



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2004-004

Bell Mobility

v.

Department of Public Works and
Government Services

*Determination issued
Wednesday, July 14, 2004*

*Reasons issued
Friday, July 16, 2004*

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

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

BETWEEN

BELL MOBILITY

Complainant

AND

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT
SERVICES**

**Government
Institution**

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.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by Bell Mobility. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,400. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated in its *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

Ellen Fry
Ellen Fry
Member

Hélène Nadeau
Hélène Nadeau
Secretary

The statement of reasons will be issued at a later date.

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Intervener:	TELUS Mobility, a division of TELUS Corporation
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STATEMENT OF REASONS

COMPLAINT

1. On April 15, 2004, Bell Mobility (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 (Solicitation No. EN994-025180/D) by the Department of Public Works and Government Services (PWGSC) for the provision of mobile wireless devices and services.

2. Bell alleged that PWGSC failed to evaluate its bid in accordance with the evaluation criteria in the solicitation, contrary to Article 506(6) of the *Agreement on Internal Trade*.² Bell requested, as a remedy, that the Tribunal recommend that PWGSC re-evaluate Bell's bid in accordance with the criteria stated in the solicitation documents and if, as a result of the re-evaluation, PWGSC determines that Bell submitted the winning proposal, that PWGSC terminate the contract awarded to Tele-Mobile Company and award the contract to Bell and, further, that PWGSC compensate Bell for its profits lost during the period preceding the award of the contract to Bell. In addition, Bell requested its costs incurred in preparing and proceeding with the complaint.

3. On April 23, 2004, 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*.³ The Tribunal did not issue a postponement of award order in accordance with subsection 30.13(3) of the *CITT Act*, since the evidence on file indicated that a contract had already been awarded. On April 27, 2004, PWGSC informed the Tribunal that a contract had been awarded to Tele-Mobile Company. On May 7, 2004, the Tribunal granted intervener status to TELUS Mobility, a division of TELUS Corporation (TELUS). On May 18, 2004, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ On May 31, 2004, Bell and TELUS filed comments on the GIR. On June 9, 2004, Bell filed comments on TELUS's submission.

4. 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

5. On December 3, 2003, PWGSC issued a Request for Proposal (RFP) for the provision of mobile wireless devices and services for various government departments. The closing date for the submission of proposals was February 5, 2004.

6. The RFP reads in part as follows:

A. **INSTRUCTIONS AND INFORMATION FOR BIDDERS**

A.9.3 Proposals **shall (M)** be complete at the time of Bid Closing.

A.11 Amendments to [Bidders'] Proposals

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

2. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [*AIT*].

3. S.O.R./93-602 [*Regulations*].

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

A.11.1 After the RFP closing date and time, amendments to the Bidder's proposal will not be accepted.

A.18.1 Mandatory Requirements:

A.18.1.1 This solicitation contains mandatory requirements. All elements for this solicitation that are mandatory requirements are identified specifically with the words "shall", "must", "mandatory", or "(M)". An entire section of this solicitation may be designated as mandatory.

A.18.1.2 Proposals must comply with each and every mandatory requirement. If a proposal does not comply with a mandatory requirement, the proposal will be considered non-compliant and will receive no further consideration.

B. FORMAT AND CONTENT OF PROPOSALS

B.3 Volume 1 – Technical Proposal

B.3.3 A Statement of Compliance

B.3.3.1.3 For mandatory items, Bidders must indicate in their Statement of Compliance whether they:

- a. COMPLY: indicates the Bidder complies with and/or accepts this item, clause, specification, terms or conditions in all respects; or
- b. DO NOT COMPLY: indicates an inability or unwillingness on the part of the Bidder to comply with and/or accept the item, clause, specification, terms or conditions in all respects.

B.3.3.1.6 The Statement of Compliance responses to the Statement of Work must include a narrative which substantiates the response to all paragraphs in the Statement of Work marked "Substantiate" by demonstrating how the Bidder satisfies the requirement. Where it is necessary to refer to other documentation which is included in the proposal, Bidders should include the precise location of the reference material including the title of the document, and the page and paragraph numbers.

C. EVALUATION AND CONTRACTOR SELECTION

C.1 General

C.1.1 Bidders are hereby advised that failure to provide a response to all of the mandatory requirements, to the degree specified and in the manner indicated will result in their proposal being assessed as non-compliant.

7. Annex A to the RFP, "Mobile Wireless Products and Services Statement of Work" (SOW), reads in part as follows:

5. End User Support and Trouble Reporting

5.1. End User Support

5.1.4. As a minimum, the Contractor **shall (M)** provide end user support during the following times:

- Weekdays: 8:00AM to 9:00 PM; and
- Saturdays: 10:00AM to 6:00PM.

(These service hours are based on local times.)

Substantiate.

8. According to PWGSC, proposals were received from three suppliers. Bell's proposal reads in part as follows:

COMPLY

CUSTOMER SERVICE HOURS

Bell Wireless Alliance (BWA)

Bell Mobility

	<u>Western Region</u>	<u>Central Region</u>	<u>Eastern Region</u>
Mon. – Fri.	8:30am to Midnight	8:30 to 9pm	8:30am to 9pm
Saturday	8:30am to 6pm	8:30 to 6pm	8:30am to 6pm
Sunday	Closed	Closed	Closed

Saskatchewan Mobility

Mon. – Fri.	8:30am to 9pm
Saturday	8:30am to 6pm
Sunday	Closed

Alliant Mobility

	<u>NS</u>	<u>NB</u>	<u>NL</u>	<u>PEI</u>
Mon. - Fri	24 hrs	24 hrs	8am to 8pm	8am to 9pm
Saturday	24 hrs	24 hrs	8am to 8pm	8:30am to 6pm
Sunday	24 hrs	24hrs	Closed	Closed

MTS Mobility – Manitoba

Mon. – Fri.	8am to 9pm
Saturday	8am to 6pm
Sunday	Closed

9. On February 16, 2004, PWGSC requested that Bell clarify that the toll-free telephone number as per section 5.1.1 of the SOW, will provide end user support, nationally, during the following times:

- Weekdays: 8:00AM to 9:00PM; and
- Saturdays: 10:00AM to 6:00PM.

(These service hours are based on local times.)

10. On February 18, 2004, Bell responded to PWGSC's request by stating that it would offer PWGSC toll-free numbers for every region, as shown in its proposal, and that the call centres would provide end-user support during the specified hours.⁵ On February 24, 2004, PWGSC requested that Bell clarify how the customer service hours for each region included in Bell's proposal meet the mandatory end-user support time requirements, to which Bell has indicated that it is compliant. On February 26, 2004, Bell stated the following: "Bell Mobility made a typo mistake by writing that our customer hour service is open from 8:30am to 5pm. It should have been as follows: Bell Mobility along with Bell Wireless Alliance (BWA) will provide to PWGSC customer service for end user starting at 8:00AM to 9:00PM on Weekdays and from 10:00AM to 6:00PM on Saturdays. Therefore Bell Mobility wholly complies with clause 5.1.4 of Annex A – SOW." On March 12, 2004, PWGSC advised Bell that its proposal had been deemed to be non-compliant and that a contract had been awarded to TELUS. On March 24, 2004, PWGSC debriefed

5. Complaint, Tab D.

Bell to explain the basis upon which its proposal had been found non-compliant. On March 25, 2004, Bell filed an objection with PWGSC regarding the evaluation of its proposal. On March 30, 2004, PWGSC advised Bell that it had confirmed its finding of non-compliance. On April 15, 2004, Bell filed its complaint with the Tribunal.

POSITIONS OF THE PARTIES

Bell's Position

11. Bell submitted that it was apparent on the face of its proposal that there was an unintended discrepancy in the information provided. It argued that, by responding "COMPLY" to the requirement to provide end-user support during the times specified in the RFP, Bell was clearly stating that it would meet the stated requirement. Bell acknowledged that the table provided did not show, in all cases, the same hours of operation as those listed in section 5.1.4 of the SOW. Bell contended however that this was due to a clerical error when the hours of operation were inserted in the table. Bell submitted that it identified the error and explained the inconsistency to PWGSC. Bell further submitted that, by the end of the clarification process, there could not have been any doubt that Bell had always intended to comply with the requirement at issue.

12. Bell submitted that not every error in a proposal should necessarily result in the disqualification of a bidder, even if the error relates to a mandatory requirement. It contended that the error, in this case, was minor and insubstantial and, as such, should not have resulted in such a serious consequence, i.e. a finding of non-compliance. It argued that PWGSC's decision in this case is particularly severe because the mandatory requirement that resulted in Bell's disqualification is one of the most easily satisfied requirements of the solicitation and that Bell's intention and ability to meet that requirement were never seriously in question. According to Bell, PWGSC subjected itself and Bell to unreasonable constraints by applying an unreasonably rigid and inflexible approach to the evaluation of Bell's proposal. Bell argued that this approach had resulted in the unfair disqualification of its proposal on minor grounds that did not reflect the substance of its proposal or its ability to provide the service required by the solicitation.

13. Bell contended that the integrity and fairness of the procurement process is not well served if eligible bidders are disqualified for minor inconsistencies or errors that are easily explained. Bell submitted that the purpose of PWGSC's requests for clarification was presumably to obtain Bell's explanation for the inconsistent information.

14. Bell submitted that, when dealing with mandatory requirements, the test is one of substantial compliance, not strict compliance. It argued that there is no absolute rule that any error in relation to a mandatory requirement is fatal to a proposal and that there has to be some flexibility in the process. Bell submitted that the real test should have been whether it would have been unfair and contrary to the integrity of the process to have accepted the offered clarification. Bell cited a complaint⁶ submitted by Mechtron Energy Ltd. in support of its position. Bell also cited a previous decision of the Federal Court of Appeal,⁷ which states that mandatory requirements are not to be construed in an isolated and disjunctive manner. Rather, as the Tribunal stated in *R.E.D. Electronics*,⁸ they are to "be interpreted as a whole with

6. *Re Complaint Filed by Mechtron Energy Ltd.* (18 August 1995), PR-95-001 (CITT) [*Mechtron*].

7. *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)* (2000), 260 N.R. 367 (F.C.A.).

8. *Re Complaint Filed by R.E.D. Electronics Inc.* (26 July 1995), 94N6660-021-0024 (CITT).

consideration of the overall purpose and objectives of the RFP.”⁹ Bell contended that the same reasonable approach should be applied when construing a bidder’s response to a mandatory requirement, i.e. the bidder’s intention should be taken from the whole document, and no single part of the proposal or clarification response should be read disjunctively and in isolation from the whole.

15. In its response to the GIR, Bell submitted that the dictionary definition of “clarify” includes: “make or become clearer”.¹⁰ It submitted that the normal dictionary definition of “clarification” is sufficiently flexible to include explaining existing aspects of a proposal that are inconsistent on their face and that such an explanation does not amount to introducing new information. Bell also submitted that, while PWGSC maintains that its decision in this case was necessary because of the outcome of a complaint¹¹ filed by CVDS Inc., *CVDS* is distinguishable on the grounds that the issue in that case was one of substantial non-compliance with a technical requirement.

16. In its response to TELUS’s submission, Bell argued that understanding the bidder’s intention as disclosed by the proposal as a whole is key to the evaluation process. It submitted that, where the proposal presents inconsistent information, the bidder should have the right to explain and correct the error by referring PWGSC to other information in the proposal that reflects the bidder’s actual intention. Bell submitted that information in another part of a bidder’s proposal includes a bidder’s statement of compliance and that the statement of compliance forms as much a part of a bidder’s proposal as any other aspect of the proposal and should be afforded equal weight with those other aspects. Bell also submitted that it is not bid repair for a bidder to explain the reasons for the inconsistency and to clarify the proposal by asking PWGSC to read the whole proposal consistently, using the correct information. Bell contended that it is important for the evaluators to determine whether the proposal is truly non-compliant or only raises a question of compliancy due to inconsistent information being presented. Bell argued that there is a distinction between the situation where a bidder fails to address or meet a mandatory requirement altogether, and the situation where a bidder addresses a mandatory requirement, but accidentally provides inconsistent information in its response.

17. Bell submitted that it did not replace information or provide missing information. It submitted that responding “COMPLY” to the requirement was the same as stating that it would provide the required support during the stated times. Bell submitted that information provided elsewhere in its proposal set out hours that were, in some cases, inconsistent with its statement that it complied with the requirement, and that there was undoubtedly a lack of clarity or uncertainty in the proposal which required explanation.

18. Finally, regarding TELUS’s request for costs, Bell submitted that the decision of whether to intervene and to make submissions was TELUS’s decision made with the knowledge that interveners are rarely, if ever, awarded costs. It also submitted that solicitor/client costs are normally awarded only where a litigant has engaged in some form of misconduct that unnecessarily lengthened the proceedings and added unreasonably to the costs.

PWGSC’s Position

19. PWGSC submitted that section 5.1.4 of the SOW required that suppliers provide end-user services to the Crown from 8:00 a.m. to 9:00 p.m. local time, on weekdays, for all regions and that the proposal submitted by Bell stated that, in some regions, this service would only begin at 8:30 a.m.

9. *Ibid.* at 6.

10. *The Canadian Oxford Dictionary*, 1998, s.v. “clarify”.

11. *Re Complaint Filed by CVDS Inc.* (22 January 2003), PR-2002-035 (CITT) [*CVDS*].

20. PWGSC submitted that it provided Bell with two opportunities to clarify how its response in the proposal could be understood to comply with the mandatory criterion in section 5.1.4 of the SOW, e.g. to identify some other technical data in another part of the proposal that, taken together with the response to section 5.1.4, could show that the “8:30am” cited could be calculated as being effectively 8:00 a.m. in the locality in question. PWGSC submitted that Bell was unable to identify any other pertinent data supplied in its proposal. Bell responded to PWGSC’s request for clarification by stating that it “made a typo mistake by writing that [its] customer hour service is open from 8:30am to 5pm. It should have been as follows:”, after which Bell proceeded to supply the revised times for its end-user service.

21. PWGSC submitted that Bell’s position that the error in its proposal was minor and should not be considered as amounting to non-compliance with the requirement is in direct conflict with the clear and express rule of strict compliance with mandatory requirements enunciated by the Tribunal in a decision¹² concerning IBM Canada Ltd., which reads in part as follows:

The Tribunal recognizes that compliance by potential suppliers with all the mandatory requirements of solicitation documents is one of the cornerstones to maintaining the integrity of any procurement system. Therefore, procuring entities must evaluate bidders’ conformance with mandatory requirements thoroughly and strictly.¹³

22. PWGSC submitted that the Tribunal described a single exception to the rule stated in *IBM*. The Tribunal noted that a non-compliant aspect in a proposal that was merely “a matter of form over substance” should not be considered grounds for finding the proposal to be non-compliant. In that case, the RFP had required the submission of unit prices. In *IBM*, the proposal had included all the data required to obtain the unit price, but did not calculate or set out the unit price *per se*. The Tribunal found that, where only the application of arithmetic was required to obtain the unit prices in the set format, this should have been done by PWGSC. The Tribunal found such circumstances to be matters of “form over substance” and, as such, a limited and narrow exception to the fundamental rule of strict compliance with mandatory requirements. PWGSC argued that, since the data submitted by Bell were substantively in error, this exception would not apply.

23. With respect to Bell’s argument that it also stated “COMPLY” in its proposal and that its response should have been treated as an inconsistency, PWGSC submitted that this argument is in clear conflict with the express directions provided to PWGSC by the Tribunal in *CIDS*. In that case, the Tribunal stated:

This case deals with Cartel’s failure to meet a mandatory requirement. According to the RFP, any such failure renders the bid non-compliant. The reference to “10k” ohms in Cartel’s proposal was, at the very least, ambiguous and it is disturbing to read that PWGSC believes that it could have “clarified” the matter and accepted the bid as if it were compliant. It is the Tribunal’s opinion that this could have constituted a change in a substantive element of the bid. The Tribunal cannot accept PWGSC’s argument to the effect that the supply, later on, of equipment complying with the line input requirements, indicates that Cartel’s error in the proposal was inconsequential to the evaluation. The Tribunal is of the view that the eventual delivery of a product that complied with the line input requirement is totally outside of the scope of the evaluation of the proposals and does not, in any way, have the effect of rendering compliant a proposal that is non-compliant. The Tribunal is of the opinion that the evaluators should have declared Cartel’s proposal non responsive pursuant to clause 15 of the RFP, which provides that bids not meeting all the mandatory requirements will be considered non responsive.¹⁴

12. *Re Complaint Filed by IBM Canada Ltd.* (5 November 1999), PR-99-020 (CITT) [*IBM*].

13. *Ibid.* at 7.

14. *Supra* note 11 at 5.

24. PWGSC submitted that it was aware that the relevant facts regarding the inconsistencies in the proposal submitted by Bell and the inconsistencies in the proposal submitted by Cartel Communications System Inc. (Cartel) were very similar. It submitted that, in both cases, the issue concerned a specific technical requirement, one of many in the RFP. It further submitted that both Bell and Cartel had made the general statement that they “COMPLY” with the requirement and that, in both cases, a non-compliant technical figure was entered on the same page of the proposal as the general statement “COMPLY”. PWGSC noted that, in both cases, the bidders submitted that the error was inadvertent and that both bidders asserted that they intended to comply and were technically capable of complying. PWGSC argued that, given these facts, and given the clear direction provided to PWGSC by the Tribunal with respect to such circumstances, it had no option but to find Bell’s proposal non-compliant with respect to the mandatory requirement in section 5.1.4 of the SOW and, therefore, to set Bell’s proposal aside from further consideration.

25. For the reasons previously outlined, PWGSC requested that it be awarded its costs in this matter, consistent with the Tribunal’s *Guideline for Fixing Costs in Procurement Complaint Proceedings (Guideline)*.

TELUS’s Position

26. TELUS submitted that the law is clear that PWGSC must be meticulous in assessing compliance with mandatory requirements. TELUS contended that, given that the consequence of a finding of non-compliance with a mandatory requirement is disqualification, it is reasonable for PWGSC to make quite sure that it has not misunderstood the response, missed some compliant interpretation of the response or missed information in another part of the bid that would clarify the response as compliant.

27. TELUS submitted that it is clear that the detailed information provided in Bell’s bid was presented quite intentionally and that the “error” was that the information on hours of support did not comply with the requirement. TELUS argued that this information cannot be said to have been inserted inadvertently. TELUS submitted that, where substantiation of compliance is required, it is the analysis of that substantiation that determines compliance, not the mere fact that the bidder stated “COMPLY”.

28. TELUS submitted that, while Bell attempts to characterize the non-compliance of its bid as of a “minor technical or procedural nature”, the information that Bell provided in its ultimate response to PWGSC was, plain and simply, different information, i.e. Bell changed the hours during which it would provide support services. TELUS argued that there is nothing unclear about the response “8:30 a.m.” or the response “8:00 p.m.” and that those responses would not be clarified by the substitution of “8:00 a.m.” and “9:00 p.m.”; rather, the responses would be changed by the provision of new and different information.

29. Finally, TELUS submitted that, when a sophisticated bidder brings a complaint that defies precedent and principle simply because there is “nothing to lose” by putting the Tribunal, the government and the successful bidder to the expense of dealing with the matter, the case calls for an exception to the Tribunal’s *Guideline*. TELUS contended that an award of substantial costs in these circumstances is the only way to prevent bidders from adopting a “nothing to lose” approach to the invocation of the Tribunal’s process. TELUS therefore requested that it be fully compensated for its legal costs, on what a civil court would call the “solicitor and client” basis.

TRIBUNAL'S DECISION

30. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, is the *AIT*.

31. Article 506(6) of the *AIT* provides that, “[i]n evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.”

32. Bell alleged that PWGSC failed to evaluate its bid in accordance with the evaluation criteria in the solicitation, because it disqualified Bell's bid for failing to satisfy section 5.1.4 of the SOW.

33. In order to satisfy the mandatory criterion in section 5.1.4 of the SOW, bidders were to first indicate in their statement of compliance whether they complied with the item or not and then, since that criterion required bidders to “[s]ubstantiate”, bidders were to provide a narrative that substantiated their response, demonstrating how the bidders satisfied the requirement. In response to the mandatory criterion in section 5.1.4, Bell stated “COMPLY” and then, to substantiate its response, included a table showing various customer service hours for different regions across Canada. The evidence indicates that there was no other information provided in the bid for that criterion to indicate how Bell would satisfy the mandatory requirement to provide end-user support during the times requested by PWGSC.

34. The mandatory criterion in section 5.1.4 of the SOW required suppliers to provide end-user support to the Crown on weekdays from 8:00 a.m. to 9:00 p.m. local time, for all regions. Bell's proposal stated that, in four of the nine regions, this service would only begin at 8:30 a.m. and, in one region, would end at 8:00 p.m.

35. The issue is whether PWGSC properly evaluated Bell's compliance with section 5.1.4 of the SOW.

36. In *IBM*, the Tribunal stated that “procuring entities must evaluate bidders' conformance with mandatory requirements thoroughly and strictly.” The Tribunal did note that there are exceptions for matters of “form over substance” and that “[w]hile bids must be read strictly, in the absence of a clear format for providing information, in the opinion of the Tribunal, some latitude must be given to the bidders.”¹⁵ Regarding clarifications, in *Mechron*, the Tribunal stated:

The Department submits that, after bid opening, it is entitled to seek, receive and take into consideration clarifications from bidders in finalizing its evaluation of the proposals. The Tribunal agrees with this position. It is important, however, to have a clear understanding as to what constitutes a clarification. The Tribunal is of the view that a clarification is an explanation of some

15. *Supra* note 12 at 7.

existing aspect of a proposal that does not amount to a substantive revision or modification of the proposal.¹⁶

37. These principles applied by the Tribunal are consistent with the basic principle of transparency in the procurement process that is provided for in the *AIT*. Article 501 of the *AIT* reads in part as follows: “the purpose of this Chapter is to establish a framework that will ensure equal access to procurement for all Canadian suppliers . . . in a context of transparency and efficiency.” The Tribunal is of the view that, if bidders were allowed to correct their bids in a substantive way, this would introduce an element of doubt in the supplier community as to the transparency of the competitive bidding process.

38. The Tribunal does not accept Bell’s argument that there is an inconsistency between the required compliance statement in section 5.1.4 of the SOW and the substantiating narrative required by the same section. In the Tribunal’s view, the compliance statement (“COMPLY”) is not intended to be a restatement of the requirement stipulated by the RFP. Rather, it is merely an indication that the bidder “complies with and/or accepts this item, clause, specification, terms or conditions in all respects”, as stated in section B.3.3.1.3 of the RFP; the compliance statement must be accompanied by a narrative that demonstrates how the bidder satisfies that requirement.¹⁷ Thus, in the Tribunal’s view, the compliance statement and the narrative are not inconsistent, as one is simply intended to explain the other.

39. The Tribunal is of the opinion that, through the clarification process initiated by PWGSC, Bell sought to make a revision, rather than provide an explanation of some existing aspect of its proposal. It submitted information that was different from that which appeared in its proposal. The Tribunal is of the view that the change that Bell sought to make to its bid through this revised information was substantive in nature.

40. Bell initially supplied non-compliant operating hours for its three regions and Saskatchewan Mobility’s single region. It supplied compliant operating hours for three of Alliant Mobility’s four regions and MTS Mobility’s single region. The non-compliant data not only covered five out of nine regions, but also represented a significant number of hours, totalling several months over the three-year term of the contract. Moreover, nothing in the bid indicates to the Tribunal that these hours were other than Bell’s normal operating times across its several regions or that they had been supplied in error.

41. In light of the foregoing, the Tribunal is of the view that the circumstances of this case do not warrant any departure from the rule set down in *IBM*. The Tribunal is not convinced that this is a matter of form over substance. The changes to Bell’s bid, had they been allowed, would have been of a substantive nature and, had PWGSC accepted them as part of the bid, this would have been contrary to the wording of the RFP and a violation of the *AIT*.

42. Therefore, the Tribunal finds that PWGSC correctly declared Bell’s bid non-compliant with the mandatory criterion in section 5.1.4 of the SOW on the basis that its substantiation for the item did not comply with the required times for end-user service.

43. In light of the foregoing, the Tribunal determines that Bell’s complaint is not valid.

44. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint. In determining the amount of the cost award for this complaint, the Tribunal has considered its *Guideline*, which contemplates classification of the level of complexity of cases based on three criteria: the complexity

16. *Supra* note 6, public version at 9.

17. See RFP at 17, section B.3.3.1.6.

of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The Tribunal's preliminary view is that this complaint case has a complexity level corresponding to the second level of complexity referred to in Appendix A of the *Guideline* (Level 2). The procurement was moderately complex, given that it involved the provision of mobile wireless products and end-user support services for various government departments. The services included roaming and long-distance service and required bidders to provide information on their existing network coverage areas, thus contributing to the complexity of the response to the solicitation required by bidders. The complexity of the complaint is moderate, in that it involved issues surrounding bid modifications. The parties provided relatively complex arguments and referred to previous decisions of the Tribunal and the Federal Court of Appeal. Finally, the complexity of the complaint proceedings is moderate, since Bell was provided an opportunity to file comments on TELUS's submission. There was one intervener, but there were no motions, and no public hearing was held. The complaint was resolved within the 90-day time frame. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$2,400.

45. The Tribunal has discretion, under section 30.16 of the *CITT Act*, to award costs to or against interveners. The Tribunal is required to exercise its discretion in awarding costs and to follow the same principles as those that are applied by the courts.¹⁸

46. The jurisprudence of the Federal Court of Canada¹⁹ indicates that costs are awarded only infrequently to or against interveners because of the high threshold that must be met before being eligible or liable for costs. In one case, where an intervention was successful, the Federal Court nevertheless held that the interveners were not entitled to costs, since their participation was completely voluntary.²⁰ In other cases, interveners were entitled to recover or be liable for costs with respect to issues that they, rather than the parties, raised.²¹ Only in one case of which the Tribunal is aware was the intervener successful in obtaining complete costs, and that was in a case where the intervener had no choice but to become a party to the proceedings, due to the possibility of the proceedings resulting in an injunction against it.²²

47. The foregoing principles were applied by the Tribunal in *Bosik*.²³ Applying these considerations to TELUS's request, the Tribunal is of the opinion that TELUS should not be awarded costs in these proceedings, as it chose to intervene. The Tribunal recognizes that TELUS's commercial interest in the proceedings was significant and considers that its submission was helpful. However, the Tribunal does not consider that the relevant judicial principles would support an award of costs to TELUS in this case. Since TELUS did not raise any issues that differed significantly from those raised by the parties, TELUS is not entitled to recover its costs.

DETERMINATION OF THE TRIBUNAL

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

49. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by Bell. The Tribunal's preliminary

18. *Canada (Attorney General) v. Georgian College of Applied Arts and Technology*, 2003 FCA 199.

19. The Federal Court of Canada has two divisions—the Federal Court of Appeal and the Federal Court.

20. *Grant v. Canada (Attorney General)*, [1995] 1 F.C. 158 (T.D.).

21. *C.J.A. v. University of Calgary*, [1986] F.C.J. No. 463 (F.C.A.); *Florence v. Canada (Air Transport Committee)*, [1991] F.C.J. No. 80 (F.C.T.D.).

22. *Glaxo Canada v. Canada (Minister of National Health and Welfare)* (1988), 19 C.P.R. (3d) 374 (F.C.T.D.).

23. *Re Complaint Filed by Bosik Vehicle Barriers Ltd.* (6 May 2004), PR-2003-082 (CITT).

indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,400. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in its *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Pierre Gosselin

Pierre Gosselin
Presiding Member

Richard Lafontaine

Richard Lafontaine
Member

Ellen Fry

Ellen Fry
Member