



Ottawa, Thursday, October 25, 2001

File No. PR-2001-023

IN THE MATTER OF a complaint filed by Bell Nexxia under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

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

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid.

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination and Reasons: October 25, 2001

Tribunal Member: Patricia M. Close, Presiding Member

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Dominique Laporte

Complainant: Bell Nexxia

Counsel for the Complainant: Ronald D. Lunau

Government Institution: Public Works and Government Services Canada

Counsel for the Government Institution: David Attwater

Ottawa, Thursday, October 25, 2001

File No. PR-2001-023

IN THE MATTER OF a complaint filed by Bell Nexxia 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 July 27, 2001, Bell Nexxia (Bell) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a procurement by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Human Resources Development (HRDC). This procurement (Solicitation No. V9345-000020/A) is for: (1) a network of integrated Interactive Voice Response (IVR) systems; (2) Computer Telephony Integration applications; (3) a toll-free call routing application; (4) Total Management Reporting of the proposed telephony infrastructure; (5) a toll-free gateway interface with 800 call services; and (6) professional services support on an “as and when required” basis.

Bell alleged that PWGSC selected, as the successful bidder, Sprint Canada Inc. (Sprint) and that, had PWGSC evaluated Sprint’s financial proposal according to the evaluation methodology set out in the Request for Proposal (RFP), Sprint’s proposal would have been declared non-compliant. Specifically, Bell alleged that the methodology applied by PWGSC appears to have incorporated two incorrect elements:

- that vendors could provide multiple toll-free costs based on application, time periods and/or locations; and,
- that it was acceptable for bidders to bid only one year of toll-free costs rather than providing the total five-year cost required.

Bell further submitted that it had reason to believe, based on information received at the debriefing, that PWGSC either allowed other deductions to be made that were not specified in the RFP or allowed a different number of annual calling minutes to be used as the starting point in the evaluation formula. In either event, Bell submitted that PWGSC had failed to apply the methodology specified in the RFP.

By applying this incorrect methodology, Bell argued, PWGSC breached several provisions of the trade agreements, notably Articles 1014(4)(c) and 1015(4)(d) of the *North American Free Trade Agreement*,² Article 506(6) of the *Agreement on Internal Trade*³ and Articles XII (2)(h), XIII (4)(b) and XIII (4)(c) of the *Agreement on Government Procurement*.⁴ Bell requested, as a remedy, that, if a contract

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
4. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [hereinafter AGP].

has been awarded to Sprint, PWGSC cancel it and award it to Bell. If the contract has not been awarded, Bell requested that the Tribunal recommend that it be awarded to Bell, the only compliant bidder. If the contract cannot be awarded to Bell, then Bell requests that the Tribunal recommend compensation to Bell for the lost opportunity to profit from this contract. Bell also requested its reasonable costs for preparing a bid in response to the procurement and for filing and pursuing the complaint.

On August 2, 2001, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the CITT Act and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.⁵

On August 28, 2001, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁶ Because of the tragic events of September 11, 2001, Bell was granted an extension to provide its comments on the GIR. On September 12, 2001, Bell filed comments on the GIR with the Tribunal.

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 disposed of the complaint on the basis of the information on the record.

PROCUREMENT PROCESS

On August 22, 2000, a Notice of Proposed Procurement (NPP) was published on MERX⁷ and, initially, had a closing date of September 29, 2000. The NPP indicated that the solicitation was subject to the AIT only. The closing date was extended to October 3, 2000, and then subsequently to October 12, 2000.

The RFP reads, in part, as follows:

A.3 Request for Proposal

As opposed to an Invitation to Tender, this is a request [commonly referred to as a Request for Proposal (RFP)] that proposals be developed and submitted to the Minister of Public Works and Government Services setting out the alternative means by which several technical, performance, time and other goals and objectives may be best met, having regard to stated mandatory requirements. The Minister will consider entering into a contract for the implementation of the most acceptable proposal which will be determined having regard to the evaluation factors set out in this RFP. In addition, the acceptability of the contract terms and conditions upon which the respondent would be prepared to undertake the implementation of the proposal will be measured against the contract terms and conditions set forth in this RFP.

The Statement of Work (SOW), Annex B to the RFP, reads, in part:

4.2 Number and Location of Systems Calculations (M)

Bidders should do their own calculations to determine where the systems should be installed and what the optimum number of systems would be to deliver the functionality that is specified in this Statement of Work. Bidders must include a minimum of two sites in different geographic locations for Business Recover Planning (BRP) purposes. Bidders must provide their toll and local call volume calculations with their recommendations on system locations. The Bidder's estimated call

5. S.O.R./93-602 [hereinafter Regulations].

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

7. Canada's Electronic Tendering Service.

volume numbers will be verified against the volumes provided in **Appendix D Table D8** to substantiate the Bidder's calculations and toll cost estimates.

Table D8: Potential Local Call Volumes per Major Center

Listed here are the highest calling volume locations in Canada. The "Potential Local Calls" and "Potential Local Minutes" columns represent the calls and minutes that would be within a free calling area if there were a system installed at these locations. The purpose of [these] data is to assist Bidders in determining where systems should be installed. If the cost of routing these calls to another IVR location is more expensive [than] installing and supporting a system, it may make sense to install a system at that location. If there were a system in Montreal, for example, there would be 1,932,585 calls generating 4,058,428 minutes that could be processed as local calls. In that example it would probably make sense to install a system in Montreal. In a lower call volume area such as Saskatoon it probably would not.

Paragraph v) of the "Pricing Model" in Annex D to the RFP reads as follows:

Toll Free Service

Toll Free Services **shall (M)** include billing, installation, activation and call routing configuration and **shall (M)** be presented as a cost per minute for all toll costs related to the call processing systems as well as for any other toll free requirements that HRDC may have. The total calling minutes are estimated to be approximately 160 million minutes annually. For evaluation purposes this number (160 million) will be adjusted to reflect the credit for the number and locations of IVR systems that the Bidder proposes. The amount of credit will be based on the figures presented in Table 8.f Appendix E to the SOW at Annex B. This estimate is not a volume commitment and no minimum commitment of either total minutes or toll minutes will be provided as a result of this contract. Toll services are to be billed on an actual usage basis, one month in arrears. On a forward going basis, toll rates shall (M) reflect "Best Customer Pricing". This means that as toll rates decline, HRDC **shall (M)** receive the benefit of these lower toll rates.

Paragraph v) of the "Total Evaluation Bid Price" section in Annex D to the RFP reads as follows:

Toll Free Services Evaluation Price: For evaluation purpose the quoted per minute Toll Free cost will be multiplied by, 160 million minutes minus the number of local minutes as determined by the proposed system locations, (Para 4.2 of the SOW refers) to determine the Toll Free Services Evaluation Price.

A note at the bottom of the Toll Free Service Pricing Table included in Annex D to the RFP reads as follows:

NOTE* Calculation to be calculated as follows:

160 million minutes less, credits based on the number and location of IVR platforms, per Table 8 of Appendix D to Annex B. In the event of an error in the calculation of the Toll Free minutes the minutes specified in Appendix D Table D8 shall prevail.

Six proposals from five bidders were received by bid closing. After the technical evaluation, HRDC determined that three bids had met the mandatory requirements of the first phase of that process, and the bidders were requested to conduct equipment demonstrations. After a delay brought on by a Tribunal inquiry (PR-2000-037), the equipment demonstrations were completed, and a further bidder was declared non-compliant. Only the proposals from Bell and Sprint were left in the running. After exchanges of correspondence between PWGSC and the bidders, to clarify certain aspects of their financial proposals, the contract was awarded to Sprint on May 7, 2001. On May 23, 2001, Bell attended a debriefing session at PWGSC. On June 5, 2001, Bell notified PWGSC of its objection to the award of the contract to Sprint. On July 13, 2001, as a result of a July 11, 2001, meeting between Bell and PWGSC, PWGSC wrote to Bell and

advised it, among other things, that it had “the right to take this to the CITT should [it] so choose.” On July 27, 2001, Bell filed a complaint with the Tribunal.

POSITION OF PARTIES

PWGSC’s Position

PWGSC presented its position under four main headings.

The solicitation is covered by the AIT only

PWGSC submitted that the services being procured are Automatic Data Processing Telecommunications and Transmission Services (category D304 of the Common Classification System), which are excluded from the coverage of NAFTA by virtue of Article 1001(1)(b) and Annex 1001.1b-2. These services are also not included in the covered services listed, for Canada, in Annex 4 to Appendix I of the AGP.

The RFP allowed for creativity and ingenuity

PWGSC submitted that the RFP was clear in providing bidders with the flexibility to propose alternative means of meeting the technical requirements of the SOW. PWGSC submitted that the very definition of an RFP allows “that proposals be developed and submitted to the Minister of Public Works and Government Services setting out the alternative means by which several technical, performance, time and other goals and objectives may be best met, having regard to stated mandatory requirements.”

The successful bidder was determined by best overall value

According to the GIR, “PWGSC submits that the RFP provided flexibility to bidders to design the most efficient and cost effective network capable of delivering the functionality required by the SOW. . . . Sprint’s proposed network meets or exceeds all the technical requirements of the SOW and, through creativity and ingenuity, is able to reduce the cost of Toll Free Services to the Crown.”

PWGSC properly applied the evaluation methodology

PWGSC submitted that Sprint’s proposal was evaluated using the correct number of minutes for toll calls to calculate Sprint’s “Toll Free Services Evaluation Price”. PWGSC also submitted that the correct number of minutes was credited as local minutes in the calculation. PWGSC based its evaluation on Sprint’s proposal in which Sprint offered the required number of physical IVR locations along with a number of virtual locations (listed in Table D8) to which calls would be treated as local calls at no cost to the crown.

In the alternative, PWGSC submitted that Sprint’s proposal could be interpreted as offering local calls for the cities with the proposed physical IVR sites, offering a rate of \$0.00 per minute for calls originating in the other listed cities and offering its proposed rate for the remaining minutes.

PWGSC concluded its response as follows:

46. As submitted above, PWGSC properly applied the evaluation methodology from the RFP. In calculating Sprint’s “Toll Free Services Evaluation Price” for evaluation purposes, PWGSC properly included only the time of toll calls for which charges apply. Sprint was properly credited for local minutes in the calculation of its toll free price. In the alternative, the RFP allowed bidders to propose more than a single toll free cost per minute. Sprint’s financial proposal clearly shows that it

bid five years of toll free costs, as required by the RFP. PWGSC evaluated Sprint's financial proposal using the total five year toll free cost.

47. PWGSC requests its bid complaint costs.

Bell's Position

In response to the GIR, Bell submitted that the RFP was clear and consistent that bidders could only receive a credit based on the number and location of their proposed IVR platforms. Bell submitted that, in its proposal, Sprint "claimed and received credits on a basis other than the number and locations of its IVR systems." Bell submitted that Sprint could only claim a credit for all available local minutes for IVR systems actually or physically located in a centre listed in Table D8. Bell submitted that Sprint's proposal and subsequent clarifications made it clear that "Sprint's proposal had to be declared non-compliant for its deliberate and wilful failure to follow the formula . . . stipulated in the RFP". Bell submitted that the invention of something called a "virtual IVR system" was not permitted or recognized in the RFP as a basis for claiming and receiving credits. Bell submitted that an IVR system is a tangible piece of hardware that has a physical location. It is comprised basically of "a server (hardware) with software loaded into it." Bell submitted that calls for which Sprint received credit as local calls would still have to be redirected to the two centres in which the IVR systems are actually located.

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 applicable agreements.

For the purpose of this inquiry, it is sufficient that the AIT apply and unnecessary for the Tribunal to make a final determination as to whether NAFTA or the AGP apply. Indeed, even if they were to apply, this would not change the outcome of the Tribunal's decision.

The applicable section of the AIT is Article 506(6) which provides, in part, that "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."

With respect to the grounds of complaint that PWGSC improperly applied the evaluation methodology by allowing bidders to provide multiple toll-free costs based on application, time periods and/or locations and by allowing bidders to bid one year of toll-free costs rather than providing the total five-year cost required, the Tribunal finds no merit in these grounds.

The following deals with the complaint to the effect that PWGSC improperly applied the evaluation methodology by allowing other deductions to be made that were not specified in the RFP. The Tribunal finds that the RFP only required physical IVR systems to be actually located in "a minimum of two sites" and that this requirement was for "Business Recover Planning purposes". Sprint's proposal clearly met this mandatory requirement. The Tribunal is of the view that, although the virtual solution proposed by Sprint in its bid may not have been expressly contemplated by the terms of the RFP, Article A.3 of the RFP makes it clear that there is sufficient latitude and flexibility for bidders to propose "**alternative means** by which several technical, performance, time and other **goals and objectives may be best met**, having regard to

stated mandatory requirements” [emphasis added]. Further to this point, Article 4.2 of the SOW states that “[b]idders should do their own calculations to determine where the systems should be installed and what the optimum number of systems would be to deliver the **functionality** that is specified in this Statement of Work” [emphasis added].

What the Tribunal must now determine is whether PWGSC properly found that Sprint was entitled to receive credits for the locations for which it proposed “virtual IVR systems”.

To establish the evaluation price for toll-free services, paragraph v) of Annex D to the RFP states that the quoted per-minute toll-free cost will be multiplied by 160 million minutes less the number of local minutes, as determined by the proposed system locations. The Tribunal is of the view that, given the latitude for creativity and the stress on the functionality of the system rather than on its structure, there is no reason why the virtual IVR systems, together with the physically located IVR systems, could not constitute the “proposed system locations” for evaluation purposes. The RFP does not link the deduction of local minute credits and the location of physical IVRs. Rather, it interchangeably uses the terms “systems”, “proposed systems” and, in a footnote to the Toll Free Service Pricing Table, “platform”. Given the overall context of the RFP, the Tribunal is satisfied that a virtual system was acceptable.

In the Tribunal’s view, the credits received by a bidder for the local minutes that its proposed network treats as non-chargeable local calls are permissible. As such, the Tribunal finds that PWGSC did not make an error in allowing the reduction by Sprint of local minutes attributed to all the centres listed in Table D8.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, the Tribunal determines that the procurement was conducted in accordance with the requirements of the AIT and that, therefore, the complaint is not valid. Each party will bear its own costs.

Patricia M. Close
Patricia M. Close
Presiding Member