



Ottawa, Thursday, November 2, 2000

File Nos.: PR-2000-017 and PR-2000-035

IN THE MATTER OF two complaints filed by TELUS Integrated 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 decisions to conduct inquiries into the complaints 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 complaints, in part, are 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 Correctional Service of Canada award the contract to TELUS Integrated Communications Inc., the only compliant bidder in relation to this solicitation.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards TELUS Integrated Communications Inc. its reasonable costs incurred in filing and proceeding with these complaints.

James A. Ogilvy \_\_\_\_\_  
James A. Ogilvy  
Presiding Member

Susanne Grimes  
Susanne Grimes  
Acting Secretary

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

Date of Determination: November 2, 2000  
Date of Reasons: December 8, 2000

Tribunal Member: James A. Ogilvy, Presiding Member

Investigation Manager: Randolph W. Heggart

Investigation Officer: Paule Couët

Counsel for the Tribunal: Gerry Stobo

Complainant: TELUS Integrated Communications Inc.

Counsel for the Complainant: Gordon Cameron

Intervener: BCE Nexxia Inc.

Counsel for the Intervener: Ronald D. Lunau  
MaryRose Ebos

Government Institution: Correctional Service of Canada

Ottawa, Friday, December 8, 2000

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IN THE MATTER OF two complaints filed by TELUS Integrated 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 decisions to conduct inquiries into the complaints under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

### STATEMENT OF REASONS

On June 20, 2000, TELUS Integrated Communications Inc. (TELUS) filed a complaint (File No. PR-2000-017 [the first 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 procurement (Request for Proposal [RFP] 21120-00-7510) by the Correctional Service of Canada (CSC) for the installation and operation, at each correctional facility in Canada, of telephone equipment and software and the associated telephone service (Inmate Telephone System [ITS]). The ITS is specifically designed so that its use by inmates can be controlled and monitored by CSC personnel.<sup>2</sup>

TELUS alleged that, contrary to a provision of the *Agreement on Internal Trade*,<sup>3</sup> the CSC selected, as the successful proponent, BCE Nexxia Inc. (BCE), whose proposal was not compliant with the mandatory requirements stipulated in the RFP. TELUS also alleged that the RFP did not clearly identify the requirements of the procurement and the criteria to be used in the evaluation of bids and the methods of weighting and evaluating the criteria. Furthermore, TELUS alleged that the procurement discriminated among potential suppliers, in that not all potential suppliers had access to certain critical information concerning the CSC's requirements.

TELUS requested, as a remedy, that the CSC cancel the award of the contract pending the resolution of this complaint and that the Tribunal issue an order requiring the CSC to recomplete the procurement. TELUS also requested its reasonable costs for preparing a bid in response to the procurement and for filing and pursuing this complaint. In the alternative, in addition to its reasonable bid preparation and complaint costs, TELUS requested that it be compensated for the profits that it lost as a result of the defective procurement.

On June 30, 2000, 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*.<sup>4</sup>

On July 7, 2000, the CSC filed a notice of motion with the Tribunal objecting to the Tribunal's jurisdiction to inquire into this matter on two grounds, first, that the solicitation at issue is not subject to the

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. The selected provider will be required to provide the service to approximately 13,000 inmates incarcerated in 49 correctional facilities operated by CSC across Canada.
3. As signed at Ottawa, Ontario, on July 18, 1994 [hereinafter AIT].
4. S.O.R./93-602 [hereinafter Regulations].

AIT pursuant to Article 502(1)(b), in that the requirement is a “no value” item to the CSC and, second, that it is not subject to the AIT pursuant to Article 507, as the CSC is acting in this procurement as an agent of the inmates only and is not the procuring entity. In the alternative, the CSC submitted that the complaint was filed late, contrary to subsection 6(1) of the Regulations, and that the ground of complaint is unfounded and hypothetical. The CSC requested an order dismissing the complaint and, in the alternative, an extension of the time to submit the Government Institution Report (GIR) pending the Tribunal’s decision. On July 10, 2000, the Tribunal issued an order postponing the award of any contract in relation to this solicitation until the Tribunal determined the validity of the complaint.

On July 13, 2000, the Tribunal informed the parties that BCE had been granted leave to intervene in this matter.

On July 21, 2000, TELUS and BCE filed comments on the motion with the Tribunal. On July 27, 2000, having reviewed the parties’ submissions on the motion, the Tribunal issued an order dismissing the first two grounds of the CSC’s motion, with reasons to follow, and indicating that the issue of the timeliness of the complaint would be deferred until the Tribunal made its determination on the merit.

On August 25, 2000, the CSC filed its GIR with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>5</sup> On September 14, 2000, BCE filed comments on the GIR with the Tribunal and, on September 15, 2000, TELUS did likewise .

In its comments on the GIR, TELUS raised new grounds of complaint (File No. PR-2000-035 [the second complaint]) in respect of the same solicitation. Therein, TELUS alleged that, contrary to the provisions of Article 506(6) of the AIT, the CSC had identified for contract award a bid that was not compliant with the mandatory pricing requirements of the RFP, that it had improperly used the “clarification” process to allow BCE to supplement and repair its bid and that, contrary to the provisions of Articles 504 and 506 of the AIT, it had communicated with BCE during the bid evaluation period, improperly and in contravention of the process described in the RFP. TELUS submitted that the effect of these additional grounds of complaint is that the contract cannot be awarded to BCE without violating the AIT. As a result, TELUS requested, as a remedy, that it be awarded the contract.

On October 5, 2000, the Tribunal informed the parties that the second complaint, filed on September 15, 2000, 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 Regulations. The Tribunal also indicated that, with the parties’ cooperation, it intended to deal with the second complaint within the same time frame as the first complaint. That same day, the Tribunal issued an order postponing the award of any contract in relation to this solicitation until the Tribunal determined the validity of the second complaint. On September 29, 2000, BCE filed comments on the second complaint with the Tribunal. On October 13, 2000, the CSC filed a GIR pertaining to the second complaint and, on October 20, 2000, TELUS filed comments on the GIR with the Tribunal.

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

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5. S.O.R./91-499.

## NOTICE OF MOTION

As stated above, on July 7, 2000, the CSC filed a notice of motion claiming, for several reasons, that the Tribunal did not have jurisdiction over the solicitation at issue. Following a review of the submissions from all parties, the Tribunal dismissed the motion. The reasons are as follows. First, it is important to recall that the Tribunal's jurisdiction to examine procurement complaints under either the *North American Free Trade Agreement*,<sup>6</sup> the *Agreement on Government Procurement*<sup>7</sup> or the AIT is engaged only if certain conditions are met. One of those conditions is that the value of the solicitation must meet a monetary threshold. If it does not, the Tribunal cannot assume jurisdiction to consider a complaint. Article 502(1) of the AIT provides that the agreement applies to procurements within Canada by any entity listed in Annex 502.1A, where the procurement value is \$25,000 or greater, in cases where the greatest portion of the procurement is for goods, and \$100,000 or greater, in cases where the largest portion of the procurement is for services. Procurement value is defined in Article 518 of the AIT as meaning "the estimated total financial commitment resulting from a procurement".

The CSC submitted that it has no financial commitment resulting from the solicitation at issue. The CSC is not financially responsible nor has it committed any funds to this procurement. As this procurement was to provide a direct dialing telephone service with a collect call option, the CSC submitted that inmates or a person accepting a collect call from an inmate would be financially responsible for the payment of the call. In response, TELUS submitted that: (1) the CSC has mischaracterized this procurement, which in fact involves the supply of goods and services directly to the CSC (not the inmates) of a value that easily meets the monetary threshold prescribed in the AIT (TELUS estimated that value at several million dollars); (2) the Tribunal, in File No. PR-96-025,<sup>8</sup> had considered in the early stage of the proceeding the CSC's "no value" argument and rejected it; and (3) the CSC's "no value" argument is inconsistent with the public sector procurement policy and government financial and accountability policy. For its part, BCE adopted the CSC's position on this point. BCE added that the objective behind the RFP was to acquire services not for the CSC but for the inmates within the CSC facilities. In this case, BCE submitted, the inmates will be financially responsible for paying for the telephone service, and they will be the ultimate beneficiaries of the procured services.

The CSC also argued that Article 507(b) of the AIT excludes, from its bid protest provisions, "procurement of goods, services or construction purchased on behalf of an entity not covered by this Chapter". In this context, the CSC submitted that it is procuring telecommunications services for inmates, not for a government entity. Considering that each inmate, as an individual, or inmates, as a group, are not entities that would be subject to the AIT, the CSC submitted that the procurement is not covered by the agreement. BCE adopted the CSC's arguments on this point. In response, TELUS submitted that this argument is without merit because it is incorrect to say that this procurement involves only services procured for the inmates. In the RFP, TELUS submitted, the CSC has articulated its need for equipment, software and services (1) to control the calls that inmates can make, (2) to intercept those calls for recording purposes, (3) to monitor, track and analyze the calls and usage patterns and (4) to work with the data thus generated. It goes without saying, TELUS submitted, that none of these control and monitoring features are being sought by the inmates.

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6. 32 I.L.M. 289 (entered into force 1 January 1994).

7. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)>.

8. Digital Equipment Corporation's complaint was withdrawn [hereinafter *Digital Equipment*].

## TRIBUNAL'S DECISION ON THE MOTION

With respect to the value issue, the Tribunal determined that the solicitation at issue has an estimated value to the CSC above the AIT monetary thresholds applicable to the procurement of goods and services. In arriving at this decision, the Tribunal considered the introduction to the Statement of Requirements (SOR) which reads, in part:

The Correctional Service of Canada requires a direct dial telephone service with a collect calling option that will provide the lowest cost local and long-distance telephone rates for inmates incarcerated at various federal penitentiaries across the country. The inmate telephone service must be networked nationally and permit the institutions to easily access data from other facilities. It must also permit the electronic transfer of their personal telephone files when an inmate is moved to another institution. The system must provide the Service with an automated capability to manage, control and supervise the inmates use of the telephones. The inmates should have the option of using either debit or collect calling. Smart Card technology as well as a personal identifier must be fully integrated into the system. The local and long distance rates for both debit and collect calling should reflect the competitive market rates in the community. The Inmate Telephone System must possess the capability of, at a later date, permitting the add-on of collateral services. [Emphasis added]

Although it appears that the inmates are responsible for the cost of each call that they make, it is clear that the CSC expects to, and will, derive numerous advantages from the ITS to assist it in managing, controlling and monitoring the telephone calls of inmates. The residual benefit will involve the provision of hardware and software, as well as related services.

It is rare, but not unheard of,<sup>9</sup> to have a solicitation where there is no apparent cost to the procuring entity. Almost all procurements for the purchase of goods or services require that money be paid to the successful bidder. However, just as in the law of contract, legal consideration in procurement cases can come in different forms. A procurement is defined in Article 518 of the AIT to mean “the acquisition by any means, including by purchase, rental, lease or conditional sale, of goods, services”. Goods are defined to mean “moveable property (including the costs of installing, operating, maintaining or manufacturing such moveable property) and includes raw materials, products, equipment”. Procurement value is defined as the “estimated total financial commitment resulting from a procurement”. Each case must be considered individually to determine whether there is an ascertainable value. In the case of the AIT, that value must be at least \$100,000, where the largest portion of the procurement is for services.

When read together, these provisions lead the Tribunal to conclude that the ITS solicitation does meet the minimum monetary threshold. Very obviously, there is considerable value to the government, in terms of equipment and services from which it will benefit, and value to the successful bidder that will have the exclusive right to provide and charge for telephone services to inmates over the duration of the contract.

In this case, TELUS has estimated that its costs in supplying the goods and services required are well above the minimum AIT threshold. This amount is arrived at by totalling the cost of the inmates' “smart cards”, installation of “card reader” telephones (including a biometric component), installation and maintenance of two terminals per institution, training, software, etc. The direct value to the CSC is clear. While the procured service will allow inmates to make telephone calls, it also allows the CSC to establish, control and monitor inmate telephone usage by providing the CSC with the ability to intercept, restrict and block calls and provide management with information about nationwide inmate telephone usage.

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9. In the administrative record for *Digital Equipment*, the Tribunal concluded that an electronic tendering service which was, according to the RFP, required to be provided at no cost to the government, with revenues to be raised from user fees, constituted a “designated contract” for the purposes of the AIT.

It follows from this that the Tribunal finds that the procurement has a monetary value for the CSC. That the CSC has designed this procurement to pass the financial commitments on to the inmates does not change the fundamental fact that the ITS necessarily involves financial commitments. The Tribunal notes, in addition, Article 505(3) of the AIT, which provides, *inter alia*, that no procuring entity shall design a solicitation in order to avoid the obligations of Chapter Five of the AIT.

Moreover, it is the CSC, not the inmates, as argued by the CSC, which is the procuring entity. The inmates have no control over the development or administration of the procurement process. Contrary to the CSC's argument, the user of a procured service is not determinative of the identity of the procuring entity. In any event, the CSC stands to benefit to a considerable extent by virtue of the control and monitoring features that the system will provide.

## PROCUREMENT PROCESS

On March 21, 2000, the CSC sent an RFP for this procurement to four telephone service providers, including TELUS and BCE. On March 29, 2000, the CSC sent the RFP to a fifth provider that requested it. The RFP includes the following provisions that are relevant to this case:

### 8. STATEMENT OF COMPLIANCE

A paragraph statement of compliance with each paragraph of the Statement of Requirements at Appendix "B" is required. The bidder shall provide a narrative response to each paragraph and subparagraph of Appendix "B". (Statement of Requirements). The narrative response shall clearly indicate the Bidders understanding of each task itself and as it relates to the SOR and applicable specifications, the Bidders compliance with the mandatory items, the proposed approach to each task, and how the Bidder proposes to perform the task.

Article 12.1.1.A.1.f of the RFP indicates that the requirement of section 3.12(a) of the SOR constitutes a mandatory condition of this RFP.

Article 13 of the RFP, "Award of Contract", reads, in part:

Proposal evaluation shall be based solely upon the contents of the Bidder's submission.

After the proposal closing date, no amendment to the proposal shall be accepted. However during the evaluation the Correctional Service may, at its discretion request clarification in writing. . . . An agreement will be entered into for the provision of a national integrated inmate telephone service with the telecommunications provider who after complying with the mandatory requirements and passing the numerical evaluation with a minimum of 70% offers the lowest national direct dial long distance calling rate.

Article 14 of the RFP, "Right to Negotiate or Cancel", reads:

CSC reserves the right to further negotiate with bidders in order to arrive at the most cost-effective contract that is in keeping with the terms and conditions of the RFP, or to not award a contract at all.

The SOR includes the following:

#### 1.1 General

The Correctional Service of Canada requires a direct dial telephone service with a collect calling option that will provide the lowest cost local and long-distance telephone rates for inmates incarcerated at various federal penitentiaries across the country.

Section 2.0 of the SOR, "Requirement", reads, in part:

The ITSP [Inmate Telephone Service Provider] must provide the lowest cost debit and collect calling rates possible.

Section 3.12 of the SOR, "Calling Rates", reads:

- 3.12 (a) It is the objective of the Service that the inmates have access to the lowest possible debit and collect calling rates.
- 3.12 (b) The TSP [Telephone Service Provider] shall provide a detailed rate structure for local, long distance and international collect and debit calls with the priority assigned to the various types of debit calls. In developing the rate structure the following factors should be taken into account.
- There is a preference for uniform calling rates that would be applicable at all of the sites across the country. Any regional variances in rates shall be identified and explained in the submission.
  - All of the inmates residing at the same institution shall have access to identical long distance charges.
  - The rate structure should reflect the competitive market rates in the community.
- 3.12(c) The rate structure used by the ITS shall not be subject to modifications without the prior consent of CSC.

Four proposals were received by bid closing date on April 25, 2000, including one each from TELUS and BCE. On May 18, 2000, the CSC informed BCE that option "A" of its proposal had been declared successful. That same day, all other bidders were informed that a more favourable proposal had been selected. On May 23, 2000, TELUS contacted the CSC by telephone concerning the outcome of the solicitation and requested a debriefing. On June 6, 2000, a debriefing session was held with TELUS. According to information in the GIR, although not offering the lowest uniform direct dialing long distance calling rate, TELUS's proposal was the only other compliant proposal received by the CSC as a result of this solicitation.

## **VALIDITY OF THE COMPLAINT**

### **CSC's Position**

The CSC submitted that TELUS is late in making its allegation that BCE's proposal was improperly selected for award because it did not offer the lowest prices for the four types of calls, as described in the SOR.

The RFP was issued on March 21, 2000, and, according to the CSC, clearly indicated at article 13 of the RFP and section 3.12 of the SOR that the award would be made on the basis of the lowest national direct dial long distance calling rate. The CSC submitted that this fact was confirmed in the answer that it provided to all bidders on April 13, 2000, which TELUS acknowledged to have received on April 14, 2000. Furthermore, the CSC submitted that, on May 23, 2000, TELUS was informed that both it and BCE had met all the mandatory requirements of the RFP. If, the CSC argued, TELUS's interpretation is correct, only one bid could have met all the mandatory requirements. Therefore, TELUS knew or should have known on or about May 23, 2000, that its interpretation was erroneous. In light of the above, the CSC submitted that TELUS knew of this basis of complaint by March 21, 2000, or alternatively on April 14, 2000, or in the further alternative on May 23, 2000, and, accordingly, it is out of time.



In the alternative, the CSC submitted that it is clear from the interpretation of the RFP and the SOR that the purpose of mandatory article 12.1.1A.1.f of the RFP was to ensure that each bidder would provide rates for the four possible services to be provided to the inmates. In order to foster inmate communication with family and community members, the objective of the requirement was to encourage potential suppliers to provide the inmates with the lowest possible debit and collect calling rates that they could offer.

With respect to TELUS's allegation that the tender documentation did not clearly identify the requirements of the procurement by not informing bidders that the inmates use the telephone service mainly in the evenings and on weekends, the CSC submitted that, if TELUS was of the view that this information was critical for bidding, it could have requested this information during the bidding period. Because TELUS did not seek such information, it is too late to complain about this ground at this time. Furthermore, the CSC submitted that, since TELUS, at the time of bidding, was the telephone service provider for approximately 28 percent of the federal inmate population (the inmates in Alberta and British Columbia), it was aware, to some degree, of the usage pattern for inmates.

In the alternative, the CSC submitted that the "time of usage" was neither a requirement nor a consideration for the CSC. The RFP clearly stated that uniform rates would be preferred. Accordingly, the CSC submitted, as this was not a requirement of the procurement, TELUS cannot claim that it was not informed of a requirement of the procurement.

With respect to TELUS's allegation that the tender documentation did not clearly identify the evaluation criteria and the methods of weighting and evaluating the criteria to be used in the evaluation of bids, the CSC submitted that this allegation stems from the CSC's response to a hypothetical question raised by TELUS at the time of TELUS's debriefing on June 6, 2000. The CSC submitted that this ground of complaint has no cause of action, is unfounded and is late. The CSC indicated that no compliant bidder submitted variable rates and that the evaluation was completed as per the evaluation methodology set out in the RFP. Furthermore, the CSC submitted, TELUS never raised the question of the variable rates before bid closing.

Concerning TELUS's further allegation that this procurement discriminated among potential suppliers because not all potential suppliers had certain critical information concerning traffic flow, the CSC submitted that this allegation is completely without merit because this information was not a consideration for the CSC. Moreover, as stated above, variable rates were not requested. Furthermore, the CSC submitted that to suggest that BCE would have had complete access to the CSC's precise weighting of requirements is unfounded, unwarranted and unjustifiable. Indeed, the CSC argued, no potential supplier had access to the RFP and SOR prior to their issuance.

In its comments of October 13, 2000, on the second complaint, the CSC submitted that the grounds of complaint therein were known or should reasonably have been known by TELUS on August 30, 2000, the day on which the Tribunal sent the GIR to TELUS. Because TELUS's second complaint was filed with the Tribunal on September 15, 2000, some 11 working days after the date on which TELUS received the GIR, the CSC submitted that this complaint was filed outside the prescribed 10-working-day time frame and, therefore, is late.

In the event that the Tribunal found TELUS's new grounds of complaint to be timely, the CSC argued, in the alternative, with respect to TELUS's allegation that option "A" of BCE's proposal was non-compliant because it applied an assumption that rendered the offer conditional, that BCE's proposal clearly stated, in response to article 3.12(c) of the RFP, that it complied and that no modifications would be made to its rate structure without the prior consent of the CSC. Given this statement, the CSC submitted that

it was satisfied that option “A” of BCE’s proposal was not conditional. The CSC also repeated and relied on BCE’s comments of September 29, 2000, to the Tribunal on this point.

With respect to the allegation that BCE failed to bid certain mandatory rates, the CSC submitted that section 3.12(b) of the SOR is not a mandatory requirement of the RFP, but rather a rated requirement. The CSC also relied on BCE’s comments on this point for its defence.

With respect to TELUS’s allegation that the CSC has permitted BCE to repair its bid by making post-closing submissions in relation to section 3.15 of the SOR, the CSC submitted that, in responding to its request for clarification concerning BCE’s compliance statement to section 3.15(a), (b), (c) and (d), BCE only referred to particular paragraphs already provided in its proposal and did not submit any new or additional information. As for the allegation that the CSC allowed the post-closing amendment of a part of BCE’s proposal filed in draft, the CSC submitted that it requested a clarification concerning the Project Management Plan (the Plan) in BCE’s proposal, which was marked as “draft”. In addition, the CSC relied on BCE’s comments on this point for its response.

With respect to TELUS’s allegation that, contrary to the express terms of the RFP, post-closing discussions and negotiations took place with BCE to the detriment of TELUS, the CSC noted that article 13 of the RFP allowed it to request clarification in writing during the evaluation of proposals and that the only exception to the rule that such communications be in writing occurred because the CSC’s electronic mail system was disabled at the time, as a result of being infected by a computer virus. Under these circumstances, the CSC was not, it claimed, acting contrary to the terms of the RFP.

### **BCE’s Position**

BCE submitted that TELUS’s four grounds of complaint in the first complaint were filed late. Concerning TELUS’s first allegation that the contract has been awarded to BCE even though it did not propose the lowest rate on four types of calls, BCE submitted that there was no such award rule in the RFP and that the RFP clearly indicated that the technically responsive proposal offering the “lowest national direct dial long distance calling rate” would be recommended for award. BCE submitted that this condition was clearly stated in the RFP for all potential suppliers to see and that, as a minimum, if TELUS had read all the provisions of the RFP, it could have apprehended an ambiguity and sought clarification at that time. BCE further submitted that the CSC’s response of April 13, 2000, to a potential supplier’s question concerning article 13 of the RFP and section 3.12(b) of the SOR should have alerted TELUS that its alleged understanding of the award rules, in this instance, was inaccurate. BCE further submitted that, if TELUS was convinced that only one bidder could possibly be compliant with the requirements of the RFP and that BCE did not offer the lowest rates on each of the designated services, it should have known this ground of complaint on May 18, 2000, when it was advised that it was not the successful bidder.

With respect to TELUS’s second and third allegations that the RFP did not clearly identify the requirements of the procurement and did not clearly identify the evaluation criteria and the methods of weighting and evaluating the criteria, BCE submitted that, if TELUS believed that “absolutely vital” information relating to inmate telephone usage was missing, it should have raised the matter or objected to the situation during the bidding period when it was apparent that such information had not been provided. Alternatively, BCE submitted, TELUS had enough knowledge from its experience in providing services to inmates in Alberta and British Columbia to determine whether it was missing “absolutely vital” information on traffic flows.

Finally, BCE submitted that TELUS knew that BCE was the incumbent service provider. If TELUS believed that BCE, as a result, had unfair and privileged access to information relating to traffic flows, then TELUS should have complained immediately about the alleged discriminatory treatment. This was not done in time.

Furthermore, BCE submitted that TELUS's interpretation of the contract award provisions in the RFP simply fails to accord with common sense. It simply makes no sense, BCE argued, that an RFP would be structured so that there could be only one compliant bidder and, in any event, article 13 of the RFP clearly contemplated that there would be more than one compliant bidder.

BCE submitted that the SOR clearly specified, at section 3.12(b), that there was a preference for uniform calling rates applicable at all the sites across the country and that TELUS has produced no evidence to the contrary.

With respect to TELUS's allegation that the CSC used unannounced evaluation criteria and methodology, BCE submitted that the question raised by TELUS on this point during the debriefing was clearly hypothetical and that, in any event, the CSC states that no compliant bidder submitted variable rates and that the evaluation was completed according to the evaluation methodology set out in the RFP.

With respect to the issue of discrimination, BCE relies on the CSC's submissions.

For all the above reasons, BCE requested that TELUS's complaint be dismissed with costs.

In its comments of September 29, 2000, to the Tribunal, BCE submitted that the second complaint, raising new grounds, was filed late. In the alternative, BCE submitted that TELUS's complaint mischaracterized BCE's proposal and contains erroneous assertions of fact.

After noting that TELUS's new allegation in the second complaint relates only to option "A" of BCE's proposal, BCE submitted that the quote on which TELUS relied to support its allegation that BCE's rate proposal in option "A" of its offer is conditional is, in fact, a statement of an assumption and not a condition. BCE argued that there is no language in the pricing proposal that suggests that BCE's rates would be nullified if the quoted assumption proved incorrect. In any event, BCE submitted that section 3.12(c) of the SOR allowed it to reserve the ability to revisit the rate structure that it proposed with the prior consent of CSC.

Concerning BCE's alleged failure to bid two mandatory rates, BCE submitted that, by referring in option "A" of its proposal to existing approved rates for local collect calls, it was proposing to charge the CSC rates for local collect calls that already exist in the industry. One reason for adopting this approach, BCE submitted, was to give the CSC confidence that it was obtaining fair rates. Furthermore, BCE submitted that the existing rates for local collect calls are known to the CSC since the CSC has dealt with these service providers for many years and received regular reports on such rate levels. With respect to international collect calls, BCE submitted that the determination of rates for overseas collect calls in its option "A" proposal is already somewhat known to CSC and provided a comprehensible and detailed rate structure in accordance with the requirement of the RFP.

With respect to the issue of "impermissible bid repair", specifically post-closing submissions and amendments, BCE submitted that, as allowed under the RFP, it only provided an explanation of its statement of compliance in respect of section 3.15(a) to (d) of the SOR. On the question of the Plan marked "draft", BCE submitted that nothing turns on this point. The reason that the word "draft" was used, BCE

submitted, was simply because the contract starting date was not known during the RFP stage. In any event, BCE submitted, the RFP specifically contemplated, under article 12.2(a), that the Plan might be modified under the sole penalty of losing evaluation points.

On the issue of knowledge of traffic flows, BCE submitted that TELUS incorrectly described the technology that is used for handling inmate calls and that TELUS would have been able to produce inmate call detail reports for the Prairie region. BCE further argued that TELUS could have done likewise for British Columbia because of its ownership of BC Tel. Moreover, BCE noted that, in January 1997, a *Local Call Analysis Report for Offender Calling* was prepared by Bell Canada for the CSC and the then Stentor members, which included TELUS. On this basis, BCE submitted that TELUS had access to inmate traffic flow information.

With respect to the remedy requested by TELUS, BCE submitted that the Tribunal should not recommend contract award to TELUS, as it did not offer the lowest national direct dial long distance calling rate. BCE submitted that, should the Tribunal uphold TELUS's complaint, the appropriate remedy is to recommend that option "B" of BCE's proposal be reevaluated in competition with other qualifying proposals.

### **TELUS's Position**

TELUS submitted that the wording of the RFP and the SOR (sections 1.1, 2.0 and 3.12(a)) contradicts the "single rate selection criterion" proposition advanced by the CSC and explicitly covers all four types of service: local and long distance required to be available on direct (debit) and collect bases. TELUS argued that the interpretation advanced by the CSC invites bidders to propose a "lowball" rate for one component of a single service and charges inmates and their families unreasonably high rates for the other components of that service and the other three types of services. TELUS submitted that the CSC's interpretation is inconsistent with the solicitation documents when read as a whole. To read the documents as the CSC suggests is commercial folly and, therefore, is not an objectively reasonable interpretation.

TELUS submitted that there is nothing in the wording of mandatory section 3.12(a) of the SOR that supports the CSC's argument that this provision merely mandates that proposals include a rate for each service. The provision, TELUS argued, speaks of the level of rates, not the mere bidding of rates. Furthermore, the above argument is contradicted by the position that the CSC took on this very point in its e-mail of June 21, 2000. In response to a question asked by TELUS, by e-mail, after its debriefing session with the CSC on June 6, 2000, the CSC stated that the objective of section 3.12(a) of the SOR "was to indicate that the Service would **exclude** any or all of the proposals that included **excessively high rates**. This would include those rates that on a test of fairness would be perceived as abusive or excessive given the fact that the inmates [cannot] select an alternative provider. This test would be **based on a comparison with the rates commonly offered in the community for similar types of service**".

TELUS submitted that section 3.12(a) of the SOR made it mandatory that bidders make available to the inmates the lowest possible debit and collect rates and that, in the context, lowest possible rates mean the lowest rates offered in a competitive procurement, i.e. the rates of the bidder offering the lowest rates on all types of services. Moreover, TELUS submitted that the CSC failed to apply the supposed "market rates" test to the rates proposed by BCE. Indeed, TELUS submitted that BCE's proposal included rates far above prevailing market rates.

With respect to the lack of information in the RFP about inmate telephone usage patterns,<sup>10</sup> TELUS submitted that such information was critical to bidding successfully because the time of day at which the supplier must provide the service has a direct impact on the costs that will be incurred in providing the service and, thus, on the price that one can bid for such services. TELUS argued that the importance of this information remains, irrespective of the fact that the CSC intended to give preference to uniform rates applicable across the country without regional variances. TELUS submitted that it was not aware, until the debriefing session, that the demand placed on the ITS would be the inverse of normal usage. Irrespective of the CSC's and BCE's propositions to the effect that TELUS could have identified these specific usage patterns from its past business experience, TELUS submitted that the CSC should not be permitted to correct a deficiency in the tender documentation by arguing that an incumbent service provider should be aware of a client's requirements.

TELUS further submitted that BCE, as the incumbent with the control of the tracking and reporting equipment, had complete access to the national data on system usage and patterns. Given the significance of this information in formulating a winning bid when price is the determining factor and the fact that only the CSC and BCE had complete access to this information, TELUS submitted that it was incumbent on the CSC to ensure that all potential suppliers had access to the same information "in the accessible and very useful format of the database reports on institutional and national usage". TELUS argued that BCE had a considerable advantage over other suppliers in pricing its proposal by being able to match this information with the anticipated costs to be incurred in providing the service at the times when it was required. As a general statement of principle, TELUS argued that, as was held by the Tribunal in File No. PR-97-037,<sup>11</sup> if a procuring entity is aware that one potential supplier has, by virtue of being an incumbent supplier, non-proprietary information that is not available to other suppliers and that gives the incumbent a bidding advantage, the entity has an obligation to disclose that information in the tender document. Failure to do so, as was the case in this instance, constitutes a violation of Article 504 of the AIT.

With respect to the issue of undisclosed evaluation criteria, i.e. that potential suppliers could have proposed rates that varied with the time of day, a fact TELUS discovered during its debriefing session, TELUS submitted that it should never be considered incumbent on a potential supplier to request evaluation criteria, nor to guess that there are additional criteria to those disclosed.

If, as confirmed in the GIR, the CSC was prepared to accept a proposal with variable rates and believed that it could evaluate such rates so they could be compared to uniform rates, TELUS submitted that the AIT mandates that those evaluation criteria be disclosed in the tender documents. TELUS submitted that the CSC's statement in the GIR that suppliers had the option of proposing variable rates and could have "requested the evaluation criteria" with which such rates would be evaluated, and the further assertion that bidders would have been told of the evaluation criteria if they had asked for them "at the time the RFP was issued", are indicative of the fact that the CSC failed to disclose all evaluation criteria in the tender documentation, contrary to the provisions of Article 506(6) of the AIT.

Furthermore, TELUS submitted that the fact that BCE and the CSC were the only ones with the information about system usage with which variable rates could have been accurately converted to average rates for the purpose of evaluation makes that situation the more unacceptable.

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10. The CSC's requirement is the inverse of the normal market demand for telephone service (peaking in evenings and weekends rather than weekday business hours).

11. *Tactical Technologies* (30 April 1998) (CITT).

TELUS concluded by suggesting that the evidence before the Tribunal demonstrates that the CSC's understanding that the procurement at issue was not subject to the AIT manifested itself throughout the drafting of the RFP, the bid process and the evaluation process, resulting in numerous breaches of the provisions of the AIT.

In its comments of October 20, 2000, TELUS set out a number of reasons why the Tribunal should not take into account any suggestion that there is a relevant difference between BCE's rate proposals marked "Option A" and "Option B" for the purposes of the Tribunal's consideration of the two complaints.

With respect to the conditional pricing issue, TELUS submitted that the sentence included in BCE's proposal with the table of rates is anything but "a statement of an assumption", as asserted by BCE. Rather, TELUS argued, the use of such language in a proposal is a well-worn vendor's tactic of securing a contract on one price, but reserving all possible arguments to revisit pricing in the future. TELUS submitted that the inclusion of the assumption gives BCE a legal argument that the CSC's acceptance of the proposal was made with the express written notice that the proposal was based on a certain set of assumptions and, as such, BCE would have the opportunity to revisit its pricing if its assumptions failed to materialize. Therefore, the CSC should have declared BCE's proposal non-compliant.

With respect to BCE's failure to bid all required rates, a mandatory requirement of the RFP, TELUS submitted that the CSC's position with respect to the meaning of section 3.12(a) of the SOR is inconsistent, incoherent and confused and that, more importantly, BCE did not submit set rates as required.

With respect to its allegation that BCE was allowed to make post-closing submissions regarding section 3.15 of the SOR, TELUS submitted that the evidence filed by the CSC in the second GIR clearly indicated that BCE's original proposal did not fully meet the narrative requirement and that it was only in its post-closing submission on this point that BCE filed the detailed paragraph-by-paragraph narrative required by article 8 of the RFP.

On the issue of the post-closing amendment, specifically the Plan marked "draft" in BCE's proposal, TELUS submitted that the Plan, although part of the rated requirement, was effectively a mandatory requirement because of its particular importance and the necessity to achieve a set minimum mandatory score for rated requirements. Nevertheless, in its proposal, BCE marked its Plan "draft", allegedly because the start date of the contract was uncertain at the time of bidding. TELUS submitted that the RFP said what it had to say about the start date of the contract ("on or about April 15, 2000") and it was up to bidders to make a proposal that accommodated whatever risk might be associated with an "on or about" start date. It was not for BCE to shift this risk to the CSC by marking its Plan "draft" so that it could be changed depending on the start date. Clearly, TELUS submitted, regardless of intention, a change from draft to final is not a clarification, but a substantive change. BCE's proposal on this point was simply non-compliant and, TELUS added, BCE never sent in a "final" Plan, nor a statement that the "draft" designation could be removed from its original proposal.

On the issue of the post-closing discussions between the CSC and BCE with respect to the Plan marked "draft", TELUS submitted that these oral communications were substantive, involved the unseemly negotiated repair of a bid, whereby a situation was arranged in which the CSC would accept a proposal and then negotiate different terms with BCE, and were conducted orally in breach of article 13 of the RFP.

Referring to the inmate telephone usage flow issue and BCE's submission that TELUS could have relied, in part, on the 1997 *Local Call Analysis Report for Offender Calling* that it received through the Stentor group, TELUS submitted that the said report is dated and limited in scope. Furthermore, the

information therein on local calls indicated that there was no appreciable impact on call volumes due to the time of day. This, TELUS argued, is the exact opposite of the inverse usage pattern disclosed by the CSC for long distance calls at the debriefing session.

## 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, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the AIT.

The CSC and BCE have argued that all the grounds of complaint raised by TELUS are late and, for that reason alone, should not be considered on their merits. The Tribunal finds that the grounds of complaint filed by TELUS in both complaints have been filed within the time frames prescribed in section 6 of the Regulations.

With respect to the grounds in the first complaint, the Tribunal is satisfied that the meaning of the contract award rule in the RFP was readily perceptible by potential suppliers adopting a particular interpretation, but it would not necessarily be the case if a potential supplier adopted a different interpretation, as did TELUS. Because the contract award rule, read in context, arguably lent itself to more than one reasonable interpretation, the Tribunal will not conclude that its meaning was immediately perceptible. This ground of complaint is, therefore, timely, and the Tribunal will consider its merits. With respect to TELUS's allegations that the RFP did not identify all the evaluation criteria or that not all potential suppliers had access to the same information in preparing their bids, the Tribunal is satisfied that these grounds of complaint surfaced only after bid closing and the evaluation of proposals and were discovered by TELUS at the time of its debriefing by the CSC.

With respect to the grounds in the second complaint, the Tribunal is satisfied that these grounds of complaint became known to TELUS only when it reviewed the GIR prepared by the CSC in response to the first complaint and that TELUS raised these grounds of complaint with the Tribunal within 10 working days of being provided with the GIR.

Article 501 of the AIT, consistent with the principles set out in Article 101(3) (Mutually Agreed Principles) and the statement of their application set out in Article 101(4), provides that the purpose of Chapter Five "is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency". Against this backdrop, Article 506(6) provides, in part, that "[t]he 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".

In essence, TELUS makes four allegations in its complaints. Firstly, it alleges that the CSC failed to clearly identify, in the RFP and the SOR, certain fundamental characteristics of its requirement. In particular, there was no information regarding the inverse demand pattern characterizing the usage requirements of the ITS and, as a result, the CSC did not ensure that potential suppliers had all the information required to prepare bids. Secondly, the CSC failed to identify all the evaluation criteria and methodology, specifically as these relate to the presentation and evaluation of variable rates. Thirdly, the CSC failed to apply the contract award rule set out in the RFP in identifying BCE's proposal as the

successful bid. Finally, the CSC failed to apply evaluation criteria in assessing BCE's proposal. The CSC overlooked the facts that BCE's rate proposal was conditional, that BCE did not propose certain mandatory rates in the manner required, that BCE did not provide certain required statements of compliance and that it did not include the Plan other than in draft form. As a result, BCE could not meet the minimum score required for rated requirements. TELUS also alleged that the CSC, under the guise of so-called bid clarification questions, conducted impermissible oral communications and negotiations with BCE, culminating in the alteration of its proposal.

The Tribunal will decide the following questions:

1. whether, pursuant to Article 506(6) of the AIT, the RFP and the SOR clearly identified the requirements of the procurement and the evaluation criteria and methodology to be used in the assessment of proposals;
2. whether, in evaluating BCE's proposal and in identifying it as the successful proposal, the CSC properly applied the evaluation criteria and methodology set out in the RFP and the SOR; and
3. whether, pursuant to Articles 501 and 504 of the AIT, all potential suppliers were afforded equal access in competing for the ITS.

With respect to the first issue, the clarity and completeness of the tender documentation, the Tribunal finds that the CSC failed to identify, in the RFP and the SOR, that the inmate telephone usage pattern was inverse to normal demand and that it, therefore, breached the provisions of Article 506(6) of the AIT. The CSC and BCE argued that, if, as alleged by TELUS, this information was critical to bidders and was clearly not included in the RFP or the SOR, TELUS should have raised the matter with the CSC before bid closing. In the alternative, the CSC and BCE argued that this information was irrelevant because the RFP clearly indicated the CSC's preference for uniform rates and because no variable rates were offered by any bidder in response to this solicitation. Furthermore, the CSC and BCE argued that, because of its previous business experience in the Prairie region and in British Columbia, TELUS was aware or should have been aware of some of the traffic flow information applying to this requirement and/or of its impact in preparing a competitive proposal.

The Tribunal disagrees with the arguments of the CSC and BCE. In the Tribunal's opinion, the fact that the CSC indicated, in the RFP, its preference for uniform rates does not render knowledge of the traffic flow information irrelevant in bidding for this requirement. In the telephone business, there is a direct relationship between the cost of a service and the time of day at which a service is provided. This is the backdrop against which all telephone service providers, including TELUS, operate. However, the usage patterns applicable to the ITS proved to be inverse to normal demand. Since the costs to the ITS service provider would be affected by this inversion, it is reasonable to assume that there would be an impact on the bidder's calculation of rates, uniform or not, for ITS users. The onus was on the CSC to communicate to potential bidders the non-proprietary information on demand patterns.

The Tribunal is also of the view that a potential supplier cannot be held responsible for making sure that the procuring entity fully describes its requirement in the tendering documentation. Article 506(6) of the AIT clearly places this responsibility on the procuring entity. In addition, the Tribunal is satisfied that the traffic flow information was readily available to the CSC when the solicitation documents were prepared. This important information should have been communicated to all potential suppliers so that their bids could have been responsive to the needs of the CSC. Furthermore, the Tribunal is persuaded that the CSC knew or reasonably should have known that this information was readily available to BCE, which was the author of the reports on inmate telephone usage traffic flow.



Concerning the argument that TELUS had access to usage information because of its prior experience as a telephone service provider for the federal inmate population in Western Canada and because of its membership in the Stentor group, the Tribunal notes that TELUS indicated that this information was partial, dated and not easily retrievable, did not lend itself to easy analysis and was even misleading. In any event, in the Tribunal's opinion, it was not TELUS's responsibility or the responsibility of any other bidder to attempt to figure out the key parameters of the CSC's needs. The onus is on the CSC to "clearly identify the requirements of the procurement" in tender documents.

With respect to TELUS's allegation that the CSC failed to set out, in the RFP, all the possible evaluation criteria and methodology, particularly those relating to variable rates, the Tribunal finds that there is no merit to this ground of complaint. In the Tribunal's opinion, there was no obligation on the CSC to set out, in the RFP and the SOR, all the evaluation criteria or methodology that might apply in theory to this solicitation. The obligation on the CSC was limited to setting out clearly in the solicitation documents the evaluation criteria and methodology that would be used in the evaluation of proposals. If TELUS was interested in proposing variable rates for this requirement, it should have brought the matter to the CSC's attention before bid closing, particularly since the CSC had expressed a preference for uniform rates. This was not done, as TELUS raised the matter only during the debriefing in the form of a hypothetical question.

With respect to the second question to be decided by the Tribunal, the Tribunal finds that the CSC did not properly apply the evaluation criteria and methodology set out in the RFP and the SOR in evaluating BCE's proposal and in identifying it as the successful proposal recommended for contract award.

The Tribunal is satisfied that the contract award rule in article 13 of the RFP, read in the context of the tender documents as a whole, makes it clear that the service provider offering "the lowest national direct dial long distance calling rate" would be selected for contract award. TELUS's allegation to the contrary is without merit. However, there is more to the contract award rule in article 13 of the RFP, specifically, that, to be considered for award, any proposal had to meet the mandatory requirements of the solicitation documents, including passing the numerical evaluation with a minimum of 70 percent. In the Tribunal's opinion, it is in relation to these requirements that the CSC has failed to properly apply the evaluation criteria and methodology of the RFP in evaluating BCE's proposal.

Specifically, in the Tribunal's view, by accepting BCE's rate proposal for option "A", which was accompanied by a statement of assumptions, it accepted a non-compliant bid. In response, the CSC submitted that BCE had committed, in its proposal, to section 3.12(c) of the SOR prohibiting a service provider to modify the rate structure that it proposed without the CSC's prior consent. The Tribunal does not agree with either the CSC or BCE on this point. No doubt, BCE made numerous assumptions in developing its overall proposal which it did not include in its proposal. Why then was this particular assumption included in the proposal as part of BCE's rate proposal? In the Tribunal's opinion, BCE's option "A" rate structure offers changeable rates. The fact that BCE committed to section 3.12(c) changes nothing with respect to this fact. By accepting BCE's rates as proposed, the CSC accepted rates that could be changed by BCE to the extent of the qualification accompanying them. In the Tribunal's opinion, the consequence of this decision is that the CSC has accepted a conditional offer.

The Tribunal is also of the view that the CSC erred in accepting as compliant BCE's rate proposal for certain calls. In two instances, BCE bid rates by reference to existing approved rates. With respect to the local collect call rates, the Tribunal notes that such rates can be changed without the CSC's prior consent and, therefore, do not meet the requirement of section 3.12(c) of the SOR. As regards the alleged international collect call rates also bid by reference by BCE, the Tribunal is not persuaded that such rates exist at all. All that BCE documented to the Tribunal in response to TELUS's allegation on this point is the

existence of some form of regulatory oversight mechanism that monitors the evolution of the charges applied to international calls, but not the existence of international rates, as such, for calls made on a collect call basis. In the Tribunal's opinion, the CSC accepted a proposal that, by referring in the latter instance to changeable, possibly non-existent, rates and by quoting in the former instance rates that could be changed without the CSC's prior consent, did not meet the requirements of section 3.12(a).

With respect to BCE's statement of compliance relating to section 3.15 of the SOR, the Tribunal finds that the CSC improperly concluded that this requirement was met. The evidence before the Tribunal clearly indicates that, in its original proposal, BCE failed to provide a full statement of compliance that included, as required by article 8 of the RFP, for each paragraph and subparagraph, a narrative statement clearly indicating: (1) the bidder's understanding of each task in itself and as it relates to the specifications; (2) the bidder's compliance with the mandatory items; (3) the proposed approach to each task; and (4) how the bidder proposed to perform the task.

It is only in responding to the CSC's request for clarification that BCE supplemented and completed its paragraph-by-paragraph narrative statement of compliance. The CSC submitted that, in answering the clarification question, BCE added nothing new to the contents of its original proposal and that, therefore, BCE's response was acceptable as a clarification. In the Tribunal's opinion, the proposal was clear and the clarification was a change to the proposal. For the CSC to conclude that the additional information that it received from BCE was a clarification is not supported by the evidence on the record.

On the subject of the Plan marked "draft" in BCE's proposal, the Tribunal is satisfied that the Plan was proposed by BCE in relation to its option "A" and option "B" rate structure proposals. The Tribunal is also satisfied that BCE at no point agreed in writing that the CSC ignore the designation "draft" on the Plan. The CSC and BCE submitted that the fact that BCE's Plan was marked "draft" was not fatal in this instance because, under the terms of the RFP, the Plan was only a rated requirement and because the CSC, pursuant to article 14 of the RFP, was at liberty to negotiate with bidders. The Tribunal recognizes that the requirement for a Plan and schedule is a rated requirement of this RFP and that bidders would receive more or less evaluation points for the quality of the Plan submitted on the basis of criteria set out in article 12.2 of the RFP. However, because, in the Tribunal's opinion, BCE submitted a Plan and schedule that were not final and definitive, the CSC did not have the discretion to award it any of the evaluation points prescribed for this requirement. In addition, because the Plan alone represented 30 percent of all the evaluation points assigned to rated requirements, and considering that any proposal had to achieve a minimum score of 70 percent for rated requirements, and considering further that any technical proposal requiring clarification or not meeting all the technical requirements, as was the case for BCE's proposal, could not receive the full 50 evaluation points related thereto, it follows that it was impossible in the circumstances for BCE's proposal to receive the required 70 percent for rated requirements. It could not, therefore, be declared compliant. As regards the provisions of article 14, in part reserving the CSC's right to negotiate with bidders, in the Tribunal's opinion, this article cannot be interpreted to mean that the CSC was at liberty to vary any of the terms and conditions offered by the potential service providers before a successful bidder was identified. For reasons of transparency, fairness and equity, this is clearly unacceptable.

With respect to TELUS's allegation that the CSC, contrary to the terms of the RFP, conducted oral negotiations with BCE resulting in BCE materially modifying its proposal after bid closing, the Tribunal finds that this allegation is supported by the facts of the case. It is clear from the record that oral communications took place between the CSC and BCE after bid closing. The CSC submitted that these oral communications were made necessary because, at the time, the CSC's electronic mail system was disabled by a viral infection. The CSC further submitted that no material issues were discussed during these oral communications. The Tribunal has no difficulty accepting that the CSC, in the circumstance, orally advised

BCE that it would use alternative means to communicate in writing with BCE, e.g. facsimile, courier, etc. However, the evidence on the record indicates that substantive oral communications concerning BCE's Plan marked "draft" took place between BCE and the CSC at that time. In the Tribunal's opinion, these oral communications involved negotiations with respect to the Plan and the reaching of an agreement to the effect that the word "draft" would be removed from BCE's proposed Plan, provided that the Plan would not be considered as final by the CSC. In the Tribunal's opinion, these communications were clearly improper, involved the negotiation of material issues and resulted in the CSC allowing BCE to repair its bid.

With respect to the third question to be decided by the Tribunal, whether all potential suppliers were afforded equal access to this procurement, the Tribunal finds that the CSC failed to provide all bidders with equal access to the inmate telephone usage information required to bid on the ITS. The Tribunal has already indicated that the CSC was responsible for clearly setting out, in the solicitation documents, all the key requirements of the ITS procurement, including communicating the significant non-proprietary usage information that it possessed. In this particular instance, the Tribunal is of the view that this obligation was even more critical because the CSC knew that one of the potential suppliers in this solicitation had available to it the usage information. By not releasing this information to all potential suppliers, the CSC effectively created two categories of bidders, those that knew the key traffic flow parameters of the ITS and those that did not. This is clearly not acceptable under the AIT. The Tribunal also finds that the interpretation that the CSC gave to many mandatory requirements of the RFP, as well as to the definition of what constitutes a bid clarification or a significant oral communication while evaluating BCE's proposal, clearly denotes preferential treatment on the part of the CSC in favour of BCE.

BCE has submitted, in the event that the Tribunal finds in favour of TELUS, that a proper remedy for the CSC would be to evaluate BCE's option "B" rate structure proposal, along with any other proposals still under consideration. The Tribunal has considered this alternative, including whether the present determination applies to BCE's option "B" rate structure proposal, as well as to its option "A".

As indicated above, the Tribunal is satisfied that the Plan marked "draft" relates to both option "A" and option "B" rate proposals. Because of the significant implications that the scoring of the Plan holds for the overall scoring of the rated requirements, as outlined above, BCE's option "B" proposal cannot be further considered for award.

The Tribunal notes that the CSC, in its submissions to the Tribunal, has indicated that TELUS's proposal met all the mandatory requirements of the RFP, including the minimum score required for rated requirements, and that BCE was identified as the successful bidder because it offered the lowest national direct dial long distance calling rate. Furthermore, the Tribunal notes that the proposals of the other two bidders in this solicitation have failed to meet all the mandatory technical and rated requirements of the RFP.<sup>12</sup> As a result, TELUS is the only responsive bidder that remains for this solicitation. In its final submission to the Tribunal, TELUS has requested that it be awarded the contract. In light of these facts and because the Tribunal is of the view that, but for the actions of the CSC in evaluating BCE's proposal, TELUS would have been the successful bidder in this solicitation, the Tribunal will recommend that the contract be awarded to TELUS.

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12. See GIR, 25 August 2000, Exhibit 46 (protected).

**DETERMINATION OF THE TRIBUNAL**

In light of the foregoing, the Tribunal determines that the procurement was not conducted in accordance with the requirements of the AIT and that, therefore, the complaints, in part, are valid.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that the CSC award the contract to TELUS, the only compliant bidder in response to this solicitation.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards TELUS its reasonable costs incurred in filing and proceeding with these complaints.

James A. Ogilvy  
James A. Ogilvy  
Presiding Member