

Ottawa, Tuesday, November 16, 1999

File No.: PR-99-025

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 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

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

Date of Determination: November 16, 1999
Date of Reasons: November 26, 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

Ottawa, Friday, November 26, 1999

File No.: PR-99-025

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*.

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. EN463-9-6005/A) by the Department of Public Works and Government Services (the Department) for the supply and installation of a certified Category 5 cable plant within a complete voice/data/CATV communications cable infrastructure at the former Justice Building in Ottawa, Ontario.

Alcatel alleges that, contrary to the open procurement process, the Department is insisting on brand-name NORDX/CDT components, cabling and certified installers, with no substitute allowed. As well, the Department is using proprietary warranty considerations to the detriment of all other competitors. Alcatel requested, as a remedy, that the Tribunal order the discontinuance of such practices and that Alcatel be reimbursed for its expenses incurred in resolving this complaint.

On September 2, 1999, the Tribunal wrote Alcatel inquiring whether or not it was a bidder or a prospective bidder for the subject procurement, 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 that it was a “potential supplier” and a “prospective bidder” with regard to the subject solicitation, as defined in section 30.1 of the CITT Act.

On September 7, 1999, the Tribunal informed the parties that the complaint had been accepted for inquiry, subject to the identification of the procuring government entity for the subject procurement and the resolution of the issue of whether the entity is a “government institution” in accordance with the definition in section 30.1 of the CITT Act. That same day, the Tribunal issued an order postponing the award of any contract in connection with the subject solicitation until the Tribunal determined the validity of the complaint.

On September 16 and 20, 1999, the Department made submissions on the issue of the “government institution”. According to the Department, the subject solicitation is in respect of a communications cabling project for the renovation of a building, formerly the Justice Building, which will then become part of the Parliamentary Precinct and provide accommodation for House of Commons members and staff. The House of Commons is the procuring government entity for the subject procurement, since it is the technical and

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].

design authority and ultimate owner of the items procured. Although the Department is the funding and contracting authority for the project and is providing project and procurement management services in relation thereto and although the trend is towards the provision by the Department of communications cabling and other information technology (IT) systems as part of its overall accommodations projects, the House of Commons, because of its particular interest in the independent management of its internal operations, nevertheless, necessarily maintains full responsibility for and control over the IT components necessary for its internal operations in the buildings that it occupies. This, the Department submitted, is outlined in the charter entitled "Parliamentary Precinct Information Technology Program" (PPITP) signed on December 1, 1997.

The Department argued that the special constitutional position of the House of Commons, as a parliamentary institution, affords it special status, distinct from government institutions. The exclusion of the House of Commons from coverage under the trade agreements is consistent with this distinction and, accordingly, this exclusion should apply to any procurement on behalf of or for the benefit of the House of Commons.

On September 20, 1999, Alcatel submitted, in response, that the House of Commons is only the proposed tenant in the facility where the procured goods will be installed. The procurement is being undertaken by the Department as directed by the Parliamentary Precinct Services Group. The Department has the ultimate project management responsibility within the PPITP charter. Alcatel further submitted that the procurement is the property and responsibility of the Department, a "government institution" within the meaning of the CITT Act, and that the procurement is, therefore, subject to the regulations of the CITT Act and within the jurisdiction of the Tribunal.

In its final comments to the Tribunal on September 24, 1999, the Department disputed Alcatel's statement that the Department will be the ultimate owner of the procured items. The Department submitted that the House of Commons will own the goods delivered, hold all warranties and be responsible for any future maintenance, replacement, upgrades and/or disposal.

On September 24, 1999, the Tribunal informed the parties that it had determined that the Department is the "government institution" for the subject procurement within the meaning of section 30.1 of the CITT Act. The Tribunal came to this view after carefully considering all the evidence. In particular, the Tribunal noted that the PPITP states that the Department is providing the basic building and is to maintain the building as would any landlord. Further, for the renovations of the Parliamentary Precinct, the Department is providing the communications cabling and furniture systems as part of the overall accommodations project. The PPITP also specifies that the Department will seek the funding for these items. Therefore, the Tribunal found that it is the Department which is the procuring entity for the subject procurement. The House of Commons is simply the intended tenant in the building in which the procured items will be installed.

PROCUREMENT PROCESS

On July 26, 1999, the Department issued a Request for Proposal (RFP) for the subject requirement. The RFP, at Part 1A, section 2, reads, in part:

In order to have its proposal considered, a Contractor **MUST** be a "NORDX/CDT Certified Systems Vendor" and include in his response to this request for proposal the following documents:

- a) a current and valid "CSV" agreement with "NORDX/CDT", and
- b) a proof that each member of the installation team has successfully completed the NORDX/CDT Installation Courses or a BICSI installer's course.

Subsection 3c) reads, in part: “It is therefore mandatory that the Contractor [provide] as part of this RFP, an acceptance of this approach and all requirements that must be met to ensure that the integrity of the NORDX/CDT 25 year warranty is maintained”.

Part 1C, section 6, reads, in part: “The data backbone and the horizontal data distribution media shall consist of star-wired NORDX/CDT Category 5 unshielded twisted pair copper”.

Part II, section 9, reads, in part: “The cable and cabling hardware shall be NORDX/CDT”.

On August 10, 1999, Alcatel wrote the Department objecting to the fact that the RFP specified only one brand of cable and cabling hardware. Alcatel argued that nothing prevented the Department from describing its requirement generically, as established and recognized standards exist for this kind of product. Alcatel submitted that there are no technical, logistical or warranty-related reasons to preclude Alcatel and Alcatel connectivity partners from bidding on this requirement.

On August 12, 1999, the Department responded, in part, as follows:

The House of Commons has specified NORDX/CDT products in solicitation EN463-9-6005/A for the cabling of the Justice Building in order to maintain consistency with existing cabling infrastructure installed in all other House of Commons campus buildings, maintain technical compatibility, and reduce the costs associated with maintaining an inventory of replacement parts and training requirements.

The current technology provides a twenty-five (25) year product warranty and a Lifetime Application Assurance program that will protect the cabling infrastructure investment as future high-speed applications are introduced. Also warranty consistency will ease the administration of warranty claims.

For the reasons mentioned above, it is in the best interest of our client and the Canadian tax payers to capitalize on long term savings both in costs and resources rather than a possible one time saving at the time of installation.

VALIDITY OF THE COMPLAINT

Department’s Position

On October 15, 1999, the Department submitted a letter in lieu of the Government Institution Report. In its letter, the Department informed the Tribunal that it originally identified this procurement as being exempt from the trade agreements because the House of Commons, a non-covered entity, was thought to be the government institution for the subject procurement. In light of the Tribunal’s decision on this point, the Department indicated that it must, along with the House of Commons, address the issue of whether to exclude this requirement from the operations of the trade agreements for national security reasons (Article 1018(1) of *North American Free Trade Agreement*,² Article 1804(b) of the *Agreement on Internal Trade*³ and Article XXIII(1) of the *Agreement on Government Procurement*⁴).

Alcatel’s Position

In its complaint, Alcatel submitted that alternative cables meeting industry specifications exist and will not negatively affect the technical performance and aesthetic consistency of the network, regardless of

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2. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
 3. As signed at Ottawa, Ontario, on 18 July 1994 [hereinafter AIT].
 4. As signed at Marrakesh on 15 April 1994 (in force for Canada on 1 January 1996).

whose connectors have been used at wall outlets. Alcatel further submitted that warranty is a competitive issue that can be achieved through many different means. Alcatel argued that single-source specifications are contrary to the competitive procurement practices of the Department and are detrimental to Canadian taxpayers. Moreover, Alcatel noted that the governing industry standards referred to in the RFP fully support a multi-vendor approach to structured cabling solutions.

On October 29, 1999, Alcatel informed the Tribunal, in writing, that it had no comment in response to the submissions by the Department and 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 *Canadian International Trade Tribunal Procurement Inquiry Regulations*⁵ 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.

Article 1007(3) of NAFTA 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 the evidence clearly demonstrates that, in this instance, the tender documentation refers to cables and fittings of a particular trademark (NORDX/CDT) and that providing these particular items is a mandatory requirement of the RFP. The RFP does not allow for "equivalent" products as required by NAFTA. It is also clear from the evidence that recognized standards exist to describe the cabling requirement generically and, therefore, that there exists a precise and intelligible way of describing the procurement requirement other than by using trademark references. For these reasons, the Tribunal is of the view that this procurement is being conducted in a manner contrary to the provisions of Article 1007(3) of NAFTA.

The Tribunal is also of the view that the Department's justification for specifying the NORDX/CDT products, its desire to maintain the NORDX/CDT 25-year warranty without allowing competition as to how extended warranties might be achieved, amounts to introducing and/or using, in the evaluation of offers, a criterion which has the effect of creating an unnecessary obstacle to trade. This contravenes the provisions of Article 506(6) of the AIT and Article 1007(1) of NAFTA. The Tribunal finally notes that the Department did not dispute Alcatel's allegations. In fact, the Department submitted that, subject to the national security provisions in the trade agreements, the RFP should be amended to comply with the requirements of the trade agreements with respect to the technical specifications and evaluation criteria.

5. S.O.R./93-602 at 4547.

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 the AIT and that, therefore, the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that the Department cancel the subject solicitation and, if the need still exists, issue a new solicitation for the requirement 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.

Pierre Gosselin
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Presiding Member