Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File Nos. PR-2008-008 and PR-2008-009

Bell Mobility

v.

Department of Public Works and Government Services

Determination and reasons issued Monday, July 14, 2008

Canadä

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IN THE MATTER OF two complaints 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 complaints 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 complaints are valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that, should the Department of Public Works and Government Services decide to exercise the option to extend the existing contracts for Stream 1 with TELUS Communications Company and Rogers Wireless Partnership (operating as Rogers Business Solutions) rather than allowing them to expire at the end of the current contract term, it do so on the basis of the original amended Request for Proposal, with the procurement of aircard service requirements falling outside those listed in the original amended Request for Proposal (i.e. the 1-GB flat rate service) being conducted through the issuance of a separate solicitation.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Bell Mobility its reasonable costs incurred in preparing and proceeding with the complaints, which costs are to be paid by the Department of Public Works and Government Services. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for these complaint cases, taken as a whole, 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 the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Audrey Chapman
Audrey Chapman
Acting Secretary

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STATEMENT OF REASONS

COMPLAINTS

1. On April 14, 2008, Bell Mobility (Bell) filed two complaints 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. EN869-055087/C) by the Department of Public Works and Government Services (PWGSC) for the provision of mobile wireless products and services.

2. Bell alleged that PWGSC improperly amended two existing contracts pertaining to the provision of mobile wireless products and services to include the provision of new services, which had the effect of precluding competition. In this regard, Bell requested, by way of a remedy, that the Tribunal recommend that PWGSC award Bell a contract for similar services and that PWGSC compensate it for lost sales from the date of the contract amendments until the date the Tribunal's recommendation is implemented. Bell also requested the reimbursement of its reasonable costs incurred in preparing and proceeding with its complaints.

3. On April 21, 2008, the Tribunal informed the parties that the complaints had been accepted for inquiry, since they 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*.[2]

4. On April 22, 2008, PWGSC informed the Tribunal that contracts had been awarded to TELUS Communications Company (TELUS) and Rogers Wireless Partnership (operating as Rogers Business Solutions) (Rogers).[3] On May 2, 2008, the Tribunal granted intervener status to TELUS. On May 9, 2008, the Tribunal granted intervener status to Rogers. On May 16, 2008, 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 30, 2008, Bell, TELUS and Rogers filed their respective comments on the GIR. On June 3, 2008, Bell filed its comments on Rogers' submission. On June 9, 2008, Rogers filed its reply to Bell's submission. On June 10, 2008, PWGSC filed its reply to Bell's comments on the GIR. The Tribunal accepted the latter two submissions on the record. Bell filed final comments on June 20, 2008.

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

PROCUREMENT PROCESS

6. On October 18, 2006, PWGSC issued a Request for Proposal (RFP) for the provision of mobile wireless products and services.[5]

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. The PWGSC contracts at issue are contract Nos. EN869-055087/001/EF and EN869-055087/002/EF with TELUS and Rogers respectively.
4. S.O.R./91-499.
5. The stated purpose of the procurement, as described in the RFP, was to achieve savings for all Government of Canada departments nationally by consolidating the Government's wireless purchasing through national procurement vehicles. In this regard, the client is defined as including ". . . any Government Department, Departmental Corporation or Agency, as identified in Schedules I, I.1, II, III, IV or V of the *Financial Administration Act* (as amended from time to time) or any other party for which the Department of Public Works and Government Services has been authorized to act from time to time pursuant to section 16 of the *Department of Public Works and Government Services Act*."

7. The RFP identified the required wireless devices and services on the basis of six "streams". These complaints concern Stream 1. The RFP requirement for Stream 1 reads as follows:

> **Stream 1 - Wireless Cellular/Personal Communication Service (PCS), Personal Digital Assistants (PDAs), and Aircard products and associated services:** Stream 1 includes Canada's needs for core mobile wireless products and services, representing the largest portion of the anticipated purchases. These products and services are the most commonly used devices and services across all of the Government of Canada's user base.

8. The RFP indicated that Canada intended to select two suppliers for Stream 1 and a single supplier for each of Streams 2 through 6. The resulting contracts were to be valid for two years with an option to extend the contracts by up to two one-year periods. The RFP specified that the contracts awarded under each stream would provide the successful contractors with the exclusive rights to provide the specified products or services in each stream. To this end, contractors were required to agree not to supply any wireless devices or services falling within the scope of the contract but outside the contractor's awarded stream to any covered department or agency.[6]

9. With regard to aircard services and products, Annex A to the RFP, "Statement of Work", provided, in part, as follows:

> . . .
>
> **3.3 AIRCARD SERVICE**
>
> 3.3.1.1 The Contractor must provide 2.5 G or 3 G data service for wireless Aircard users.
>
> 3.3.1.2 The Contractor's Aircard service must provide Wi-Fi hotspot service in any of the Contractor's Wi-Fi hotspot service areas.
>
> 3.3.1.3 The Contractor must provide data roaming within Canada, the US and internationally.
>
> **3.4 WIRELESS PRODUCTS**
>
> . . .
>
> **3.4.4 Aircard Products**
>
> 3.4.4.1 The Contractor must offer network air cards (the "Aircards"). Aircards are defined as hardware adapters/peripheral wireless devices that interface to computer equipment and other devices (including PDAs) using a range of interconnection interfaces, including PCI, PCMCIA, CF, Serial and USB ports.
>
> 3.4.4.2 The Contractor's Aircards must include software that allows the user to:
>
> a) operate on the 2.5 G cellular, 3 G cellular service, and/or Wi-Fi service;
>
> b) determine signal strength, roaming status, digital network availability, and other network connection parameters; and
>
> c) initiate voice and data calls.
>
> . . .

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6. GIR, Exhibit 1, clause B12(e).

10. Paragraph (b) of clause A.19 of the RFP provides the following mandatory requirement:

> **Stream 1 Financial Proposal:** Bidders *must* submit a completed version of Appendix 1B – Stream 1 Pricing Evaluation Tables.
>
> [Emphasis added]

In this regard, one of the evaluation tables ("Stream 1 – Wireless Cellular/PCS, SPDA/PDA, and Aircard Services and Products") included the following line items of relevance to aircard services:

> Monthly Flat Rate per User for unlimited Web Browsing
>
> Rate per Megabyte for Web Browsing and Email

11. On November 17 and 24, 2006, PWGSC amended the RFP (by way of Solicitation Amendment Nos. 004 and 005 respectively) to revise the pricing and evaluation table for Stream 1.[7] As a consequence, at the time the RFP closed, i.e. on December 20, 2006, bidders were required to propose a monthly flat rate per user for aircard services for 30 MB of data usage and an additional per-MB rate for each MB used over and above the 30 MB by each user.

12. On February 26, 2007, contracts for Stream 1 were awarded to TELUS and to Rogers. While Bell was not awarded a contract for Stream 1, it did receive a contract for Stream 6.

13. After PWGSC awarded the contracts for Stream 1 to TELUS and Rogers, it amended these contracts to include, among other things, a "Monthly Flat Rate per User for Aircard Services with 1 Gb Data Usage" and a "Rate per Megabyte for Aircard Additional Data Usage (over 1 Gb)". On March 7, 2008, PWGSC provided details of the contract amendments to Bell.[8]

14. On March 17, 2008, Bell made an objection to PWGSC regarding the issuance of the contract amendments on the ground that the amendments constituted new sole-source procurements. On March 31, 2008, PWGSC advised Bell that its objection was refused on the basis that the amendments were matters of contract administration. The Tribunal understands that Bell received its response from PWGSC on April 1, 2008.

15. On April 14, 2008, Bell filed its complaints with the Tribunal.

PRELIMINARY MATTER

Timing

16. Rogers alleged, *inter alia*, that the complaints filed by Bell were time-barred. In this regard, the Tribunal understands that, in the course of a telephone conversation with a representative of PWGSC on February 1, 2008, a representative of Bell inquired about amendments to the contracts for Stream 1 with TELUS and Rogers and, in particular, the change in price for data usage (i.e. from a 30-MB to 1-GB price basis).

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7. GIR, Exhibits 4 and 5. These amendments to the pricing and evaluation table for Stream 1 were reflected in a new consolidated table issued on December 14, 2006, as part of Amendment No. 009 to the solicitation. GIR, Exhibit 6.
8. GIR, Exhibit 17.

17. On March 7, 2008, Bell received a copy of the contract amendments from PWGSC. On March 17, 2008, Bell made an objection to PWGSC regarding the issuance of the amendments.[9] On April 1, 2008, Bell received a denial of relief from PWGSC.[10] On April 14, 2008, Bell filed its complaints with the Tribunal.

18. Rogers submitted that the *Regulations* do not allow a potential supplier to wait to make an objection or to file a complaint until it has all of the facts surrounding a complaint nor do they allow for a potential supplier to wait until it has gathered the best evidence supporting a complaint. It contended that all that is required is knowledge of the basis or foundation of a complaint and cited the Federal Court of Appeal's decision in *IBM Canada Ltd. v. Hewlett-Packard (Canada) Ltd.* as authority for that proposition. In that case the court stated that potential suppliers ". . . are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process. . . ."[11]

19. Rogers submitted that it is apparent from the conversation between PWGSC and Bell that, as of February 1, 2008, Bell knew that (1) there had been a change in the rate for aircard data usage up to 1 GB for both TELUS and Rogers and that (2) contract amendments had been made to put these rate changes in effect. Rogers further submitted that these are the fundamental facts that underlie the entire complaints. It contended that once Bell had knowledge of these facts, it was incumbent upon it to exercise the reasonable diligence expected of complainants in the procurement review process and to file complaints or, at a minimum, a letter of objection within 10 working days.

20. Rogers submitted that Bell appears to take the position that it was entitled to wait until 10 working days of having been provided copies of the amendments to file its objection. Rogers contended that there is no legal basis for this position.

21. In response, Bell submitted that Rogers' position is inconsistent with the recent decision of the Federal Court of Appeal in *TPG Technology Consulting Ltd. v. Minister of Public Works and Government Services*,[12] wherein the court stated that, to meet the purposes of the *CITT Act*, authorized communication from PWGSC is required before statutory time limits can be engaged. Bell submitted that, for the purposes of determining the relevant time period for it to file its complaints, no authorized communication about the issuance of the amendments came from PWGSC until March 7, 2008, the date when PWGSC officially confirmed the contract amendments and provided copies of those amendments to Bell.

22. Bell submitted that, until it had sight of the amendments and the explanation provided by PWGSC, it could not assess whether reasonable grounds existed for the complaints.

23. While the Tribunal finds that Bell received some information regarding the existence of amendments to the contracts awarded to TELUS and Rogers via a telephone conversation with the contracting officer, the Tribunal is of the view that it was not until Bell received copies of the actual contractual amendments, on March 7, 2008, that it was able to assess whether or not it had a basis of complaint. Bell made its objection to PWGSC on March 17, 2008, within the 10-working-day time limit for filing objections and received a denial of relief from PWGSC on April 1, 2008. Bell filed its complaints with the Tribunal on April 14, 2008, again within the 10-working-day time limit.[13]

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9. GIR, Exhibit 18.
10. GIR, Exhibit 19. Bell submitted in its complaint that it received PWGSC's letter on April 1, 2008.
11. 2002 FCA 284.
12. 2007 FCA 219.
13. *Regulations*, s. 6.

24. In light of the foregoing, the Tribunal determines that the complaints were filed on time and that it therefore has jurisdiction to inquire into the complaints.

TRIBUNAL'S ANALYSIS

25. 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 *Agreement on Internal Trade*.[14]

26. Article 506(6) of the *AIT* requires that ". . . [t]he tender documents shall clearly identify the requirements of the procurement. . . ." Articles 506(11) and (12) of the *AIT* allow an entity of a party to use procurement procedures that are different from those described in paragraphs 1 through 10 in certain circumstances, including "[w]here only one supplier is able to meet the requirements of a procurement . . . .".

27. Bell submitted that post-award amendments to the TELUS contract and the Rogers contract included the addition of new aircard service plans for 1-GB data usage, together with rates for associated services for heavy aircard users.

28. In support of its complaint that this amounted to the sole-source procurement of new aircard services, Bell submitted, *inter alia*:

(a) that the new service plans do not provide a discount on the contract rate per MB for usage over and above 30 MB, but rather, provide a new plan for heavy users whereby a monthly flat rate is payable regardless of whether the usage is over and above 30 MB in any given month;

(b) that these new service plans necessitated the insertion of new line items into the TELUS and Rogers contracts;[15]

(c) that there are substantial differences in function, price, potential take rate[16] and supplier profit margin between the 30-MB-based and new 1-GB-based service plans; and

(d) that there are no existing contractual clauses, options or agreements between the parties authorizing the extension of the contracts to cover the new "heavy user" requirement, which PWGSC has since procured from TELUS and Rogers without competition.

29. Accordingly, Bell contended that PWGSC was obligated to re-tender the new high-volume service plan requirement pursuant to the applicable trade agreements.

30. PWGSC explained that, in the months following the awarding of the contracts, it became apparent that there were a certain number of "heavy" users of aircard services whose duties required aircard usage well in excess of 30 MB (i.e. the amount included in the basic flat rate in the original contractual pricing structure). Given the additional per-MB-based charge for each usage over and above 30 MB, the original

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14. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].
15. Complaint, Exhibit E.
16. According to Bell a "take rate" is the number of people "taking you up" on a given offer.

contractual price structure was proving very expensive. As a result, PWGSC was approached by certain departments and agencies with respect to the possibility of having the service providers offer an additional volume discount rate for the same aircard services.

31. PWGSC claimed that the scope of the services provided under the contracts is not affected by the amendments. Rather, Canada will obtain these services at a reduced rate for certain users whose duties require extensive aircard usage. PWGSC submitted that the amendments are part of the normal everyday practice of contractual relationships by which the parties to a contract, from time to time, seek to adjust the terms of the contract to deal with evolving operational or commercial circumstances. In this regard, it submitted that amendments to a contract that do not change the essential elements and purpose of the contract once it has been awarded, should be considered matters of contract administration, which fall outside of the Tribunal's jurisdiction.

32. In support of its position, PWGSC submitted that the contract amendments at issue affected only a very small share of the services provided under Stream 1 as a whole and, indeed, a small share of the aircard services take-up under the contracts. As such, the addition of another pricing option for the aircard services represented a minor adjustment to the overall substance of the TELUS and Rogers contracts for Stream 1.

33. TELUS submitted that the RFP asked bidders to price the service in particular increments. It argued that the fact that PWGSC and TELUS later decided that it would make more sense to price the same service in different increments did not result in the procurement of a new service. TELUS submitted that the procuring entity must be fair when choosing among potential suppliers, but must also be allowed common-sense business flexibility to administer the resulting contract once it is awarded. Finding a more appropriate way of pricing what it has bought is precisely the sort of common-sense business flexibility that is accorded to the procuring entity through contract administration, which is not subject to constraint under the trade agreements.

34. Rogers submitted that the RFP clearly contemplated that there would be service enhancements during the term of the contract. The RFP, and resulting contract, specifically stipulate that the winning bidders are to make available to Canada any service enhancements that are offered commercially.[17] Rogers submitted that the heavy user aircard rates are "service enhancements" to the existing services within the meaning of the model contract.

35. In response, Bell submitted that the 1-GB service plan is not a "technological improvement" over the 30-MB service plan within the meaning of the contract. It submitted that the 30-MB and 1-GB service plans constitute different services because they serve different needs and users. Bell submitted that in the telecommunications industry, what wireless service providers offer their customers is different price points in order to match different levels of network usage. Therefore, Bell submitted that, while it is accurate to state that the amendments introduce different services, it is inaccurate to state that the 1-GB plan is a technological improvement over the 30-MB plan. In this regard, it noted that the two plans both run off the same wireless network, and the technology employed is exactly the same.

36. PWGSC submitted that, although Bell alleged that the addition of an alternative pricing option resulted in a new profit source, it is self-evident that characterizing it as a new service is completely without foundation. As a result of these amendments, Canada received a substantial discount on the costs chargeable by the suppliers with respect to those users who were using substantially more than the basic 30 MB. In addition, given the limited number of users who have so far taken up this alternative plan, there is little reason to anticipate that this option will generate any large-scale increase in new users of the aircard services.

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17. GIR, Exhibit 1, clause B11(j).

37. At the time the RFP closed, bidders were required to propose a monthly flat rate per user for aircard services for 30 MB of data usage and an additional per-MB rate for each MB used over and above the 30 MB by each user. Bidders were required to submit a completed version of Appendix 1B, "Stream 1 Pricing and Evaluation Tables". The Tribunal notes that clause A.5 of the RFP stated the following: "This document contains all the requirements relating to this solicitation. . . ."

38. Bell is not contesting the original procurement process (i.e. the evaluation of the bids by PWGSC) for Stream 1 services pursuant to which the original contracts were awarded to TELUS and Rogers. The issue in this case is whether the post-award amendments to the TELUS and Rogers contracts constituted a new procurement done without competition and conducted in a manner inconsistent with the applicable trade agreement or were, instead, ones that fell within the parameters of legitimate contract administration.

39. Article 501 of the *AIT*, which provides context for the substantive obligations set out in Chapter 5 of the Agreement on Government Procurement, provides, in relevant 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 order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency."

40. The Tribunal finds that the general aircard service requirement contained in the RFP, which was intended to satisfy the needs of a government-wide client base, could be fulfilled under one service plan, or a combination of service plans, with the usage rate structure clearly being an integral feature of aircard service plan design. In this regard, the Tribunal accepts Bell's contention that the 30-MB-based aircard service called for under the original RFP (as amended) and the new 1-GB-based service introduced by amendment to the TELUS and Rogers contracts constituted separate service plans that differed in important respects, including in relation to:

- the usage rate structure (i.e. 30-MB versus 1-GB-based)
- the targeted client sub-group (i.e. occasional users versus heavy users);[18] and
- the cost-effectiveness of functional capabilities involving higher-volume transmissions of data deriving, in particular, from the availability of a larger capacity at a lower total cost under the 1-GB service plan.

41. Therefore, while the new 1–GB flat rate service plan fell within the scope of "Aircard Service" and "Aircard Products" as described in clauses 3.3 and 3.4.4 respectively of Annex A ("Statement of Work") to the RFP, the 1-GB-based line items added to the TELUS and Rogers contracts substantially changed the mandatory specifications for aircard services, as set out in the Stream 1 pricing and evaluation tables in Annex D to the RFP (as amended, in relation to aircard services). As the Tribunal has stated in a previous case, ". . . [i]t is not a simple matter of contract administration if a mandatory term of a procurement is changed after bids are received or even after a contract is awarded. . . ."[19]

42. The Tribunal does not share Rogers' view that heavy user aircard rates are merely "service enhancements", the offering of which is permitted under clause B11(j) of the RFP. That provision reads as follows:

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18. PWGSC acknowledged that the new 1-GB-based line items were added to the TELUS and Rogers contracts specifically to accommodate a subsequently identified client sub-group of heavy users.
19. *Re Complaint Filed by Canyon Contracting* (19 September 2006), PR-2006-016 (CITT) at 5.

> **Technological Improvements:** The Contractor agrees to advise the PWGSC Technical Authority of all technological improvements that affect the services in each Stream under this Contract. The Contractor agrees to offer all improvements it is offering to its customers at large as part of its standard service offering at no additional charge to Canada. Any other service enhancements must only be provided following approval in writing by the Contracting Authority. The price of these other service enhancements will be negotiated on a case-by-case basis.

It is settled law that "words and combination of words" in a contract "take meaning from their context".[20] A careful reading of the above provision, including its title, "Technological Improvements", and the phrase "all technological improvements that affect the services in each Stream under this Contract", which imparts meaning to the subsequent references to "improvements" and "service enhancements", reveals that the clause deals with *technological* improvements and the basis on which they are made available to PWGSC. In particular, those technological improvements offered to customers at large, as part of the standard service, are to be offered to the Government of Canada at no additional charge while all other technological service enhancements require PWGSC's prior approval and the negotiation of price. In the Tribunal's view, clause B11(j) is rendered inapplicable by the fact that the impugned changes to the aircard service were not technological in nature.

43. In summary, the Tribunal finds that, by proceeding in the manner in which it did, PWGSC effectively conducted a new procurement without competition. Accordingly, the Tribunal finds that PWGSC breached the *AIT* by not following the procedures for procurement contained in Article 506.

44. In light of the foregoing, the Tribunal determines that the complaints are valid.

Remedy

45. In recommending a remedy, the Tribunal is required, under subsection 30.15(3) of the *CITT Act*, to consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including the following:

> (*a*) the seriousness of any deficiency in the procurement process found by the Tribunal;
>
> (*b*) the degree to which the complainant and all other interested parties were prejudiced;
>
> (*c*) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
>
> (*d*) whether the parties acted in good faith; and
>
> (*e*) the extent to which the contract was performed.

46. Having considered subsections 30.15(2) and (3) of the *CITT Act*, as well as the uncertainty as to whether Bell would ultimately have been successful had the 1-GB flat rate aircard service plan been competitively bid and the Tribunal's belief that Bell will be afforded the opportunity to compete for the existing service and to bid on aircard service requirements in a new solicitation in the near future, the Tribunal will not recommend compensation for lost profit or lost opportunity, nor will it recommend the immediate award of a parallel contract to Bell. The Tribunal is of the view that, although PWGSC breached the *AIT* by not tendering the 1-GB flat rate aircard service plan and that there was an effect on other suppliers, the breach is not considered an egregious error having regard to the small number of heavy users and operational considerations.

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20. S.M. Waddams, *The Law of Contracts*, 5th ed. (Aurora: Canada Law Book, 2005), para. 494 at 351.

47. The Tribunal therefore recommends that, should PWGSC decide to exercise the option to extend the existing contracts for Stream 1 with TELUS and Rogers rather than allowing them to expire at the end of the current contract term, it do so on the basis of the original amended RFP, with the procurement of aircard service requirements falling outside those listed in the original amended RFP (i.e. the 1-GB flat rate service) being conducted through the issuance of a separate solicitation.

Costs

48. The Tribunal awards Bell its reasonable costs incurred in preparing and proceeding with the complaints. In determining the amount of the cost award for these complaint cases, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates classification of the level of complexity of cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The Tribunal's preliminary view is that these complaint cases, taken as a whole, have a complexity level corresponding to the second level of complexity referred to in Appendix A of the *Guideline*. The procurement was moderately complex as the requirement was for six different streams of mobile wireless products and services for various departments and agencies. The complaints were moderately complex as they dealt with the matter of improper contract administration. The complaint proceedings were of medium complexity, as there were two interveners and some additional submissions were accepted on the record. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is $2,400.

DETERMINATION OF THE TRIBUNAL

49. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaints are valid.

50. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that, should PWGSC decide to exercise the option to extend the existing contracts for Stream 1 with TELUS and Rogers rather than allowing them to expire at the end of the current contract term, it do so on the basis of the original amended RFP, with the procurement of aircard service requirements falling outside those listed in the original amended RFP (i.e. the 1-GB flat rate service) being conducted through the issuance of a separate solicitation.

51. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Bell its reasonable costs incurred in preparing and proceeding with the complaints, which costs are to be paid by PWGSC. The Tribunal's preliminary indication of the level of complexity for these complaint cases, taken as a whole, 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 the *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Pasquale Michaele Saroli
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