



Ottawa, Friday, November 10, 2000

**File No.: PR-2000-019**

IN THE MATTER OF a complaint 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 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 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Richard Lafontaine  
Richard Lafontaine  
Presiding Member

Pierre Gosselin  
Pierre Gosselin  
Member

James A. Ogilvy  
James A. Ogilvy  
Member

Michel P. Granger  
Michel P. Granger  
Secretary

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

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Date of Determination: November 10, 2000  
Date of Reasons: December 6, 2000

Tribunal Members: Richard Lafontaine, Presiding Member  
Pierre Gosselin, Member  
James A. Ogilvy, Member

Investigation Manager: Randolph W. Heggart

Investigation Officer: Paule Couët

Counsel for the Tribunal: Michèle Hurteau

Complainant: TELUS Integrated Communications Inc.

Counsel for the Complainant: Barbara A. McIssac, Q.C.  
Kris Klein

Interveners: BCE Nexxia Inc.  
Marconi Communications Canada Inc.

Counsel for Bell Nexxia Inc.: Ronald D. Lunau  
MaryRose Ebos

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Susan D. Clarke  
Christianne M. Laizner  
Oriana Trombetti



Ottawa, Wednesday, December 6, 2000

File No.: PR-2000-019

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

## STATEMENT OF REASONS

On June 29, 2000, TELUS Integrated Communications Inc. (TELUS) 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 procurement (Solicitation No.: W8484-7-AB09/C) by the Department of Public Works and Government Services (the Department) for the Telecommunication Services Renewal Project<sup>2</sup> (TSRP) of the Department of National Defence (DND).

TELUS alleged that the Department contravened the spirit of Articles 501 and 506(6) of the *Agreement on Internal Trade*<sup>3</sup> by failing to award the contract to the bidder with the lowest bid evaluation value (BEV). Furthermore, TELUS alleged that the Department, contrary to Article 506(6) of the AIT, did not follow the evaluation methodology and criteria set out in the Request for Proposal (RFP). TELUS finally alleged that, contrary to the principles in the AIT for an efficient, fair and transparent procurement process, the Department unilaterally changed the price of TELUS's proposal during the clarification process.

TELUS requested, as a remedy, that the Tribunal recommend that the contract awarded to BCE Nexxia Inc. (BCE) be cancelled and that the contract be awarded instead to TELUS for the amount contained in TELUS's bid. In the alternative, TELUS requested a recommendation that it be compensated for the opportunity that it had lost as a result of the defective procurement. TELUS also requested its costs for preparing a response to the RFP and for filing and pursuing this complaint.

On July 5, 2000, the Tribunal informed the parties that, pursuant to subsection 30.13(1) of the CITT Act, 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 13 and 18, 2000, the Tribunal informed the parties that BCE and Marconi Communications Canada Inc. (Marconi) respectively had been granted leave to intervene in this matter. On July 18, 2000, TELUS filed a motion with the Tribunal for an order requiring the Department to produce a number of identified documents for inspection by the Tribunal and TELUS. On July 27, 2000, the Tribunal informed the parties that the motion was premature. The Tribunal noted that, pursuant to subrule 103(2) of the *Canadian International Trade Tribunal Rules*,<sup>5</sup> the Government Institution

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. To allow for voice and data communication between various bases of the Department of National Defence located across Canada for a period of five years, with a two-year renewal option.
3. As signed at Ottawa, Ontario, on July 18, 1994 [hereinafter AIT].
4. S.O.R./93-602 [hereinafter Regulations].
5. S.O.R./91-499.

Report (GIR) must respond fully to all the allegations made by TELUS in its complaint and shall include all supporting documents relevant to the complaint and any additional evidence or information that may be necessary to resolve the complaint. Accordingly, the Tribunal dismissed the motion. On August 16, 2000, the Department filed a GIR with the Tribunal. On August 30, 2000, TELUS and BCE filed comments on the GIR with the Tribunal. On September 15, 2000, the Department submitted that TELUS's response to the GIR raised new issues and representations that were not addressed in the GIR.

In addition to the new interpretation of Article B.13.4.4 of the RFP that it is only partially mandatory and that the formula prescribed in that article is merely illustrative, as argued by TELUS in its reply submissions, the Department submitted, in its letter of September 15, 2000, that TELUS had also raised a new issue with respect to the interpretation of Article C.4.2. The Department argued that TELUS contended that Article C.4.2. required the Department to make a determination of rejection of a proposal and to notify unsuccessful bidders of the rejection of a proposal prior to a contract award. By not acting in this manner, the Department contravened the requirements of Article C.4.2. The Department responded by stating that TELUS was notified on June 19, 2000, of the evaluation of its proposal as non-compliant and of the award of the contract. Therefore, the time for filing a complaint on this issue had long since expired. On September 19, 2000, the Tribunal directed TELUS, BCE and Marconi to address a number of issues and, in particular, the issue of the interpretation of Article C.4.2. TELUS and BCE responded.

In its response of September 20, 2000, BCE submitted that TELUS is out of time to raise a complaint concerning the Department's decision to advise TELUS on June 19, 2000, that its bid was found non-compliant and concerning any resulting effect that such a decision may have had on TELUS's ability to obtain a postponement of award order.

In its response of September 22, 2000, TELUS argued that its allegation that the Department had violated the provisions of Article C.4.2 of the RFP by failing to advise it that its bid was non-compliant during the evaluation of its proposal was not a new issue. It argued that the appropriate remedy, should the complaint be determined valid, would be for the Tribunal to issue a recommendation that the contract to BCE be cancelled and that a new contract be awarded to TELUS. TELUS argued that it had made submissions on July 17 and 18, 2000, on the issue of remedy and relied on Article C.4.2 in support of its request. It concluded that this was not a new issue and that it had been properly raised in the reply to the GIR.

The Tribunal ruled on October 17, 2000, that it accepted, as part of the ruling, the reply submissions to the GIR made by TELUS, save and except those submissions made in respect to Article C.4.2 of the RFP and that its reasons, in this regard, would be included in its determination. The Tribunal finds that TELUS's arguments respecting the Department's rejection of TELUS's proposal and the notification to unsuccessful bidders of the rejection of a proposal prior to a contract award by the Department are arguments which deal with the timing of the award of the contract. The evidence indicates that TELUS was informed by the Department on or about June 19, 2000, that its proposal was non-compliant and that the contract had been awarded. The Tribunal finds that TELUS knew or reasonably should have known on or about June 19, 2000, the basis of its complaint with respect to timing of the award of the contract. In reviewing the correspondence from TELUS of July 17 and 18, 2000, the Tribunal notes that TELUS sought a stop order and did not, at that time, raise the argument that Article C.4.2 had been wrongly interpreted by the Department and that the Department had contravened that article when it advised TELUS that its bid was non-compliant only after the contract had been awarded. The Tribunal finds that that issue was raised only at the stage of the reply submissions by TELUS. The Tribunal is of the opinion that TELUS ought to have raised that ground of complaint 10 working days from June 19, 2000, when it was advised that its proposal was found to be non-compliant and that the contract had been awarded to BCE on June 16, 2000. Therefore, the Tribunal finds that TELUS did not raise the matter in a timely manner.

On September 15, 2000, TELUS submitted four additional documents on the grounds that they were relevant to the issues. The Department and BCE responded to the submissions. The Tribunal considered the arguments presented by the parties and accepted only the fourth document which reproduced two versions of the briefing note entitled “DND –Telecommunication Services Renewal Project (TSRP)” dated April 28 and May 4, 2000. Those documents address the request-for-clarification issue that was raised by TELUS in its complaint. The Tribunal does not accept the filing of the other documents, as the issues in those documents relate to the timing of the award of the contract and were not raised in the complaint. TELUS cannot now raise them, as they are outside the time limits for filing a complaint.

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 and will dispose of the complaint on the basis of the information on the record.

## PROCUREMENT PROCESS

### RFP

On October 22, 1999, a Notice of Proposed Procurement for this solicitation was issued on Canada’s Electronic Tendering Service (MERX) with the corresponding RFP. The RFP, as amended, includes the following provisions relevant to this case:

- A.3.1 This RFP is to select a Contractor qualified under the Supply Arrangement<sup>[6]</sup> (SA) for the acquisition of telecommunication services for DND locations throughout Canada.
- B.9.4 Proposals shall be submitted in three (3) separately bound and titled volumes as indicated below:
- Volume 1** - Section A Management Section (Executive summary)
  - Section B Response to Operational and Functional Requirements
  - Section C Statement of Compliance
  - Volume 2** - Response to Pricing Requirements
  - Volume 3** - Additional Documentation (If provided)

**PRICING INFORMATION SHALL NOT BE INCLUDED IN ANY SECTION OF THE PROPOSAL OTHER THAN IN VOLUME 2, RESPONSE TO PRICING REQUIREMENTS. (M)**

- B.12.1 For each item in this RFP and associated SOW [Statement of Work], including any amendments and clarifications distributed to Bidders during the solicitation period, it is MANDATORY that Bidders indicate compliance/non-compliance on a paragraph by paragraph basis, using Appendix “D”, Table 1 - Parts 1 and 2, attached hereto as templates. The Statement of Compliance at Appendix “D”, Table 1 - Parts 1 and 2, shall be provided in a separate section (Section C) and shall refer to sections in the Bidder’s proposal where further information and detail, as required, can be found. (M)
- B.12.2 ...
- a) **For MANDATORY and NON-MANDATORY Items:**

**COMPLY:** - indicates a commitment on the part of the Bidder to comply with and/or accept this item, clause, specification, terms and conditions in all aspects.

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6. Supply Arrangement (SA) for Telecommunication Services EN599-6-0001.

- B.12.4 In this RFP, all items containing the words “MANDATORY” or “shall” or “must” or the designator (**M**) are to be considered mandatory requirements.
- B.12.6 A Bidder shall provide sufficient information and supporting documentation in its proposal to demonstrate its ability to comply with the mandatory items. At its discretion, Canada hereby reserves the right to accept or reject any compliance declaration. (**M**)
- B.13.2.1 All TSRP services shall be provided at a **Single Firm Monthly Rate** for the life of the contract (including the optional period). . .
- B.13.4.2 For each SDA [Service Delivery Area] grouping, the Bidder shall quote the cost increase and cost reduction, non-recurring cost (NRC) and Monthly Recurring Cost (MRC), that would apply should a SDA in the grouping be added or closed.
- B.13.4.3 The information requested above regarding SDA groupings and costs shall be provided using the format called for at Table 2 of Appendix D. The quoted costs figures will be used in the bid evaluation.
- B.13.4.4 The total cost arrived at by adding the cost figures provided by the Bidder at Table 2 of Appendix D for the addition of SDAs, for all SDAs listed at Annex L to the SOW, over a five year period, i.e. [Sum of all NRCs to add SDAs + (60 x Sum of all MRCs to add SDAs)], shall not be higher than the total bid cost for five years.**
- C.1.1 A committee composed of representatives of PWGSC/Science, Informatics and Professional Services Sector (SIPSS), and the Department of National Defence (DND) will evaluate the proposals on behalf of Canada. Outside consultants may also be involved in the evaluation process.
- C.2.1 Bids will be evaluated according to a five step-by-step process as detailed below:
- C.2.2 Step 1 - Each Proposal will be reviewed to ensure that ALL mandatory documents specified in the RFP are provided. Failure to provide any mandatory documentation will render the proposal “non-compliant”.
- C.2.3 Step 2 - MANDATORY items will be evaluated on a simple Pass/Fail basis. Proposals will be reviewed to ensure that the Bidder meets all mandatory requirements specified in the RFP and the attached SOW. In particular, the evaluation team will be reviewing the information provided in the proposal in support of the statement of compliance made by the Bidder. To be deemed compliant, a Bidder must comply with all mandatory requirements, including the minimum mandatory requirement stated for the rated requirements. Any proposal which fails to meet ALL mandatory requirements will be declared NON-COMPLIANT and no further consideration will be given to that proposal.
- C.2.4 Step 3 - The evaluation team will then assess the two rated components.
- C.2.5 Step 4 - The financial proposals, from the “compliant” proposals only, will be evaluated. Compliant bids will be compared on the basis of cost to the Crown using a combination of bid cost, rated value and added cost. The following formula will apply:

$$\text{BEV} = \text{BC} - \text{RV} + \text{AC}$$

Where:

**BEV = Bid Evaluation Value**

**BC = Bid Cost**

**RV = Rated Value**

**AC = Added Cost**

- a) The BEV is the total bid evaluation cost for five years.
- b) The BC is the total contract cost for five years as per the Bidder’s proposal.

- c) The RV is \$500,000.00 multiplied by the number of points awarded to the Bidder for the two rated components at Step 3 of the evaluation process. This represents a value of \$100,000.00 per point, per year, for five years.
- d) The AC is the dollar value arrived at using the following formula:

**AC = Cost of adding bandwidth + cost of adding SDAs - Credits for closing SDAs**

Where:

- i) **Cost of adding bandwidth** = 0.1 x The total cost associated with adding one T1, above the mandatory requirement, at each of the SDAs identified at Annex L to the SOW (for 5 years), where the total cost is the sum of the quoted cost to add one T1 at each SDAs (as per article B.13.3) i.e. [Sum of all NRCs (for the first T1) + (60 x Sum of all MRCs (for the first T1))].
- ii) **Cost of adding SDAs** = 10 x The average cost per SDA (for 5 years), where the average cost is the sum of the quoted cost for all SDAs (as per article B.13.4), applied over five years, i.e. [Sum of all NRCs + (60 x Sum of all MRCs)], divided by the total number of SDAs identified at Annex L to the SOW.
- iii) **Credits for closing SDAs** = 10 x The average cost reduction per SDA (for 5 years), where the average cost reduction is the sum of the quoted cost reductions for all SDAs (as per article B.13.4), applied over five years, i.e. [(60 x Sum of all MRCs Reductions) - Sum of all NRCs], divided by the total number of SDAs identified at Annex L to the SOW.

C.2.6 Step 5 - **The compliant Bidder with the lowest BEV will be declared the winning Bidder.**

C.3.1 If clarification(s) are required by the Evaluation Team, requests for such information will be made through the PWGSC Contracting Officer. Bidders will have 24 to 72 hours (at the discretion of the PWGSC Contracting Officer) to provide the necessary information. Failure to meet this deadline will result in the proposal being NON-RESPONSIVE.

C.4.3 A proposal will be considered non-compliant if it is not supported by proper and adequate detail; particularly supporting evidence required by a mandatory item.

Article E.17.1c) of the RFP indicated that “[t]he Contractor’s proposal dated \_\_\_\_\_ and any following clarifications” would form part of any resulting contract.

Four proposals were submitted by bid closing time on February 15, 2000, including one proposal from TELUS and one proposal from BCE.

### **Bid Evaluation Plan**

A Bid Evaluation Plan dated February 8, 2000, details the methods, procedures and reporting structure to be employed in evaluating bid responses to the TSRP RFP. It includes the following provisions relevant to this case.

Clause 1.2, “Evaluation procedures”, reads as follows: “The evaluation procedures are detailed in Section C of the TSRP RFP. These procedures must be followed and no variations are allowed”.

Clause 3.1, “Contracting Authority”, reads as follows: “The Contracting Authority, PWGSC/SIPSS, is responsible for all aspects of the procurement process. PWGSC will conduct the financial evaluation independently of the technical evaluation of proposals conducted by DND”.

Clause 6, "Evaluation Criteria Standards and Indicators", reads as follows: "The mandatory requirements are outlined in the TSRP RFP and SOW. These requirements are tabulated at Appendix D to the SOW, as Table 1, Parts 1 and 2. Mandatory requirements will be evaluated on a simple pass/fail basis by individual team members and then compiled in order to arrive at the evaluation team's decision".

The Bid Evaluation Plan was supplemented with evaluation worksheets for the initial screening of the RFP and the SOW.

The evaluation worksheets were broken down into numbered serial items corresponding to the sections and articles of the RFP and SOW and included, for each item, a brief section entitled "Instructions/Notes" to the evaluator. The evaluation worksheet under "Instructions/Notes" to evaluators, states, in part: "Boxes [items] marked (F) at right, although requiring substantiation, may require reference to Volume 2 and thus substantiation may not be possible during the technical/Management evaluation". The evaluation worksheet under serial item nos. 74 and 75 corresponding to Articles B.13.4.3 and B.13.4.4 of the RFP, respectively, includes the following instruction/note to the evaluators: "Substantiation of understanding or compliance (as appropriate) to be confirmed during Financial Evaluation". The two items are marked with an (F) on the right.

The RFP required that bidders propose a "Single Firm Monthly Rate" for the provision of the required services. All MRCs and NRCs were to be included in the "Single Firm Monthly Rate". In order to determine the BC or total contract cost of the service over the five-year period of the contract, the "Single Firm Monthly Rate" was to be multiplied by 60 months. The RFP also required bidders (in addition to the firm rates to add "Bandwidth" not at issue in this case) to propose firm rates in respect of recurring and non-recurring costs for adding new SDAs and credits for closing SDAs.

On April 17, 2000, DND wrote the Department, in part, as follows: "I am pleased to inform you that the Evaluation Team has determined that all four proposals have met the minimum technical requirements set out in the Request for Proposal and its Statement of Work. This determination is based upon the information provided in Volumes I and III of the Proposals and in the clarifications received during the course of the evaluation process".

The technical evaluation report also included, *inter alia*, the following statement: "It should also be noted that a number of RFP and SOW serials were not evaluated by the technical evaluation team as the relevant substantiation and/or compliance statements were included in Volume II. It is therefore recommended that a thorough review of the documentation provided in Volume II be carried out, with assistance from members of the technical evaluation team as required".

### **Financial Evaluation of Proposals**

In evaluating TELUS's financial proposal, the Department noted that the formula used by TELUS for calculating the "Cost of adding SDAs" subtracted (instead of adding) the NRCs from 60 times the MRCs, and the Department decided to seek a clarification from TELUS. According to the GIR, the clarification request was issued in accordance with departmental policy.<sup>7</sup>

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7. Article 7.390 of the *Supply Manual* reads: "In the event of errors in the mathematical extension of unit price items, the unit price prevails and the mathematical extension is adjusted accordingly. In the event of errors in the addition of lump sum prices or unit price extensions, the total is corrected and the corrected mathematical sum is reflected in the total bid price. The bidder must be advised immediately of the corrected total bid price and must confirm or withdraw the bid".



The Department contacted all bidders at the time, by telephone, to notify them of the request for clarification that was being sent by facsimile, to ensure that the facsimile had been received and to indicate that there was a time limit for response.

On April 18, 2000, the Department sent, by facsimile, a request for clarification to TELUS. Items 1 to 7 sought confirmation of the figures used by the evaluators in determining TELUS's BEV. The same request was made of all four bidders in precisely the same format. On April 19, 2000, TELUS responded that the figures calculated by the Department in relation to the cost of adding SDAs were correct. In fact, TELUS corrected the placement of a decimal point in the Department's request for clarification.

With respect to the items relating specifically to TELUS's financial proposal, the Department requested confirmation of the BEV and the cost of adding SDAs, as calculated by the Department using the formulae found in the RFP. TELUS confirmed that the costs were those calculated by the Department and not those quoted in its financial proposal.

On May 3, 2000, the Department's procurement officer sought the opinion of a departmental cost analyst with respect to the compliance of TELUS's financial proposal with Article B.13.4.4 of the RFP.

On May 4, 2000, two analysts, having reviewed the matter, replied as follows: "Based upon the information submitted by Telus with their bid and by reviewing the evaluation of their bid in accordance with the requirements, it is apparent that the Telus bid is non-compliant with respect to this clause".

Applying the formula contained in Article B.13.4.4 of the RFP, it was determined that TELUS's proposed cost for adding SDAs contravened the RFP requirement. Consequently, TELUS's proposal was found to be non-compliant with the mandatory requirement of Article B.13.4.4.

On June 16, 2000, a contract was awarded to BCE. On June 19, 2000, TELUS was informed of the result of the competition. On June 21, 2000, TELUS requested a debriefing, which was held on June 27, 2000.

### **Department's Position**

The Department submitted that, in accordance with its obligations under the AIT, it established a framework for this procurement that ensured equal access for all Canadian suppliers and that was fair and transparent. Furthermore, the Department submitted that, in accordance with Articles 501 and 506(6) of the AIT, it clearly identified the requirements of the procurement, the criteria to be used in the evaluation of proposals and the methods of weighting and evaluating the criteria. As well, the Department properly applied the evaluation criteria set out in the RFP, evaluating TELUS's proposal as non-compliant.

The Department submitted that the requirement at Article B.13.4.4 of the RFP was mandatory, clearly identified as such in bold type in the RFP and aimed at ensuring that subsequent additional costs in the contract did not exceed the cost of the base bid. Moreover, the importance of the requirement as an evaluation criterion was never challenged during the bid formulation period and, accordingly, the time for filing a complaint in this respect has long expired.

With respect to TELUS's allegation that the disqualification of its financial proposal for failure to comply with a mandatory requirement is only permissible at Step 2 of the evaluation process, the Department submitted that, at Step 2 of the evaluation process, it was noted that TELUS's Statement of Compliance indicated that its financial proposal complied with the requirement of Article B.13.4.4 of the

RFP. However, the Department submitted that the substantiation of this particular statement was not possible until the review of TELUS's financial proposal at Step 4 of the evaluation process. Therefore, the Department submitted, the discrepancy between TELUS's Statement of Compliance in its technical proposal in respect of Article B.13.4.4 and its proposed pricing, set out only in its financial proposal, was necessarily determined during Step 4. TELUS, the Department submitted, is a sophisticated bidder of major Crown projects and should recognize that the evaluation of financial proposals necessarily takes place after completion of the technical evaluation and, therefore, its rationale in this respect is incomprehensible. The Department also submitted that the Tribunal in File No. PR-99-002<sup>8</sup> recognized the principle that the Department was correct in concluding that a proposal was non-compliant when it found, upon review, that the bid response failed to conform to essential requirements.

The Department submitted that there can be no doubt that TELUS has not applied the formula set out in Article B.13.4.4 of the RFP. It applied a fundamentally different formula. The Department submitted that it is its responsibility to evaluate proposals according to the criteria set out in the RFP and to apply the criteria equally to all proposals. Furthermore, the Department disputed TELUS's assertion that its use of the formula was an effort to make its bid more attractive. Rather, the Department's view is that TELUS has developed an "after-the-fact" rationale with respect to an error in its bid.

With respect to TELUS's allegation that the request for clarification of its financial proposal was improperly conducted, causing TELUS to make an inadvertent error in its response, the Department submitted that this is not supported by TELUS's financial proposal when read in its entirety. There is no suggestion whatsoever in TELUS's proposal that it intended to "absorb" or give a credit representing the equivalent of the added non-recurring costs associated with the SDAs.

The Department also argued, assuming for argument's sake that TELUS made an error in its response, that the Crown is not responsible for TELUS's "errors" nor can it correct such errors, as such action would constitute bid repair. As well, the Department noted that TELUS did not indicate what the correct response to the Department's clarification questions ought to have been.

The Department submitted that it acted in good faith in seeking clarification. It strongly objected to TELUS's allegations of misconduct and mal-intent or to suggestions implying bias on the part of the Department's officials. The Department submitted that the clarification questions were framed according to departmental policy and did not "construct" TELUS non-compliance. The Department denied having unilaterally changed TELUS's bid price or having attempted to "bury" facts or important information, as suggested by TELUS. As well, the Department submitted, TELUS's allegations of bias are unsupported when one considers that it received the maximum points available for rated requirements.

The Department submitted that its defence of this complaint has involved extensive and arduous preparation to address lengthy, malicious and unfounded representations. Therefore, the Department submitted, this is an appropriate case for award of costs to the Crown.

### **BCE's Position**

BCE submitted that TELUS's proposal was properly found to be non-compliant with Article B.13.4.4 of the RFP. BCE submitted that the said article contained two mandatory requirements: a mathematical formula and a requirement that the cost of adding SDAs not be higher than the total bid cost for five years. The meaning of Article B.13.4.4, BCE submitted, was exceptionally clear and simple, and the

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8. *Northern Micro* (12 July 1999) (CITT).

error in TELUS's bid was simply that, when the mathematical formula was applied to TELUS's figures, TELUS's cost of adding SDAs exceeded its total five-year bid costs. With respect to TELUS's allegation that the Department, through its own errors and misstatement, changed TELUS's price unilaterally, BCE submitted that it is specious for TELUS to assert that its compliant bid was turned into a non-compliant bid by the Department. TELUS's bid, BCE submitted, was never compliant. Indeed, BCE argued, TELUS was not free to apply a different formula. When the proper formula was applied, the cost of adding SDAs exceeded its total bid cost for five years, and TELUS itself confirmed these figures to the Department.

BCE submitted that TELUS was aware or ought to have been aware of the importance of giving an accurate and considered response to the Department's request for clarification and that it is disingenuous of TELUS to try to escape its own responsibility by claiming that it was misled by a passing comment supposedly made by a public official during a brief telephone call.

With respect to TELUS's allegation that the Department changed its bid price unilaterally, BCE submitted that the Department did not change TELUS's bid price, but merely performed the calculation called for by Article B.13.4.4 of the RFP on the figures quoted by TELUS. Concerning TELUS's allegation that the Department ignored and did not consider relevant "footnotes" in its bid, BCE submitted that this allegation does not appear to accord with the evidence and that, in any event, the calculations contained in the "footnotes" only confirmed that it had failed to apply the required formula. BCE further submitted that, for obvious fairness, transparency and non-discrimination reasons, there can be no such thing as a "minor" mandatory requirement.

With respect to the evaluation process and, more specifically, the manner in which it was applied in this instance, BCE submitted that compliance of a bid is always an issue, even after a contract has been awarded. More specifically, in this instance, consideration of TELUS's financial proposal was necessary to confirm or reject TELUS's Statement of Compliance. Concerning TELUS's allegation that the Department misled it by not giving it notice that compliance was at issue when it sought clarification of TELUS's figures, BCE submitted that it was apparent that the request for clarification dealt with a mandatory requirement of the RFP. BCE submitted that whether or not TELUS erroneously assumed, given the phase of the evaluation process, that its proposal was compliant does not excuse it from taking care in providing a correct response to the Department's request for clarification.

Furthermore, BCE submitted that the Department's request for clarification was made according to established policy and practices and that, therefore, the Department cannot be taxed with having constructed the clarification question to mislead TELUS or that the oral comments supposedly made by a government official were intended to "mislead" TELUS into making a careless response to the request for clarification.

BCE submitted that TELUS consistently failed to take responsibility for its own bid errors and its response to the request for clarification. TELUS, BCE argued, had every opportunity to carefully review the request for clarification (in fact, TELUS took less time to conduct its review than was allowed) to understand its implications and to submit whatever response that it deemed appropriate.

Finally, BCE submitted that there is no evidence on the record to support TELUS's view formed at the time of the debriefing that the Department or DND was biased against TELUS. On the contrary, BCE submitted, a review of the record indicates that this procurement process has respected the rules of openness, transparency and fairness.

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

## TELUS's Position

TELUS submitted that the fundamental issue before the Tribunal is whether TELUS complied with Article B.13.4.4 of the RFP. It submitted that the GIR confirmed that the Department changed its proposal by altering the price therein for the addition of the SDAs and also failed to follow the requirements of the RFP, the bid evaluation plan therein and the basic tenets of fairness.

TELUS, admitting that mandatory requirements are not subject to varying degrees of compliance, recognized that Article B.13.4.4 of the RFP was a mandatory requirement that required that the total cost of adding SDAs not be greater than the total bid cost for five years. However, TELUS submitted, the formula set out in that article was not mandatory. TELUS argued that the formula was only illustrative. In any event, TELUS submitted that any remaining doubt about the role of the formula in Article B.13.4.4 should be interpreted using the *contra proferentem*<sup>9</sup> principle against the Department, the author of the Article.

TELUS submitted that the GIR does not dispute that TELUS's proposal contained a total cost of adding SDAs that was less than TELUS's total bid cost. The dispute is over why the Department misunderstood that TELUS's bid was based on the deduction of the NRCs, since TELUS's proposal twice<sup>10</sup> illustrated that the Total Additional (60-month) Cost was based on deducting the NRCs. If the Department had read and/or had evaluated its proposal in its entirety, including the explanatory notes, TELUS submitted, it would have found TELUS's proposal compliant.

TELUS submitted that its proposal should have been read in its entirety and interpreted and evaluated as a coherent whole. In this respect, TELUS submitted that the opinion provided after the fact by two cost analysts is attributable to the nature of the questions posed to them by the contracting officer and that, given the context of the consultation, they could not provide independent evaluation. Had the Department followed up on the Article B.13.4.4 compliance issue with a proper clarification letter, TELUS submitted that it would have become clear what TELUS intended to do and why.

With respect to the issue of the clarification letter, TELUS submitted that the Department has no right, during the evaluation of a proposal, to change the price submitted by a bidder in part or globally. It may only correct errors, such as the mathematical extension of unit price items or errors in the addition of lump-sum prices. However, TELUS submitted, in this instance, there was no mathematical error in the use of the formula by TELUS. However, TELUS submitted, if the Department was of that view, it should have so informed TELUS immediately and asked TELUS to confirm its price or to withdraw its bid. The Department knew that TELUS could not amend its bid in any substantive way under the penalty of bid repair and being rendered non-compliant for so doing. As a corollary, TELUS submitted that the Department cannot be allowed to render a compliant bid non-compliant by any means – including by means of a request for clarification.

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9. *Black's Law Dictionary*, 7th ed., defines the expression as follows: The doctrine that, in interpreting documents, ambiguities are to be construed unfavorably to the drafter.

10. The first illustration is found at Section 3, Appendix D, Table 2, a summary of TELUS's proposal, reproduced at Tab D of the complaint, and the second illustration is found at Section 5, C.2.5 Bid Evaluation Value of TELUS's proposal, reproduced at Tab 9 of TELUS's reply submission.

TELUS submitted that, considering the phase of the bid evaluation process at which the request for clarification was sent (i.e. the bid financial evaluation phase), it was reasonable for TELUS to believe that the evaluation process had passed Step 2 and, therefore, that its proposal had met all the mandatory requirements of the RFP. Indeed, TELUS submitted, there is absolutely no reason why the Department's contracting officer, rather than the evaluation team, could not, at Stage 2, confirm that each bid met the mandatory financial requirements. The constant suggestion by the Department that such a course of action was impossible to follow is not credible. Furthermore, there was no indication in the RFP to the effect that mandatory criteria, except the financial criteria, would be examined for compliance, but rather that all mandatory criteria would be examined. Finally, TELUS submitted that, when the request for clarification was sent to it, it was reasonable for TELUS to believe that the published evaluation process, as described in the RFP, had passed Step 2. Therefore, it submitted, the terms of the RFP created a reasonable belief on TELUS's part that it had passed all the mandatory requirements.

Admitting that it made an error when it confirmed the figures and calculations sent by the Department, TELUS nevertheless argued that this error should not bar it from exercising its rights under the AIT and that its error should not justify the violations of the Department's obligation, including the failure to provide TELUS with a real and meaningful opportunity to understand the purpose of the request for clarification. Furthermore, TELUS argued that (1) the lack of specificity in the request for clarification, (2) the Department's telephone representations to the effect that the request for clarification was "very simple" and "no big deal" and only required that TELUS quickly confirm certain figures and (3) the statement on the facsimile that TELUS could not alter its proposal in any way by confirming the figures all contributed to TELUS's error in responding the way in which it did.

On the issue of bias, TELUS submitted that, even if the request for clarification was issued in good faith, the Department seriously breached its obligations and that, therefore, not only is TELUS within its right to complain to the Tribunal but the Department has no basis to attack TELUS simply because it is exercising its procedural rights. However, TELUS submitted, there is evidence<sup>11</sup> to support an assertion that there was a bias against TELUS in this instance.

TELUS completed its reply by making extensive submissions on the subject of remedy.

## **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.

With respect to TELUS's allegation that the Department failed to follow the bid evaluation procedure, in that TELUS's proposal was declared non-compliant at Step 4 of the evaluation process whereas, had the proposal really been non-compliant, it should have been declared so at Step 2, the Tribunal finds that the Department conducted the evaluation procedure in the manner that was stipulated in the RFP. The Tribunal is satisfied that the evaluators clearly noted, at Step 2, the need to verify, at a later point,

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11. Paragraph 63 of TELUS's reply submission.

certain mandatory requirements in the financial proposal for which a simple declaration of compliance was sufficient at the earlier stage. The whole purpose of keeping the evaluation of the price and technical elements of a proposal separate is to allow the evaluation of the technical portion of proposals to proceed in a fashion uncontaminated by the knowledge of relative prices. Evaluations are designed this way to ensure that bidders' proposals are examined solely on their technical merits and in the most objective manner possible. The Tribunal is of the view that the knowledge of relative prices can and does, at times, compromise an evaluator's ability to be objective. When certain mandatory requirements are verifiable only in the financial portion of the proposal, it is clear that the complete evaluation of these will occur only when the financial proposal is being evaluated. In this case, that was at Step 4. Therefore, this ground of complaint is not valid.

The Tribunal will deal with the following two TELUS allegations together: that the Department failed to use the clarification procedure correctly, in that it changed the price of TELUS's proposal during the clarification process, and that the Department failed to award the contract to the bidder with the lowest BEV, namely, TELUS.

The Tribunal believes the TELUS's proposal was non-compliant from the outset and that the clarification process made no difference to the Department's final decision. The Tribunal finds that the RFP was clear that a proposal had to meet the mandatory requirements in order to be considered for award and that one of those mandatory requirements, as defined in the RFP, was that the total cost of the additional SDAs had to be calculated in a specific way. The Tribunal also finds that the Department followed the requirements of the RFP when it found TELUS's proposal to be non-compliant. The Department correctly determined that the way in which TELUS used the formula in its proposal was improper and contrary to a mandatory requirement. The total TELUS proposed cost of the additional SDAs, when calculated the specified way, exceeded TELUS's proposed bid cost, contrary to another mandatory requirement. With respect to TELUS's allegation that the price of its proposal was altered during the clarification process, the Tribunal finds that the Department did not change the price proposed by TELUS in its original proposal. The clarification questions used the prices, as proposed, and entered them into the correct formulae. The Tribunal finds that the clarification questions, as posed to TELUS, were clear and unambiguous and that TELUS's answers were also clear and unambiguous. In fact, it is the precision of TELUS's response to the request for clarification that leads the Tribunal to believe that TELUS, while possibly not fully comprehending the consequences, clearly understood the clarification questions. As such, these grounds of complaint are not valid.

The Department requested in the GIR the opportunity to make further submissions with respect to the award of costs in this matter. While its complaint is not valid, the Tribunal has decided that the circumstances of this case do not warrant costs against TELUS. Therefore, submissions on this matter are not necessary, and no costs will be awarded.

**DETERMINATION OF THE TRIBUNAL**

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

Richard Lafontaine

Richard Lafontaine  
Presiding Member

Pierre Gosselin

Pierre Gosselin  
Member

James A. Ogilvy

James A. Ogilvy  
Member