

Ottawa, Friday, November 5, 1999

File No.: PR-99-020

IN THE MATTER OF a complaint filed by IBM Canada Ltd.  
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 re-evaluate IBM Canada Ltd.'s proposal received in response to the solicitation. This re-evaluation should be performed in light of the Canadian International Trade Tribunal determination herein. In the event that IBM Canada Ltd. is declared the successful bidder by the Department of Public Works and Government Services in accordance with the evaluation and award provisions set out in the solicitation documents, the Canadian International Trade Tribunal further recommends that the contract awarded to Amdahl Canada Limited be terminated and, instead, be awarded to IBM Canada Ltd.

In the alternative, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services present to the Canadian International Trade Tribunal a proposal for compensation developed jointly with IBM Canada Ltd., that recognizes the profit it lost in being deprived of the contract.

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

Arthur B. Trudeau

Arthur B. Trudeau

Member

Michel P. Granger

Michel P. Granger

Secretary

Date of Determination:	November 5, 1999
Tribunal Member:	Arthur B. Trudeau
Investigation Manager:	Randolph W. Heggart
Investigation Officer:	Dominique Laporte
Counsel for the Tribunal:	Gerry Stobo
Complainant:	IBM Canada Ltd.
Counsel for the Complainant:	Ronald C. Lefebvre
Government Institution:	Department of Public Works and Government Services

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the complaint under subsection 30.13(1) of the *Canadian  
International Trade Tribunal Act*.

### **STATEMENT OF REASONS**

On July 19, 1999, IBM Canada Ltd. (IBM) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning the leasing and maintenance (Solicitation No.: EN869-9-4022/A) by the Department of Public Works and Government Services (the Department) of two IBM plug compatible mainframe computers, one for the MacDonald-Cartier Data Center (MCDC) and one for the Aviation Parkway Data Center (APDC) of Government Telecommunications and Informatics Services, a constituent of the Department.

IBM alleged that contrary to the provisions of the *Agreement on Internal Trade*,<sup>2</sup> the Department improperly applied mandatory evaluation criterion vii) a) of subsection B.3 of the Request for Proposal (RFP) which requires bidders to submit a firm price per MSU (millions of service units) delivered and, on this basis, erroneously concluded that IBM's proposal was non-compliant to all the essential requirements of the RFP.

IBM requested, as a remedy, that, should it be concluded that it is the winner of this competition, the contract awarded to Amdahl Canada Limited (Amdahl) on June 30, 1999, in the amount of \$1,777,094.35, be rescinded and that it be awarded instead to IBM. In the alternative, IBM requested that the Department enter into a second separate contract with IBM to provide exactly what was called for under this solicitation. In the further alternative, IBM requested that it be compensated for the costs of putting together its proposal, the loss of all profits it stood to make on this contract and the cost of bringing this matter to the Tribunal.

On July 21, 1999, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the conditions set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>3</sup> On September 10, 1999, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>4</sup> On September 21, 1999, IBM filed its comments on the GIR with the Tribunal. On September 29, 1999, the Tribunal requested the Department, in writing, to submit additional information

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter *CITT Act*].
  2. As signed at Ottawa, Ontario, on 18 July 1994 [hereinafter *AIT*].
  3. S.O.R./93 - 602, C. Gaz. 1993. II. 4547. (as amended) [hereinafter *Regulations*].
  4. S.O.R./91 - 499, C. Gaz. 1991. II. 2912. (as amended).

concerning Amdahl's proposal. In response, on October 4, 1999, the Department filed additional information as well as comments on IBM's comments on the GIR. IBM made final submissions to the Tribunal on October 12, 1999.

Given that there was sufficient information on record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on record.

## **PROCUREMENT PROCESS**

On May 19, 1999, an RFP for the 24 month lease of two mainframe computers<sup>5</sup> was issued with a Notice of Proposed Procurement on Canada's Electronic Tendering Service (MERX) and in *Government Business Opportunities*.

The RFP, as amended, subsection B.3 Financial Proposal, reads:

It is **essential** that the separately bound Financial Proposal include:

- vii) A cost summary (i.e. total Proposal cost) with an itemized list of deliverables with complete item pricing (expressed in Canadian dollars) as follows:
  - a) firm price per MSU delivered (referred to as m-rate in the attached); (The attached pricing layout shown in Annex B shows the method to be used for conversion of this rate to a monthly lease rate.)
  - c) firm unit price for each 16 channel increment;
  - d) firm unit price for each 1 GB of memory;

Section C of the RFP, Evaluation and Selection Criteria, reads in part:

### **C.1 Essential Requirements**

If an essential requirement is not complied with, the proposal will be considered non-responsive and will not receive further consideration.

### **C.4 Evaluation of Proposals:**

The following factors will be considered in evaluating proposals received in response to this RFP:

- iii) The submission of all required document(s) and/or information specified in Sections A, B, and C of this document;
- v) Each Mainframe will be separately evaluated based on the following itemized pricing:
  - a) cost for 24 month lease for all equipment, including cost for Options; (Equipment costs will be based on 109 MSUs ... for MCDC, and corresponding specification amounts for APDC.
- vi) Although proposed equipment may not exactly match the maximum value of 109 MSUs and 22 MSUs, these numbers will be used where applicable for purposes of the evaluation.
- vii) Should there be an error in the extended pricing of the Bidder's proposal, the unit pricing shall prevail and the extended pricing shall be corrected in the evaluation.

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5. A mainframe computer is typically used for very large applications. MSU is used as a unit measurement of mainframe performance. Commercial mainframe computers supplied by different manufacturers have varying specified performance ratings or MSU ratings. However, suppliers have machines in the marketplace which fit into a certain range of performance ratings. *Source:* GIR.

- viii) Any and all costs associated with meeting these requirements are the responsibility of the Bidder. Failure to meet or adequately address these requirements will render the Bidder's Offer or Proposal non-responsive and no further consideration will be given to the Bidder's Offer or Proposal in relation to the stated Requirement.

### C.5 Present Value Analysis

Present Value (PV) analysis will be used to determine the cost of the bidder's proposal for purposes of the evaluation.

In Annex A - Statement of Work (SOW) of the RFP, under section 2. Processor Requirement, clause 2.1.1, provides, in part, that the initial processor complex must provide a usable capacity within the range of 72 to 78 MSUs for the MCDC and 11 to 15 MSUs for the APDC; under section 3. Additional Processing Requirements and Upgrades, subsection 3.1, provides that the proposed processor complex must have expansion capabilities to be bid as options, exercisable at the discretion of the Crown, while clause 3.1.1 provides that the RFP shall include upgrade options "on a price per MSU basis".

Annex B - Pricing Format of the RFP reads, in part, as follows:

Item No.	Description	Qty	Unit of Issue	Firm Monthly Lease Rate	Extended Price	Firm Monthly Maintenance Cost	Extended Maintenance Cost	Present Value Price
MCDC 001	24 month Lease of Mainframe (based on 109 MSUs) with 17 Logical Partitions	24	Mth	\$ _____	\$ _____	\$ _____	\$ _____	\$ _____
APDC 001	24 month Lease of Mainframe (based on 22 MSUs)	24	Mth	\$ _____	\$ _____	\$ _____	\$ _____	\$ _____

Under "Lease Rate Calculations", Annex B reads, in part, as follows:

m-rate = cost in \$ per MSU, being the lump sum lease rate per MSU (bidder proposed rate)

#msu = number of MSUs (i.e. 109 for MCDC evaluation, and 22 for APDC)

n= number of months for the lease duration (i.e. 24 months)

PV = present value

On June 15, 1999, the Department issued amendment No. 005 to the RFP. The amendment included the following questions and answers:

#### Question 12:

In the financial evaluation, is the PV column the PV of the monthly lease rate, or combined lease rate and maintenance?

#### Response:

Combined PV of lease and maintenance rate; this column as shown is for the present value of both the monthly lease rate and the monthly maintenance rate. Both the monthly lease rate and the monthly maintenance rate will be present valued and included in the total, and may be shown separately in the proposal if desired. For errors in the PV, extended monthly lease rate, or monthly lease rate, the firm cost per MSU, (or cost per 16 channels, etc.) with the quoted interest rate will take precedence.

Question 15 contains a request for change to the pricing format. In its response, the Department stated: "No change. Proposals must bid a fixed cost per MSU per system for the proposed systems, including options. No change to Annex B, so proposals must bid as indicated in the RFP".

The RFP closed on June 21, 1999. Three proposals were received including one from IBM and one from Amdahl.

According to the GIR, the evaluation of the proposals was completed on June 25, 1999. IBM's proposal was found to be non-compliant for failing to provide 1) a price per MSU as required by clause B.3 vii) a) of the RFP; 2) a price per 16 channel increment, clause B.3 vii) c); and 3) a price per each additional gigabyte of memory, clause B.3 vii) d).

On July 5, 1999, the Department informed IBM, in writing, that its proposal was unsuccessful and advised that Amdahl was the successful bidder. That same day, in a telephone conversation, the Department and IBM briefly discussed the reasons for disqualification of the IBM's proposal. On July 7, 1999, IBM requested a debriefing which was scheduled for the following day. However, on July 8, 1999, IBM cancelled the meeting and, later that day, requested by e-mail that the Department produce a written description of the reasons for the disqualification of its proposal.

IBM's complaint was received by the Tribunal on July 14, 1999. On July 28, 1999, the Department responded to IBM's request of July 8, 1999, in part, as follows:

IBM Canada's proposal was found to be non-compliant, as it failed to meet the mandatory requirements of the Request for Proposal. The proposal failed to provide a firm price per MSU, a firm unit price for each 16 channel increment and a firm price for each 1 GB of memory. This requirement was clearly outlined in the Request for Proposal at Article B.3 vii), and the requirement for a fixed price per MSU was further emphasized in Amendment #5, in the response to Question #15.

## **VALIDITY OF THE COMPLAINT**

### **Department's Position**

According to the Department, the requirement to submit firm unit prices was clearly set out in the RFP in clauses B.3 vii) a), c) and d) and was clearly identified as an essential or mandatory requirement of the RFP. This requirement, the Department argued, was reinforced by its responses to questions 12 and 15 contained in amendment 005 to the RFP.

The Department further argued that Annex B to the RFP, which provides leasing rate calculations, in no way removes the obligation of bidders to submit the above mentioned firm unit prices in their financial proposals. These unit prices, the Department submitted, enable it to fairly evaluate the price proposals of different proponents because the mainframe machines offered by one supplier may vary in MSU size range from the mainframe machines offered by another supplier. The requirement for unit prices, the Department argued, was intended to make clear to bidders that the price for each MSU, for each 16-channel increment and for each additional gigabyte of memory could not differ for the upgraded versus the initial mainframe machines. Furthermore, the RFP clearly indicates that bidders were required to include options to upgrade their proposed machines on a price per MSU basis. This, the Department submitted, was aimed at eliminating the possibility that a contractor argue, once the contract is awarded, that different pricing is

applicable in respect of the initial systems (72-78 MSUs at MCDC and 11-15 MSUs at APDC) versus the upgraded systems.

The Department submitted that it would have been in breach of its obligation to treat all proponents fairly and equally had it accepted IBM's financial proposal as submitted or had it requested IBM to submit the omitted information following the closing date for the receipt of proposals.

The Department requested the opportunity to make further submissions with respect to the award of costs in this matter.

In its additional observations of October 4, 1999, the Department submitted that, had IBM not cancelled the debriefing which it requested and which was scheduled for July 8, 1999, it would have been informed sooner as to the full reasons why its bid was determined to be non-compliant.

In addition, the Department submitted that, contrary to IBM's contention, the "Present Value Price" column in the Pricing Format Sheet is not equal to  $m\text{-rate} \times \#MSUs$  because the entry includes amounts for maintenance charges as indicated by the Pricing Format Sheet. Therefore, the Department argued, there are only certain circumstances in which dividing the amount shown for "Present Value Price" by the number of MSUs (109 or 22) will result in a firm unit price per MSU, for example, when the charge for maintenance is \$0, as in the case of Amdahl's bid. For the above reasons, the Department indicated that it disagreed entirely with IBM's allegation that the figures shown in the Pricing Format Sheet under the Present Value Price entry were arrived at by multiplying the firm price per MSU by the number of MSUs called for.

Concerning IBM's contention that the sum of \$1 it quoted for the leasing of additional channels is a common law practice to show that something is really being offered "free of charge", the Department submitted that it is without merit. At best, the Department argued, IBM's bid is confusing and inconsistent in that respect. Indeed, IBM's bid also contains a number of \$0 quotes which, presumably, also mean "no charge".

### **IBM's Position**

IBM submitted that its proposal contains firm unit prices for MSUs, 16-channel increments, and gigabytes of memory. These prices, IBM contended, are included in the Pricing Format Sheet of the tender document. IBM submitted that when the Pricing Format Sheet asks for the Present Value of 109 MSUs and 22 MSUs, the Department knows very well that the figures shown there were arrived at by multiplying the firm price per MSU by the number of MSUs called for. The price per MSU could, therefore, have been easily determined by the Department's dividing the number shown in the Present Value column by 109 for MCDC, and 22 for the APDC. The firm price per MSU, IBM submitted, was not "buried in deliberate and willful obscurity", it was simply set out, in the prescribed way, in the Present Value column of the Department's own Pricing Format Sheet.

Concerning firm unit prices for 16-channel increments and additional gigabytes of memory, IBM argued that there can be no doubt that IBM was giving them to the Department free of charge.

On the question of the firm unit price per MSU, IBM submitted that no one would fault the Department for dividing the figures provided by IBM for 109 MSUs in one case and 22 MSUs in the other, to arrive at IBM's firm price per MSU. This, IBM suggested, would not have been favoring a bidder since there was no guessing or interpreting to do.

In its final submissions, IBM noted that although it is unfortunate that IBM was forced to cancel the debriefing scheduled for July 8, 1999, this does not explain why it took the Department 20 days to produce a one-sentence explanation of the reasons for IBM's proposal disqualification. More importantly, IBM submitted that it cannot be blamed or considered late for addressing two of the three reasons for the disqualification of its proposal only in its comments on the GIR, since it was not aware of these reasons at the time it filed its complaint with the Tribunal.

On the price per MSU issue, IBM submitted that the Department failed to indicate in its comments that IBM, like Amdahl, clearly indicated in its proposal that its firm monthly maintenance costs and its extended maintenance cost would be \$0 and that, for this reason, dividing the amount shown for "Present Value Price" by the number of MSUs (109 or 22) would, of necessity, have resulted in disclosing IBM's firm price per MSU per mainframe.

IBM further submitted that its proposal was found non-compliant because it failed to provide a sheet of paper entitled "Cost Summary" and instead provided its firm unit prices in the Pricing Format Sheet. IBM also submitted that the \$0 or \$1 quotes, in its proposal, were not inconsistent and should not have confused the Department.

### **TRIBUNAL'S DECISION**

Section 30.14 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 provides, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in the *AIT*.

Article 506(6) of the *AIT*, provides, in part: "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". The Tribunal will decide whether the solicitation documents clearly indicated that firm unit prices were required for each MSU delivered, for each 16-channel increment and for each additional gigabyte of memory and, whether the Department acted according to these provisions when it declared IBM's proposal non-compliant for failing to include such firm unit prices.

The Tribunal is satisfied that the requirements for firm unit prices per MSU, for each 16-channel increment and for each additional gigabyte of memory were clearly set out in the RFP and that these requirements constitute essential requirements of the solicitation. This is not in dispute. The parties also agree that failure to meet one of these requirements is sufficient reason not to consider a proposal any further. How bidders were to express these firm unit prices is another matter.

What is in dispute, is whether or not IBM's proposal contained the above-mentioned firm unit prices. The Department is of the view that IBM's proposal failed to include a separate tabulation or summary with the said unit prices and, therefore, had to be declared non-compliant. For its part, IBM submits that the above-mentioned unit prices were contained in the Pricing Format Sheet provided with the RFP and included in its proposal and that these unit prices could easily have been determined by the Department through a simple and straightforward mathematical operation.



The Tribunal recognizes that compliance by potential suppliers with all the mandatory requirements of solicitation documents is one of the cornerstones to maintaining the integrity of any procurement system. Therefore, procuring entities must evaluate bidders' conformance with mandatory requirements thoroughly and strictly. This being said, the Tribunal notes that in this instance, given the structure of the solicitation documents and the clarifications provided by the Department before bid closing, it was possible for bidders to express the above-mentioned unit prices in a variety of ways in their proposals, for instance, in the form of a separate cost summary sheet or as part of the Pricing Format Sheet. The Tribunal notes that the Department approved of the manner in which Amdahl submitted its bid, including a separate document entitled Summary Pricing Sheet. Yet, the Tribunal also notes that this sheet does not appear to include all the information itemized in clause B.3 vii) a) 1). In the opinion of the Tribunal, the RFP did not prescribe a set format for expressing these unit prices in proposals, therefore, bidders were at liberty as to how and where in their proposals they chose to express the said unit prices.

The Department submitted that under certain conditions (e.g. where the charge for MSU maintenance is \$0, as was the case for IBM's proposal), dividing the amount shown by bidders in the "Present Value Price" column of the Pricing Format Sheet by the applicable number of MSUs, 109 or 22, would result in firm unit prices per MSU. This is corroborated by clause B.3 vii) a) of the RFP, where it is stated, in part, that the: "firm price per MSU delivered (referred to as m-rate in the attached [Annex B])" wherein the "m-rate = cost in \$ per MSU, being the lump sum lease rate per MSU (bidder proposed rate)" for 24 months. The Tribunal is also satisfied that the Department's responses to questions number 12 and 15 in Amendment 005 to the RFP made it abundantly clear that only one set of unit prices would be accepted from bidders and that these unit prices had to be expressed as set out in Annex B of the RFP. Although, generally, the government does not have an obligation to figure out bidders' unit prices, in this specific instance, because the Department is the author of the solicitation documents and because the Department responses to clarification questions made it abundantly clear that only one set of unit prices would be accepted per bidder, the Department should have derived IBM's price per MSU by dividing the amounts quoted in the Present Value Price column of the Pricing Format Sheet by the applicable number of MSUs. Therefore, what the Department found to be a non-compliance was, in the opinion of the Tribunal, a matter of form over substance. IBM's proposal contained firm unit prices that were incorporated in the Financial Summary Sheet as provided in Annex B of the RFP, which can be relied upon by the Department. Moreover, as indicated above, there was no prescribed form set out in the RFP in which to express firm unit prices in proposals; nor was a unit cost per MSU column provided in the Financial Summary Sheet. While bids must be read strictly, in the absence of a clear format for providing information, in the opinion of the Tribunal, some latitude must be given to the bidders. No such latitude was given by the Department to IBM in this case even though, in the opinion of the Tribunal, IBM's bid price per MSU was clearly expressed in the Financial Summary Sheet provided by the Department as part of the RFP.

Concerning the issue of IBM's proposal containing firm unit prices for each 16-channel increment and for each additional gigabyte of memory, the Tribunal is satisfied that IBM has provided those unit prices in the Price Format Sheet of its proposal. In the opinion of the Tribunal, IBM's proposal clearly indicates that the additional channels and gigabytes of memory will be provided free of charge.

For the above reasons, the Tribunal finds that the Department wrongly concluded that IBM's proposal failed to provide firm unit prices for each MSU, for each additional 16-channel increment and for each additional gigabyte of memory and, therefore, improperly determined that IBM's proposal was not compliant. In the opinion of the Tribunal, these actions by the Department deprived IBM of its right to a fair evaluation, to be declared responsive and to possibly be awarded the contract. To remedy the situation, the

Tribunal will recommend that IBM's proposal be re-evaluated on the basis of this determination and, as appropriate, that it be awarded the contract or be compensated for the lost opportunity to profit therefrom.

### **DETERMINATION OF THE TRIBUNAL**

In light of the foregoing, the Tribunal determines that the procurement was not conducted in accordance with *AIT* requirements 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 re-evaluate IBM's proposal, received in response to the solicitation. This re-evaluation should be performed in light of the Tribunal's determination herein. In the event that IBM is declared the successful bidder by the Department, in accordance with the evaluation and award provisions set out in the solicitation documents, the Tribunal further recommends that the contract awarded to Amdahl be terminated and, instead, awarded to IBM.

In the alternative, the Tribunal recommends that the Department present to the Tribunal a proposal for compensation, developed jointly with IBM, that recognizes the profit it lost in being deprived of the contract.

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

Arthur B. Trudeau

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Member