CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, May 30, 2001

**File No.: PR-2000-059**

IN THE MATTER OF a complaint filed by P&L Communications 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 subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards P&L Communications Inc. its reasonable costs incurred in filing and proceeding with this complaint but, subject to the costs that might be incurred in finalizing this award, limits these costs up to and including consideration by P&L Communications Inc. of the Department of Public Works and Government Services' letter of March 14, 2001, filed with the Canadian International Trade Tribunal in lieu of the Government Institution Report.

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

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| Date of Determination and Reasons: | May 30, 2001 |
| Tribunal Member: | Patricia M. Close, Presiding Member |
| Investigation Manager: | Randolph W. Heggart |
| Investigation Officer: | Paule Couët |
| Counsel for the Tribunal: | Michèle Hurteau |
| Complainant: | P&L Communications Inc. |
| Counsel for the Complainant: | Paul M. Lalonde<br>Jason B. Yustin |
| Government Institution: | Department of Public Works and Government Services |
| Counsel for the Government Institution: | Christianne M. Laizner<br>Susan D. Clarke<br>Ian McLeod |

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# STATEMENT OF REASONS

## COMPLAINT

On February 8, 2001, P&L Communications Inc. (PLCom) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] concerning the procurement, on a sole-source basis, from Densan Consultants Limited (Densan) (Solicitation No. 39014-010701/A) by the Department of Public Works and Government Services (the Department) of an electronic media monitoring system for the Canadian Food Inspection Agency (CFIA).

PLCom alleged that, contrary to several articles of the *North American Free Trade Agreement*[2] and the *Agreement on Internal Trade*,[3] the Department, in conducting this procurement, resorted to limited tendering procedures on the basis of an unfounded restrictive specification, thus discriminating against PLCom and failing to provide it with an equal opportunity to compete.

As a remedy, PLCom requested that the Advance Contract Award Notice (ACAN) and related contract be suspended pending the Tribunal's investigation and that a competitive procurement process, with a technical specification allowing for functional equivalents to Microsoft software, be held for this requirement. In the alternative, PLCom requested to be compensated for the profits that it lost and the reasonable costs that it incurred in preparing a response to this solicitation and in proceeding with this complaint.

On February 13, 2001, the Tribunal informed the parties that the complaint had been accepted for inquiry as it 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*.[4] 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 March 14, 2001, the Department filed a letter with the Tribunal, in lieu of the Government Institution Report (GIR) required by rule 103 of the *Canadian International Trade Tribunal Rules*.[5] On March 26, 2001, PLCom filed comments on this letter with the Tribunal in which it made allegations as to the reasons why the Department was not filing a

1. R.S.C. 1985, c. 47 (4th Supp.) [hereinafter CITT Act].
2. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/eng/it.htm> [hereinafter AIT].
4. S.O.R./93-602 [hereinafter Regulations].
5. S.O.R./91-499.

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

proper GIR in this matter. On March 28, 2001, in light of the seriousness of the allegations made by PLCom, the Tribunal requested that the Department comment on PLCom's submissions of March 26, 2001. On April 6, 2001, the Department filed its comments in response.

Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required, nor was the additional information that PLCom wished to file, and disposed of the complaint on the basis of the information on the record.

**PROCUREMENT PROCESS**

On January 10, 2000, the CFIA received a "Needs Analysis" report (the report) from a consultant concerning the CFIA's requirement for the electronic media monitoring system. The report recommended a solution from a private sector company and advised that three options were available, two from Densan and one from PLCom. The report also recommended the acquisition of one of the electronic media monitoring systems offered by Densan. The report indicated that the CFIA could lease the electronic media monitoring system from Densan for a two-year period without a competitive procurement process.

On February 29, 2000, the CFIA issued a six-month lease for the system with Densan in the amount of $23,320. On October 2, 2000, the arrangement was extended for a further six months and the value of the lease was increased to a maximum of $36,640.

In November 2000, the CFIA decided to sole-source the acquisition of the system to Densan and issued a requisition to the Department to that effect on November 23, 2000. On December 29, 2000, the Department published an ACAN for this requirement on Canada's Electronic Tendering Service (MERX). The ACAN closed on January 15, 2001. The ACAN indicates that the solicitation is covered by NAFTA and the AIT and that a non-competitive procurement strategy is being used for reasons of "Exclusive Rights". The ACAN also indicates that "[s]ection 6 of the Government Contract Regulations is being invoked in this procurement as only one person or firm is capable of performing the contract."

After indicating that Articles 506(12)(a) and (b) of the AIT and Articles 1016.2(b) and (d) of NAFTA apply to the procurement, the ACAN set out the reasons for single tendering:

> Only one firm is capable of performing the contract
> - Only company with local support
> - Only company with analytical component
> - Only company with experience in working with radio and television
> - Only company with detail, robust and most comprehensive search engine.

On January 12, 2001, PLCom advised the Department, by telephone, that it would submit a written statement of capabilities and would request that a competitive procurement be held. On January 15, 2001, PLCom submitted a written response to the ACAN. On January 25 and 29, 2001, the Department informed PLCom that the product that it proposed did not meet the mandatory requirements of the ACAN and that its challenge was therefore dismissed. On February 8, 2001, PLCom filed this complaint with the Tribunal. On March 2, 2001, the CFIA advised the Department to cancel the proposed sole-source procurement to Densan. On March 3, 2001, the lease arrangement with Densan was further extended to June 30, 2001, pending the Tribunal's decision in this matter. That last amendment increased the value of the leasing agreement to $41,300.

## POSITION OF PARTIES

### Department's Position

On March 14, 2001, the Department explained its position in a letter addressed to the Tribunal:

> [The Department] wish[es] to advise you that the subject solicitation in this matter … has been cancelled.
>
> Subsequent to the issuance of the subject solicitation, CFIA became aware of the existence of a media monitoring system developed by another federal government department that is available to all federal government departments and agencies. CFIA is currently evaluating this system to determine whether it meets CFIA's requirements. It expects to complete this evaluation by mid-April, 2001, although operational factors may require additional time.
>
> If, as a result of this evaluation, CFIA concludes that this system does not meet CFIA's requirements, then CFIA will consider the options available to it at that time. CFIA may conclude that it does not require an electronic media-monitoring system at this time. If it is determined that such a system remains a requirement, then CFIA will submit a new requisition to [the Department] requesting the initiation of a new competitive procurement solicitation for such a product.

In concluding, the Department submitted that, under the circumstances, PLCom's only entitlement to relief might be with respect to complaint costs.

In its comments of April 6, 2001, to the Tribunal, the Department submitted that PLCom had raised new issues in its response to the Department's letter of March 14, 2001, namely whether the CFIA acted in bad faith or in a grossly negligent manner in carrying out the procurement, or whether it intentionally provided inaccurate information to the Tribunal, thereby injuring the integrity and credibility of the procurement process. The Department further submitted that PLCom raised these new issues to found a new claim for compensation.

The Department and the CFIA took issue with the unfounded allegations contained in PLCom's comments. The Department submitted that these new allegations were specious, disingenuous, without proper foundation, unsupported by any evidence and without merit. The Department submitted that there had been no injury to PLCom because no contract was awarded pursuant to the ACAN procurement procedure. The Department asserted that PLCom would be afforded the opportunity to compete should there be a requirement to procure the system from the private sector.

The Department added that PLCom's "surmising" with respect to the late filing of the GIR is vexatious in nature. The Department submitted that the late filing of the GIR was clearly a mistake attributable to a simple human error brought about by an office move.

The Department further submitted that, considering the Tribunal's procurement review process is to facilitate an expeditious inquiry into bid challenges, it would not be appropriate to file a GIR that would defend the continuation of an ACAN procurement process that was terminated and where agreement now exists to invoke competitive tendering should the need for an electronic media monitoring system continue to exist.

Concerning the principal matter at issue, i.e. the intended sole-source award to Densan, the Department submitted that the facts are straightforward and do not provide support for the speculative charges laid by PLCom in its comments on the GIR.

With respect to the CFIA's lack of knowledge of the in-government NewsDesk system, the Department submitted that PLCom had established no connection between the CFIA's alleged misconduct or negligence and any alleged injury or prejudice caused to it. The Department submitted that PLCom was not prejudiced in any way by the fact that the NewsDesk system was not evaluated at the time of the original lease to Densan. The Department submitted that PLCom was disadvantaged, not by the absence of an examination of the NewsDesk system in the report, but by the fact that the consultant hired by the CFIA recommended one of the Densan solutions over PLCom's solution. In addition, the Department submitted that it is illogical and unreasonable for PLCom to attempt to manufacture some basis for liability for punitive damages, which would impose upon the Crown the duty to be informed of every commercial or governmental technology solution available in the marketplace when preparing a solicitation. The trade agreements, the Department submitted, do not impose such an obligation.

What is important, the Department concluded, is that the sole-source procurement has been cancelled and, should the need for the electronic media monitoring system persist, it will be fulfilled through open tendering procedures.

**PLCom's Position**

PLCom submitted that the Department should file a proper GIR in the matter and argued that the withdrawal of the solicitation is not a proper explanation for the CFIA's dubious actions in this case. PLCom indicated that it was disappointed that the CFIA had chosen not to explain its actions or even to attempt to justify its conduct under the trade agreements. PLCom submitted that one could only conclude from this lack of response that the CFIA agrees with the submissions and grounds in PLCom's complaint.

PLCom submitted that it is confounding and inconsistent, if not disingenuous, for the CFIA to now argue that its requirement may no longer exist. Indeed, PLCom argued, the ACAN confirmed that officials at the CFIA already had decided to award a contract to Densan. The CFIA officials not only had decided that a requirement existed, but they had also decided what the requirement entailed, who the contract awardee would be, and what the terms and specific price would be. The CFIA officials had also, by the very terms of the ACAN, done sufficient research to determine that the contract was subject to NAFTA and the AIT, that the justifications for sole-sourcing applied, and that Densan allegedly had "exclusive rights". Moreover, PLCom submitted that the CFIA had allegedly entered into a formal agreement with Densan to rent its software prior to the ACAN.

PLCom later submitted that the admission in the Department's letter of March 14, 2001, that the CFIA only became aware of the existence of the NewsDesk system developed by the Department of the Solicitor General after the issuance of the solicitation is staggering. PLCom submitted that the NewsDesk system is well known in the Ottawa media monitoring milieu and anyone who carried out the most basic research on the state of the industry would have discovered its existence. PLCom further submitted that it stretches credibility to suggest that the CFIA did not know about this electronic media monitoring system before issuing the ACAN, particularly so given the knowledge and expertise of the consultant hired by the CFIA to advise on this procurement.

PLCom submitted that, if the CFIA did not know about the NewsDesk system before issuing the ACAN, it failed to carry out the most perfunctory verifications about what is available on the market before deciding to purchase a system from Densan. Therefore, PLCom submitted, the CFIA's assertion in the ACAN about the unique characteristics of the Densan system and the alleged "exclusive rights" attached thereto was made without any basis or verification. In so doing, PLCom submitted, the CFIA either willfully sought to avoid its obligations under the trade agreements or acted in a reckless and grossly negligent

manner. Either way, PLCom submitted that the CFIA subverted the goals of the trade agreements and caused injury to the credibility and integrity of the procurement process.

In light of the above, PLCom submitted that the CFIA should be ordered to pay compensation reflecting that injury in line with the principles laid out by the Tribunal in file No. PR-99-035.[6] PLCom submitted that, if the CFIA knew or willfully ignored at the time of the issuance of the ACAN that the NewsDesk system existed, then it intentionally provided inaccurate information to the Department and the Tribunal, subverting the goals of the trade agreements and injuring the integrity and credibility of the federal procurement system.

## 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 further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements of the applicable trade agreements.

Article 1016 of NAFTA provides that an entity may, in certain circumstances and subject to certain conditions, use limited tendering procedures provided that such procedures are not used with a view to avoid maximum possible competition or in a manner that would constitute a means of discrimination between suppliers of the other parties or protection of domestic suppliers. Article 506(12) of the AIT provides that, where only one supplier is able to meet the requirements of procurement, an entity may, in certain circumstances, use limited tendering procedures.

In this instance, the Department and the CFIA have conceded that at least two suppliers, Densan and PLCom, were capable of meeting the requirements of this procurement. On this basis, the Tribunal determines that the conditions set out in Article 1016 of NAFTA and Article 506(12) of the AIT to use limited tendering procedures do not exist in this instance and that the complaint is therefore valid. In its letter, the Department clearly admitted that it was a mistake to have issued an ACAN in this case and proposed to submit this requirement to open tendering procedures should there still be a need to acquire a system from the private sector.

In principle, the filing by the Department of a letter in lieu of the GIR to speed up proceedings and to minimize costs to parties is appropriate when the government is conceding the case brought against it. However, given the serious allegations made by PLCom in response to the letter filed by the Department in lieu of the GIR, the Tribunal requested that the Department supplement its letter.

Based on the letter submitted by the Department on April 6, 2001, the Tribunal is of the view that the question as to whether the Department and the CFIA should have been aware of the existence of the NewsDesk system at the time they initiated this procurement is not at issue. As well, the Tribunal has carefully reviewed the submissions filed by the parties and is of the view that the degree of prejudice experienced by PLCom in this case cannot be equated to the degree of prejudice that Dr. Luik experienced in file No. PR-99-035. With respect to the time for filing the letter in lieu of the GIR, the Tribunal is satisfied that the short delay in filing was due to an inadvertent human error and did not cause prejudice to PLCom.

6. *Re Complaint Filed by Dr. John C. Luik* (28 March 2000).

It was made clear to PLCom in the Department's letter responding to the complaint that the Department and the CFIA had improperly invoked limited tendering procedures in this instance and that the government was prepared to correct the situation in a manner that accommodated PLCom's request for remedy, and PLCom's allegations appear to the Tribunal to be unfounded. Therefore, the Tribunal will limit its award for complaint costs up to and including consideration by PLCom of the Department's letter of March 14, 2001, filed with the Tribunal in lieu of the GIR. In the Tribunal's opinion, PLCom should support its costs for pursuing the matter further.

**DETERMINATION OF THE TRIBUNAL**

In light of the foregoing, the Tribunal determines that this procurement was not conducted in accordance with the provisions of the applicable trade agreements and that the complaint is therefore valid.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards PLCom its reasonable costs incurred in filing and proceeding with this complaint but, subject to the costs that might be incurred in finalizing this award, limits these costs up to and including consideration by PLCom of the Department's letter of March 14, 2001, filed with the Tribunal in lieu of the GIR.

Patricia M. Close
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Presiding Member