



BY FACSIMILE

October 11, 2005

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**Re: Solicitation Number EN994-045668/01/A
MTS Allstream Inc. (File No. PR-2005-022)**

The Canadian International Trade Tribunal (the Tribunal) (Panel: James A. Ogilvy, Presiding Member; Pierre Gosselin, Member; Ellen Fry, Member) has reviewed the complaint submitted on September 23, 2005, on behalf of MTS Allstream Inc. (MTS), and has decided not to initiate an inquiry into this complaint.

MTS alleged that the Department of Public Works and Government Services (PWGSC) had structured the request for proposal (RFP) to ensure that all bidders, with the exception of the incumbent (Bell Canada [Bell]), would be found non-compliant. Specifically MTS alleged that the RFP unjustifiably excluded non-Local Exchange Carriers (LECs) from bidding and that there were timing issues that favoured Bell, in particular the contract award date, the service implementation date and the bid submission date. MTS argued that the RFP contravenes Articles 504.3(c), (d) and (g) of the AIT and fails to ensure equal access to this procurement for all Canadian suppliers as required by Article 501.

Subsection 7(1)(c) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* reads, in part, that the Tribunal shall, within five working days after the day on which the complaint is filed, determine whether “the information provided by the complainant ... discloses a reasonable indication that the procurement has not been carried out in accordance with whichever one of Chapter Ten of NAFTA, Chapter Five of the *Agreement on Internal Trade* or the *Agreement on Government Procurement* ...applies”.

MTS submitted that the RFP stated that if, for whatever reason, the contract could not be awarded by December 19, 2005, PWGSC would enter into a three-year extension of the EEWD contract with Bell. MTS argued that by keeping December 19, 2005, as the contract award date and by adding the potential consequences of the extension of the Bell contract, PWGSC unfairly shifted the financial responsibility of the remainder of that extension to the winning bidder and, therefore,

improperly restricted the opportunity of non-incumbent bidders to bid on the RFP.

With respect to the service implementation date, MTS argued that only Bell could meet the December 20, 2005 service requirement target date. While noting that the RFP allows bidders to be awarded a contract on December 19, 2005, and then choose an in-service date (ISD) and implementation completion date (ICD) after December 20, 2005, MTS submitted that if the ISD and ICD were after December 20, 2005, then the above-noted contract extension would occur and the bidder would be forced to incur enormous costs, which it estimated at \$70-100 million, as it took over responsibility for the EEWD contract extension.

MTS argued that the effect of these two elements was to guarantee Bell a contract for the services described in the procurement even if another successful bidder was selected.

With respect to the bid submission timeframe of 36 days, MTS noted that the previous RFP had had a bidding period of 117 days, which the Tribunal had ruled, in its Determination in complaint case PR-2005-061, was adequate. In addition, MTS noted that the 36-day timeframe of the subject RFP was well under the industry standard.

MTS also argued, separate from the above timing issues, that the RFP unjustifiably excluded some potential bidders by virtue of the restrictions on the ability to access volumetric information required to submit a compliant bid. MTS submitted that, by exclusively limiting access to the required data to Canadian Radio-television and Telecommunications Commission (CRTC) registered LECs the RFP excluded resellers, as a category of potential Canadian suppliers, from tendering for this procurement.

The Tribunal notes that PWGSC has brought extensive information regarding the earlier procurement for the same services (the subject of Tribunal complaint PR-2004-061) into this new RFP, and has explained that link, in considerable detail, as well as highlighting the changes subsequent to the previous solicitation. Further, the Tribunal's earlier decision is a matter of public record and it therefore sees it as appropriate to take notice of both these sources of information in considering the present complaint. Furthermore, the Tribunal notes that the present complaint is made on behalf of a company that was involved in the earlier solicitation process and the complaint that arose out of it, and was fully aware of the services to be provided.

Concerning the timing elements referred to in the complaint, the Tribunal is of the view that the RFP currently provides bidders with considerable latitude regarding when they can assume responsibility for the services in question, the ISD, and when their implementation phase had to be completed, the ICD. The Tribunal believes that allowing an 18 month window from the contract award date to ICD is not only reasonable but appropriately addresses the Tribunal's determination in the previous case.

With this in mind, it is the Tribunal's view that, regarding the contract award and implementation dates, MTS has not shown that there was a reasonable indication that the contract award date and implementation dates are in breach of the applicable trade agreement, given the time available for bid preparation and the scheduling flexibility built into the implementation process. All parties to this, and the previous, solicitations are aware that the December 19, 2005 deadline is unchangeable to ensure the continuity of service to the 177,000 lines involved.

The Tribunal also believes that, in MTS's case, given that it was well aware of the requirements of the previous solicitation and had the benefit of the 117-day bidding period, the bidding period was adequate in the circumstances.

Regarding the argument that the contract extension relating to the EEWD forces "enormous cost" on a non-incumbent bidder and has the effect, regardless of whichever company is the successful bidder, of giving Bell a contract for the services in question, the Tribunal believes that PWGSC was entitled to ensure that the governments cost of receiving Local Access Services (LAS) is not affected by any changes in the identity of the service provider. The Tribunal believes that PWGSC has the responsibility of ensuring continuity of service, and given the circumstances surrounding this particular solicitation, that means that Bell must be involved for a certain time, as either the main contractor or by providing some services to the successful competitive carrier. In the Tribunal's opinion, the complaint does not provide a reasonable indication that PWGSC has breached the AIT in its efforts to ensure that essential services will continue, with flexibility to allow a competitive carrier to assume responsibility of the service, in a manner that is "cost-neutral" to the Crown, regardless of whomever is providing the service.

Finally, with respect to MTS's argument that the RFP unfairly restricts the solicitation to potential suppliers who were CRTC-registered LECs, the Tribunal notes that MTS is such a LEC and has offered no evidence that it would be unable to obtain the information it states is required for it to submit a compliant proposal. The issue is therefore theoretical in nature for MTS and the Tribunal will not pursue it.

The Tribunal finds that there is no reasonable indication that PWGSC breached the Agreement on Internal Trade, the only trade agreement applicable to this requirement, in constructing the RFP and solicitation process in the manner that it has.

In considering this complaint, the Tribunal took into account the significant, extraordinary circumstances that affect telecommunication services procurement in general – the CRTC tariff environment, the difficulties inherent in having the two distinct, unequal classes of incumbent local exchange carrier bidders and competitive local exchange carrier bidders – as well as specific ones regarding the provision of LAS in the National Capital Area – the EEWD tariff components and conditions and the immutable date of December 19, 2005. The Tribunal believes that the complaint does not provide a reasonable indication that PWGSC breached the provisions of the AIT, under these circumstances, in structuring the RFP in the manner in which it did.

In light of the above, the Tribunal will not conduct an inquiry into this complaint and considers the matter closed.

Yours sincerely,

Hélène Nadeau
Secretary