementation, Transition and Acceptance**").

(vii) A detailed description of how the Bidder will maintain the dialing plan at all times during the implementation phase (see the Statement of Work, Section 5), including a description of the impact each proposed Service Delivery Methodology will have on the dialing plan.

(viii) A detailed description of how the Bidder will provide the Telemanagement System and the Line Feature Change Service during the implementation phase (see the Statement of Work, Section 15.11).

(ix) A detailed description of how the Bidder will manage the following functions during implementation:

(A) LAS Product Help Desk (see the Statement of Work, Section 17.10);

(B) Business Office (see the Statement of Work, Section 17.9);

(C) Repair Desk (see the Statement of Work, Section 17.12); and

(D) Telemanagement Help Desk (see the Statement of Work, Section 17.11).

44. MTS also submitted that the above provisions of the RFP were biased since only CLECs and not Bell were required to:

- demonstrate experience delivering LAS using the SDM proposed by the bidder—a mandatory pass/fail criterion;
- submit a customer reference to confirm that the bidder provides similar services and that the customer is very satisfied with those services—worth 200 out of 800 points to be awarded for the technical portion of the bidder's proposal;
- provide a risk management plan—worth 40 out of 800 technical points; and
- provide an implementation plan—worth 190 out of 800 technical points.

45. MTS alleged that the RFP guarantees in writing that Bell will pass the mandatory criteria and will receive 430 points (as identified above) out of 800 technical points for its bid for merely proposing to deliver the same service, using the same SDM, that it is providing today and without providing the documents or assurances that all other bidders are required to submit.

**PWGSC's Position**

46. PWGSC submitted that it is necessary and reasonable that the compliance testing for LAS be performed on active lines in use by the GoC in the area to be serviced—the NCA. It argued that the RFP contemplates compliance testing in the field as opposed to a hypothetical or laboratory environment.

PWGSC submitted that this will allow the testing to be driven by the functionality in use by GoC users at those locations. It also noted that MTS did not submit any evidence to prove that Bell intends to block the competitive process by preventing CLECs from providing services during compliance testing. In addition, it submitted evidence[20] to demonstrate that one of the complainants, TELUS, had already engaged Bell staff to ensure support of its solution.

47. PWGSC submitted that this RFP was but one step in the overall voice telecommunications procurement strategy for LAS, which continues to evolve each time there is an indication that more than one supplier can supply LAS in any of the PWGSC-maintained markets. PWGSC submitted that it was informed in September 2004 that TELUS considered itself capable of providing LAS throughout the NCA. As a result, in November 2004, PWGSC advised TELUS that it would be releasing a competitive solicitation for the NCA LAS and that work had begun on the RFP. PWGSC submitted that it informed MTS Allstream Inc. and all other potential suppliers in December 2004 that it was anticipating publishing the RFP in mid-February 2005. PWGSC submitted that all parties were aware of the end-of-tariff deadline of December 19, 2005, but no company complained to PWGSC until after the RFP was released.

48. PWGSC submitted that it had provided information regarding addresses to all potential suppliers as soon as this information had been gathered, sorted and compiled. It submitted that it went through the file line-by-line, verified all addresses and provided complete street addresses and postal codes for 98 percent of the lines. PWGSC submitted that the information had to be assembled and organized specifically for this procurement and is otherwise not readily available because, although PWGSC was the contract manager for the services that Bell was providing, the service requirements come directly from client departments and are subject to constant change. PWGSC submitted that the information was sufficient for potential suppliers to submit responsive proposals and that it had informed bidders that, if a complete street address was unknown, their proposals were not required to indicate by what means they were proposing to provide LAS for that address.

49. PWGSC submitted that it is both necessary and reasonable to evaluate whether a bidder has experience in providing LAS by means of the proposed SDM. PWGSC argued that a bidder's experience in delivering LAS using resale does not demonstrate that it is capable of delivering LAS by using its own facilities and vice versa.

50. PWGSC submitted that the 40 points at issue in the risk management plan specifically relate to the risk inherent in proposing a solution that uses more than one SDM to deliver the LAS. PWGSC submitted that, by allowing bidders to propose hybrid solutions, it not only opened the solicitation to more bidders but also added an integration risk that would not be present if only single SDM solutions were permitted. It noted that all bidders that proposed a single SDM would receive the 40 points, but that bidders proposing a hybrid solution were also capable of obtaining the 40 points if their risk plans contained adequate mitigation strategies to contain the risks of integration.

51. PWGSC also submitted that, given the risks involved in making the transition of such a large number of lines, it cannot conduct a prudent evaluation of a supplier's capacity to provide the services without examining that supplier's ability to provide a seamless transition to the users. It submitted that any bidder with the requisite experience would be capable of supplying a strong implementation plan and could therefore obtain full marks for this criterion.

20. Exhibit 25 of the GIR.

52. Specifically, regarding the alleged preferential treatment of Bell, PWGSC submitted that it chose to be transparent about the treatment that it will provide the incumbent. Regarding the specific allegations about the rated requirements, PWGSC submitted that:

- concerning bidders being able to demonstrate their experience delivering LAS using the SDM in their proposal and the evaluation of the experience and quality of that service, transparency is best achieved by indicating to all bidders that, if Bell proposes to deliver the LAS using the same SDM that it currently does, it would fully meet the rated requirement. This is based on the fact that PWGSC is the "reference" required by the RFP and that, as the customer, it is very satisfied [21] with the services that are being provided [200 points];
- concerning the risk management plan, if Bell proposes to deliver the LAS in the same way that it currently does (single SDM), it would fully meet the rated requirement, as will all bidders proposing the use of a single SDM [40 points];
- concerning the implementation plan, if Bell proposes to deliver the LAS in the same way that it currently does, then there are no implementation or transition issues [190 points].

53. PWGSC noted that, in all cases, if Bell chooses to address the current LAS requirement with anything other than the single SDM that it is currently providing, it will be required to submit the same documentation, assurances and information that are required of all other bidders. Regarding the above criteria, PWGSC submitted that all bidders, not just Bell, are capable of achieving full marks. It also submitted that the requirement of the *AIT* is to allow equal access to procurements, not to treat proposals presenting different risks identically.

**Cisco's Comments**

54. Cisco submitted that the procurement process was biased, that the compliance testing procedures failed to ensure equal access to the procurement, that the dialling plan requirement favoured Bell, that the delivery schedule was intended to prevent CLECs from meeting the requirements of the procurement and that the use of voice over internet protocols (VOIP) was unfairly restricted.

55. Cisco agreed with MTS's submissions and also argued that the procurement created two classes of bidders—the ILEC and the CLECs—and that the biases present in the RFP clearly favour the ILEC by:

- presupposing that Bell would submit a perfect bid regarding the sections where Bell is guaranteed full marks, therefore precluding the possibility that another bidder could propose a better solution;
- requiring that compliance testing take place using Bell's lines. Cisco argued that PWGSC's defence—that MTS did not submit any evidence that Bell intended to block the competitive process—is irrelevant because the obligations in the *AIT* are binding on PWGSC, not MTS, and that PWGSC is obliged to ensure that the procurement process is non-discriminatory;
- keeping a dialling plan that has the effect of perpetually restricting access to LAS in the NCA to Bell; and
- imposing a delivery schedule that could only be met by Bell.

21. Annex D to the RFP at 6.

56. As a major supplier of voice and IP communications systems, Cisco was also concerned that PWGSC was unfairly restricting the use of VoIP in regards to the solicitation. It submitted that, despite the growing number of VoIP phones and PWGSC's acknowledgement that VoIP is an emerging technology,[22] the RFP maintained a discriminatory and restrictive bias favouring the Centrex-based systems provided by Bell. It argued that PWGSC's deliberate exclusion of VoIP-technology-based solutions denied equal access to the procurement for potential suppliers by unfairly limiting the means by which they can supply this service.

## TRIBUNAL'S ANALYSIS

57. 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 agreement, which, in this case, is the *AIT*.

58. Article 504 of the *AIT* reads in part as follows:

> 2. With respect to the Federal Government, paragraph 1 means that, subject to Article 404 (Legitimate Objectives), it shall not discriminate:
>
> (a) between the goods or services of a particular Province or region, including those goods and services included in construction contracts, 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.
>
> 3. Except as otherwise provided in this Chapter, measures that are inconsistent with paragraphs 1 and 2 include, but are not limited to, the following:
>
> (a) 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;
>
> (b) the biasing of technical specifications in favour of, or against, particular goods or services, including those goods or services included in construction contracts, or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter;
>
> (c) the timing of events in the tender process so as to prevent suppliers from submitting bids;
>
> (d) the specification of quantities and delivery schedules of a scale and frequency that may reasonably be judged as deliberately designed to prevent suppliers from meeting the requirements of the procurement;
>
> (g) the unjustifiable exclusion of a supplier from tendering.

59. Article 506 of the *AIT* reads in part as follows:

> 5. Each Party shall provide suppliers with a reasonable period of time to submit a bid, taking into account the time needed to disseminate the information and the complexity of the procurement.

22. Section A.1 of the RFP.

> 6. 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.

**First ground of complaint**

60. As mentioned above, MTS alleged that the mandatory requirement to maintain the existing dialling plan at all times biases the technical specifications in favour of Bell, contrary to the prohibition against discrimination in Article 504 of the *AIT*. That prohibition is "subject to Article 404 (Legitimate Objectives)", which reads as follows:

> Where it is established that a measure is inconsistent with [Article 504], that measure is still permissible under this Agreement where it can be demonstrated that:
>
> (a) the purpose of the measure is to achieve a legitimate objective;
>
> (b) the measure does not operate to impair unduly the access of persons, goods, services or investments of a Party that meet that legitimate objective;
>
> (c) the measure is not more trade restrictive than necessary to achieve that legitimate objective; and
>
> (d) the measure does not create a disguised restriction on trade.

61. Article 202 of the *AIT* defines the term "legitimate objective" as any of the following objectives pursued within the territory of a party:

> (a) public security and safety;
>
> (b) public order;
>
> (c) protection of human, animal or plant life or health;
>
> (d) protection of the environment;
>
> (e) consumer protection;
>
> (f) protection of the health, safety and well-being of workers; or
>
> (g) affirmative action programs for disadvantaged groups;
>
> considering, among other things, where appropriate, fundamental climatic or other geographical factors, technological or infrastructural factors, or scientific justification.

62. In the Tribunal's view, the procurement in this case does not fall under any of the headings in the above definition and, therefore, the exception in Article 404 of the *AIT* does not apply to the provisions of Article 504 for purposes of this procurement.

63. Therefore, the question facing the Tribunal on the first ground of complaint is limited to determining whether the advantages accruing to Bell under the mandatory dialling plan stem solely from an acceptable procurement requirement on PWGSC's part or prove the biasing of the technical specifications within the meaning of Article 504 of the *AIT*.

64. There is no doubt that the requirement to maintain the existing dialling plan throughout the transition to a new platform gives Bell a natural advantage over its CLEC competitors. All Bell would have to do, if it won the procurement, would be more of the same thing that it has been doing for the past three years. The CLECs would be performing some combination of activities that might include, depending on their choice of SDM, leasing, installing and testing new equipment and facilities.

65. PWGSC contends that the difficulties were exaggerated, because Bell's Nortel DMS switches can be programmed to "talk to" other switches using standards, procedures and software available not only to Bell but also to the CLECs. This may or may not be the case, since there was no evidence that Bell used other manufacturers' switches, such as those of Lucent or Cisco, which are also used by telecommunications carriers in North America. Rather, the evidence was that Nortel DMS switches can talk to other Nortel DMS switches. Moreover, such intercommunications would require the cooperation of both carriers before the switches could be configured with the necessary information. The evidence at the hearing confirmed that, despite years of trying for cooperation through CRTC-sponsored industry committee work, such cooperation was still not forthcoming. The Tribunal questions whether Bell would suddenly decide to cooperate in this manner with its CLEC competitors.

66. The Tribunal is of the view that it is not inappropriate for PWGSC to establish specific requirements, such as the use of "8" as a prefix, the choice of a private versus a public exchange, and the use of 7 versus 10 digits within that exchange.

67. However, the Tribunal is of the opinion that, while PWGSC has the right to establish the parameters of an RFP, it must do so reasonably. PWGSC does not have licence to establish conditions that are impossible to meet.

68. The Tribunal believes that the evidence on file demonstrates that a seamless transition to a new service provider using an SDM other than reselling Bell's services is an unreasonable expectation in prevailing market conditions. The Tribunal notes that, despite the potential, but not yet proven, technological compatibility between switches made by different manufacturers, such an arrangement, while perhaps not impossible from a technical standpoint, requires collaboration between parties that have, as yet, been unable to cooperate regarding this issue. The Tribunal also notes that, even in the most straightforward of circumstances in which a bidder might propose reselling Bell's services in their entirety, such a seamless transition could not be completed in the time allotted by the RFP.

69. Therefore, the Tribunal is of the view that the obligation to maintain the dialling plan throughout the entire transition constitutes a technical specification that is biased in favour of Bell, the incumbent supplier, contrary to the prohibition in Article 504(3)(b) of the *AIT*. The Tribunal finds that the complaint on the first ground is therefore valid.

**Second ground of complaint**

70. As mentioned above, MTS alleged that the timing aspects of the procurement contravene the *AIT*, first, because the four-month implementation deadline violates Article 504(3)(d) of the *AIT*, which prohibits the specification of delivery schedules of a scale and frequency that may reasonably be judged as being deliberately designed to prevent suppliers from meeting the requirements of the procurement, and, second, because the deadline for submitting bids violates Article 506(5), which requires the purchasing authority to provide a reasonable time for submitting a bid, taking account of the complexity of the procurement.

71. Regarding the second issue, the time frame for submitting bids, the Tribunal notes that they were originally due on March 29, 2005. As a result of a number of questions from potential suppliers giving rise to a series of amendments to the RFP, this deadline was ultimately extended to June 14, 2005, a full four months after the solicitation was published. Despite the enormity of the procurement, the Tribunal is of the view that the time frame, as extended, is reasonable. No evidence was adduced that the extended time frame was unsatisfactory.

72. Regarding the first issue, MTS argued that, not only were the time frames in the delivery schedule designed to prevent potential suppliers from complying with the requirement, but the problem was exacerbated by the added requirement of obtaining PWGSC's approval for any changes in the SDMs over 5 percent. Any failure by the successful bidder to implement its plan with respect to the proposed proportions between SDMs within a tolerance of plus or minus 5 percent would constitute default.

73. In this connection, the Tribunal notes that section 17.1 (Service Management Requirements) of Annex A to the RFP, as originally stipulated, reads as follows:

> 17.1.1 The Contractor **SHALL (M)** provide to the Technical Authority notification of any planned changes to the LAS service delivery methodology identifying the departure from the original service delivery methodology with respect to the percentage of resale, leased and owned facilities.
>
> 17.1.2 The Contractor **SHALL (M)** require the approval of the Technical Authority prior to the implementation of any proposed process changes to the service delivery methodology. The Technical Authority will identify the approval process to be followed by the Contractor.

74. Should a CLEC win the contract, it is highly likely that its bid would be a hybrid proposing more than one SDM and requiring a longer implementation period than a straight resell scenario. Accordingly, the Tribunal believes that the proportions between or among those SDMs would change from the pre-December 20 period to the post-December 20 period. The Tribunal is of the view that, as long as the operational requirements of the RFP are met, the proportions of each of the SDMs should be immaterial to PWGSC.

75. However, the Tribunal also notes that the strictness of the above condition is mitigated by the opportunity for the successful bidder (at this stage, the "contractor") to seek changes to the relative proportions between SDMs, and it recognizes the efforts by PWGSC, in amendment No. 23 to the RFP, to make the framework more favourable to the contractor. For example, Article 17.1.6 of the revised RFP states that, "[p]rovided that the migration plan addresses all such concerns and issues, the Technical Authority will provide approval of the migration plan within 5 working days."

76. According to the Tribunal, the revised terms of the RFP provide sufficient flexibility and assurance to prospective suppliers that, after the award of the contract, they will be able to make modifications to the balance between SDMs, and to do so within a predictable framework. Therefore, in the Tribunal's opinion, any timing problem with the four-month implementation period would not be unreasonably affected by the terms stipulated by the post-award modification of delivery schedules.

77. However, regarding the main point in the first issue, the Tribunal finds the four-month schedule and other requirements for implementation to be onerous and unnecessarily rigid. There appears to be no supportable justification for requiring full implementation by December 20, 2005. The Tribunal agrees with MTS that, if the contract should be awarded to a CLEC that bid the resell SDM, then the responsibility for maintaining the service falls upon that new contractor on the given date, at which point Bell, as the former incumbent, would be providing service to the new contractor rather than to the GoC.

78. The Tribunal therefore believes that it should be of no consequence to the GoC if the actual transition takes longer than four months, provided that the service that it receives satisfies the GoC's operational needs and is transparent to the users. The Tribunal notes that PWGSC, when it issued RFPs for LAS in British Columbia and Nova Scotia/Prince Edward Island, contemplated this possibility, unlike in the RFP for the NCA.

79. The Tribunal is of the view that the four-month implementation period set by PWGSC prevented potential suppliers from meeting the requirements of the solicitation. While there may have not existed, at the outset, a deliberate strategy by PWGSC to make it difficult for other suppliers to provide responsive bids, it is the Tribunal's opinion that PWGSC, being fully aware of all the circumstances surrounding this procurement, knowingly imposed an implementation deadline that other potential suppliers were not capable of meeting, contrary to Article 504(3)(d) of the *AIT*. Thus, the Tribunal finds the complaint valid on the second ground.

**Third ground of complaint**

80. As mentioned above, MTS alleged that the requirements in the RFP, relating to (1) information required from potential suppliers that choose multiple SDMs and (2) compliance testing, contravene Articles 504(3)(b) and 504(3)(a) of the *AIT* respectively.

81. First, regarding MTS's allegation that extra information requirements were imposed upon CLEC suppliers from which Bell was unfairly exempted, the Tribunal must again have regard to Article 504(3)(b) of the *AIT*, which prohibits biasing technical specifications.

82. There are two aspects of this ground of complaint worth mentioning: (1) an affirmative obligation on the part of the CLECs to provide documentation—customer references, risk assessment, etc.—that Bell need not supply, provided it proposed meeting the requirements of the RFP with its current SDM solution; and (2) the absence of any obligation on the part of Bell or PWGSC to provide the CLECs with all the information necessary to be able to produce a complete, viable proposal. Both aspects allegedly conferred an unfair competitive advantage on Bell: the former, because Bell was guaranteed passes on two mandatory requirements and the full 430 points on the rated requirements (out of a total of 800 for the technical proposal); and the latter, because the CLECs were deprived of information needed to make their proposals competitive yet not money-losing, while Bell had 100 percent of the information in its possession.

83. Regarding the RFP "guaranteeing" Bell a certain number of points, the Tribunal believes that PWGSC acted in an open and transparent manner in stating that the incumbent had provided satisfactory services and believes that it was therefore reasonable for PWGSC to grant full marks to the incumbent in the areas in which it has declared that it will do so. The Tribunal notes that the RFP explicitly states that this treatment is contingent on Bell maintaining a single SDM and that a proposal by Bell for a different SDM or multiple SDMs would lead to the requirement that the incumbent satisfy the same test as any other bidder. The Tribunal also notes that there was nothing in the RFP to suggest that any bidder was precluded from obtaining full marks in any of the rated categories or achieving "pass" marks in the pass/fail criteria.

84. The Tribunal accepts PWGSC's argument that, rather than biasing the technical specifications, the asymmetrical nature of the affirmative informational requirements of the CLECs actually levelled the playing field between Bell and the CLECs and arose as an ineluctable consequence of the CRTC's regulatory regime. Since Bell is an incumbent monopoly provider where transition to a competitive environment is the goal, procurement disciplines must be fashioned to take into account this unique

situation. Depriving Bell of the fruits of its labours to maintain a perfectly satisfied customer over the past three years would be unfair. Therefore, the GoC should be allowed to give Bell a favourable reference and passing grade in all informational categories of which the CLECs complained.

85. Imposing an affirmative obligation on the CLECs to provide, through the medium of *their* customers, equivalent references and strategies may be one of few practical ways of giving the CLECs an opportunity to neutralize any inherent advantage that Bell currently enjoys as a result of its incumbent monopoly position. In other words, it is a case of PWGSC treating unequal candidates differently in order to arrive at true equality of opportunity. In the Tribunal's opinion, this is not bias within the meaning of Article 504(3)(b) of the *AIT*.

86. Regarding the information allegedly missing from the RFP, the Tribunal believes that it is incumbent upon PWGSC to provide all bidders with the information that they need to produce fully compliant proposals. The Tribunal notes that PWGSC has provided incrementally more complete information to the bidders regarding the addresses of service delivery points through a series of amendments, up to and including amendment No. 25, issued 97 days after the RFP was first published on MERX.

87. The Tribunal accepts PWGSC's claim that it was providing this information as expeditiously as possible. The Tribunal is of the view that the information provided, though not available in its totality at the beginning of the competition period, was ultimately adequate in quantity and available in sufficient time for bidders to incorporate it into their submissions. Therefore, the Tribunal finds no biasing of technical specifications on this count for purposes of Article 504(3)(b) of the *AIT*.

88. Second, regarding compliance testing, it is noteworthy that Article 504(3)(a) of the *AIT* prohibits requirements in an RFP that are based on the location where the services are provided. Thus, the argument goes, PWGSC has violated the above provision by stipulating that compliance testing must take place in the NCA on existing GoC lines, since the NAC is where the LAS are provided.

89. Section A.29(e) of the RFP (compliance testing) does indeed require that tests be done in the NCA, which is where the LAS are provided. Although claiming that this is a necessary requirement, PWGSC provided no evidence to indicate that telecommunications lines in other parts of the country operated any differently from those in the NCA. Indeed, to the contrary, the evidence on file and at the hearing was to the effect that telecommunications is a technologically mature industry full of standards, technological means for interoperability and experience with "backward compatibility".

90. In fact, PWGSC acknowledged that the dialling plan specified in this RFP is the same that is being provided by MTS Allstream Inc. and TELUS in British Columbia, Manitoba or Alberta. Therefore, the Tribunal has no reason to believe that telephone services, including the mandatory dialling plan functionality, would operate differently in these locales than they do in the NCA.

91. The Tribunal does not therefore believe that PWGSC has provided the necessary justification for requiring the testing to be done in the NCA. In the absence of evidence to the contrary, the Tribunal is of the view that, for testing technology, the bidder should demonstrate the compliance of its systems without being required to do so in any particular part of the country. In the Tribunal's opinion, the compliance testing is purely a technical test and, as such, can be performed anywhere and does not have to be restricted to the ILEC's network.

92. By requiring the testing to be done in the NCA, the Tribunal believes that PWGSC has placed the incumbent at an advantage relative to the CLECs, which not only have to perform the compliance testing but also have the additional task of gaining control over those lines from an ILEC whose actions are beyond the control of either PWGSC or the CLEC. The Tribunal notes that, although the RFP states[23] that the technical authority will *identify* the locations for compliance testing, there is no indication that the technical authority will facilitate relations with Bell.

93. The Tribunal therefore finds that, as a result of PWGSC's violation of Article 504(3)(a) of the *AIT* with regard to compliance testing, the third ground of complaint is valid.

Ancillary Matters

94. Before disposing fully of the complaint, the Tribunal will now address a couple of ancillary matters that were raised and discussed during the case:

- MTS argued that, if Bell were to win the contract, it would be afforded "privileged and unique access to all buildings within the NCA". The Tribunal believes that this potential advantage will be equally available to whichever bidder is eventually successful and, therefore, does not demonstrate bias or favouritism to any one bidder. The Tribunal will therefore not comment further on this issue.
- VoIP—The Tribunal must address the complaint pertaining to the RFP before it, not what might have been or what may be in the future. The Tribunal does not believe that PWGSC is obliged to remain on the leading edge of the technology curve and notes that PWGSC has consistently stated that VoIP is outside the scope of the RFP for LAS in the NCA. This being the case, the Tribunal will not comment further on this issue.

**Remedy**

95. Having found the complaint to be valid, the Tribunal must now recommend a suitable means of redressing the harm visited upon MTS through the deficiencies in the RFP.

96. In this connection, section 30.15 of the *CITT Act* prescribes the Tribunal's mandate. The section reads in part as follows:

> (2) Subject to the regulations, where the Tribunal determines that a complaint is valid, it may recommend such remedy as it considers appropriate, including any one or more of the following remedies;
>
> (*a*) that a new solicitation for the designated contract be issued;
>
> (*b*) that the bids be re-evaluated;
>
> (*c*) that the designated contract be terminated;
>
> (*d*) that the designated contract be awarded to the complainant; or
>
> (*e*) that the complainant be compensated by an amount specified by the Tribunal.

23. Section A.29(e)(ii) of the RFP.

> (3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including
>
> (*a*) the seriousness of any deficiency in the procurement process found by the Tribunal;
>
> (*b*) the degree to which the complainant and all other interested parties were prejudiced;
>
> (*c*) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
>
> (*d*) whether the parties acted in good faith; and
>
> (*e*) the extent to which the contract was performed.
>
> (4) Subject to the regulations, the Tribunal may award to the complainant the reasonable costs incurred by the complainant in preparing a response to the solicitation for the designated contract.

97. The Tribunal, pursuant to subsection 30.15(2) of the *CITT Act*, recommends, as a remedy, that PWGSC cancel the existing solicitation and issue a new RFP, one that addresses the elements listed above, including:

- that all mandatory requirements, and more specifically those related to the dialling plan, be reasonable and unbiased;
- that the implementation phases be adequate in length to allow competitors to structure their proposals to reflect their most efficient manner of addressing the Crown's requirement instead of having avoidable restraints thrust upon them; and
- that the conditions relating to compliance testing not be restricted to the location where the services are to be provided.

98. In making the above recommendation, the Tribunal has taken into account the circumstances enumerated in subsection 30.15(3) of the *CITT Act*, the most relevant ones being that the contract has yet to be awarded—making contract performance moot—and that MTS has been seriously prejudiced by its virtual inability to bid on the procurement under the terms currently stipulated.

99. The imposition of a 4-month implementation period to effect something that, on the evidence, was likely to take 12 to 18 months, was a serious deficiency, which precluded the CLECs from any meaningful opportunity of producing LAS that competed with those of Bell. The other deficiencies—the requirements that the transition be "seamless" and that the compliance testing be performed on Bell's system in the NCA—although arguably individually less serious, had a cumulative effect that exacerbated the seriousness of the 4-month implementation period and its prejudicial effect on MTS.

100. In the alternative, the Canadian International Trade Tribunal recommends that MTS Allstream Inc., Call-Net Enterprises and TELUS Communications Inc. be compensated by an amount that recognizes the opportunity that they have lost collectively or separately to participate meaningfully in the procurement as a result of the Department of Public Works and Government Services' breaches. If the Department of Public Works and Government Services elects to compensate the complainants for lost opportunity and the parties are unable to agree on an amount to be paid or the distribution thereof, then, within 30 days of notifying the Canadian International Trade Tribunal in accordance with section 13 of the *Canadian International Trade*

*Tribunal Regulations* of their intention to do so, the parties may apply to the Canadian International Trade Tribunal for a determination of the amount of compensation.

101. The Tribunal believes that PWGSC's decision to proceed in the manner that it did caused all bidders to incur avoidable costs in the preparation of their proposals. In an effort to put all bidders back to the position in which they were prior to the start of the solicitation, the Tribunal awards bid preparation costs to all bidders that submitted proposals in response to the RFP.

102. The Tribunal will award MTS its reasonable costs incurred in preparing and proceeding with the complaint. The Tribunal has considered the *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*) and is of the view that this complaint case has a complexity level corresponding to the highest level of complexity referred to in Appendix A of the *Guideline* (Level 3).

103. The *Guideline* contemplates classification of the level of complexity of complaint cases based on three criteria: the complexity of the procurement; the complexity of the complaint; and the complexity of the complaint proceedings. The complexity of the procurement was high, in that it involved a complex system that included elements of installation and maintenance. The complexity of the complaint was medium, in that it involved overly restrictive specifications, as well as mandatory and rated requirements. Finally, the complexity of the complaint proceedings was high, as there were two interveners, a public hearing was held, and the 135-day time frame was required. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is $4,100. The Tribunal reserves jurisdiction to establish the final amount of the award.

**DETERMINATION OF THE TRIBUNAL**

104. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid.

105. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that PWGSC terminate the existing tendering process and initiate a new solicitation as expeditiously as possible. The Tribunal further recommends that the new solicitation provide bidders with adequate information to allow them to submit responsive proposals and include time frames that do not unduly restrict opportunity for bidders to submit proposals based on their own capabilities and expertise.

106. In the alternative, the Canadian International Trade Tribunal recommends that MTS Allstream Inc., Call-Net Enterprises and TELUS Communications Inc. be compensated by an amount that recognizes the opportunity that they have lost collectively or separately to participate meaningfully in the procurement as a result of the Department of Public Works and Government Services' breaches. If the Department of Public Works and Government Services elects to compensate the complainants for lost opportunity and the parties are unable to agree on an amount to be paid or the distribution thereof, then, within 30 days of notifying the Canadian International Trade Tribunal in accordance with section 13 of the *Canadian International Trade Tribunal Regulations* of their intention to do so, the parties may apply to the Canadian International Trade Tribunal for a determination of the amount of compensation.

107. Pursuant to subsections 30.15(4) of the *CITT Act,* the Tribunal awards all bidders that submitted proposals in response to solicitation No. EN994-045668/B their reasonable costs incurred in preparing their proposals to that solicitation.

108. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards MTS its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by PWGSC. The Tribunal's

preliminary indication of the level of complexity for this complaint case is Level 3, and its preliminary indication of the amount of the cost award is $4,100. If either party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated by the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Zdenek Kvarda
Zdenek Kvarda
Member

IN THE MATTER OF a complaint filed by MTS Allstream Inc., Call-Net Enterprises Inc. and TELUS Communications Inc. 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;

AND FURTHER TO the Canadian International Trade Tribunal's Determination of August 5, 2005.

**BETWEEN**

| | |
|---|---|
| **MTS ALLSTREAM INC., CALL-NET ENTERPRISES INC. AND TELUS COMMUNICATIONS INC.** | **Complainants** |

**AND**

| | |
|---|---|
| **THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES** | **Government Institution** |

## DETERMINATION OF THE TRIBUNAL

## CORRIGENDUM

The fourth paragraph of the determination should read as follows:

Pursuant to subsection 30.15(4) of the Canadian International Trade Tribunal Act, the Canadian International Trade Tribunal awards MTS Allstream Inc., Call-Net Enterprises Inc. and TELUS Communications Inc. their reasonable costs incurred in preparing their proposals submitted in response to solicitation No. EN994-045668/B. The Canadian International Trade Tribunal recommends that all other bidders that submitted proposals in response to solicitation No. EN994-045668/B be compensated for their reasonable costs incurred in preparing their proposals.

By order of the Tribunal,

Hélène Nadeau
Secretary