

Ottawa, Tuesday, December 7, 1999

File No.: PR-99-024

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

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

DETERMINATION OF THE TRIBUNAL

Pursuant to section 30.14 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 cancel the subject solicitation and, if the need still exists, issue a new solicitation for the requirement and proceed thereon in accordance with the provisions of the applicable trade agreements.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Alcatel Canada Wire, a Division of Alcatel Canada Inc., its reasonable costs incurred in relation to filing and proceeding with the complaint.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination: December 7, 1999

Tribunal Member: Pierre Gosselin

Investigation Manager: Randolph W. Heggart

Investigation Officer: Dominique Laporte

Counsel for the Tribunal: Tamra Alexander
John Dodsworth

Complainant: Alcatel Canada Wire, a Division of Alcatel Canada Inc.

Government Institution: Department of Public Works and Government Services

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STATEMENT OF REASONS

On August 30, 1999, the Canadian International Trade Tribunal (the Tribunal) received a complaint from Alcatel Canada Wire, a Division of Alcatel Canada Inc. (Alcatel), made pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning the procurement (Solicitation No. E0218-9-G014/A) by the Department of Public Works and Government Services (the Department) for the supply and installation of a NORDX/CDT (no substitute) voice structured cabling system, for the Department of National Revenue (now Canada Customs and Revenue Agency) at 166 Frederick Street East, Kitchener, Ontario.

Alcatel alleged that, contrary to the open procurement process, the Department is specifying brand-name NORDX/CDT cabling and components, with no substitutes allowed, requiring that the successful bidder be a NORDX/CDT certified system vendor. As well, the Department is using proprietary warranty provisions to the detriment of all other competitors. Alcatel requested, as a remedy, that the Tribunal order that such practices be discontinued and that Alcatel be reimbursed for the expenses that it incurred in resolving this complaint.

On September 2, 1999, the Tribunal wrote Alcatel inquiring whether Alcatel was a bidder or a prospective bidder for this requirement in accordance with the definition of "potential supplier" provided in section 30.1 of the *CITT Act*. On September 3, 1999, Alcatel informed the Tribunal, in writing, that it was a "potential supplier" for the subject procurement within the meaning of section 30.1 of the *CITT Act*. On September 7, 1999, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the conditions for inquiry set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² That same day, the Tribunal issued an order postponing the award of any contract in connection with this solicitation until the Tribunal determined the validity of the complaint.

On October 1, 1999, the Department filed a motion with the Tribunal pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*³ to obtain an order dismissing the complaint pursuant to paragraph 10(a) of the *Regulations* on the basis that Alcatel is not a potential supplier within the meaning of

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

section 30.1 of the *CITT Act* and requesting that the time limit for filing the Government Institution Report (GIR) in this matter be extended. Essentially, the Department submitted that Alcatel does not fall within the definition of “supplier” in either the *North American Free Trade Agreement*⁴ or the *Agreement on Internal Trade*⁵ because it is a manufacturer and supplier of cables only and cannot provide the voice structured cabling system services which form the requirement of the solicitation in dispute.⁶ Accordingly, the Department submitted that Alcatel cannot be considered a “bidder” or “prospective bidder” on the designated contract within the meaning of sections 30.1 and 30.11 of the *CITT Act*.

The Tribunal received Alcatel’s response to the Department’s letter on October 14, 1999. Alcatel submitted that it has, within its operational structure, all the requisite technical, financial, contracting, commercial and supply resources, including, but not limited to, industry alliances, certified sub-contractors, in-house manufacturing and outsourcing options necessary to execute the contractual requirements outlined in the subject solicitation. Alcatel added that it has the financial and commercial means to undertake this project as a primary (supply and install) contracting vendor. The Department filed no comments in response.

On October 26, 1999, the Tribunal determined that Alcatel is a potential supplier on the designated contract. The Tribunal finds Alcatel’s submission of October 14, 1999, credible and persuasive. It is the Tribunal’s opinion that Alcatel demonstrated that it has the financial, technical and commercial capacity to fulfil the requirements of the subject procurement. Accordingly, the motion was dismissed. On October 28, 1999, the Tribunal informed the parties of this decision and requested that the Department submit the GIR by November 8, 1999.

On November 5, 1999, the Department sent a letter to the Tribunal, in lieu of the GIR, indicating that the Department had decided to re-tender the subject solicitation with revised requirements based on performance specifications instead of specifications requiring NORDX/CDT cabling. On November 11, 1999, Alcatel requested that the case be decided on the existing record.

TRIBUNAL’S DECISION

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

Article 1007(1) of *NAFTA* provides:

Each Party shall ensure that its entities do not prepare, adopt or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade.

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4. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter *NAFTA*].
 5. As signed at Ottawa, Ontario, on July 8, 1994 [hereinafter *AIT*].
 6. Article 1025 of *NAFTA* defines “supplier” as “a person that has provided or could provide goods or services in response to an entity’s call for tender”. Article 518 of the *AIT* defines “supplier” as “a person, who, based on an assessment of that person’s financial, technical and commercial capacity, is capable of fulfilling the requirements of a procurement and includes a person who submits a tender for the purpose of obtaining a construction contract”.

Article 1007(3) of *NAFTA* further provides:

Each Party shall ensure that the technical specifications prescribed by its entities do not require or refer to a particular trademark or name, patent, design or type, specific origin or producer or supplier unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements and provided that, in such cases, words such as “or equivalent” are included in the tender documentation.

The Tribunal is of the view that, contrary to the provisions of Articles 1007(1) and (3) of *NAFTA*, the tender documentation for this solicitation refers to cables, fittings and related installer qualifications and warranty provisions of a particular trademark (NORDX/CDT) as a mandatory requirement. The Request for Proposal does not provide for “equivalent” products, as required by *NAFTA*. The Department acknowledged this fact in its submission of November 5, 1999. Therefore, the complaint is valid. In its submission of November 5, 1999, the Department indicated that the subject solicitation would be re-tendered using performance specifications instead of the specification requiring NORDX/CDT cabling.

DETERMINATION OF THE TRIBUNAL

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

Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that the Department cancel the subject solicitation and, if the need still exists, issue a new solicitation for the requirement and proceed thereon in accordance with the provisions of the applicable trade agreements.

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

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Presiding Member