

Ottawa, Monday, July 13, 1998

File No.: PR-97-054

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

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 section 30.14 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services develop clear criteria for the production and subsequent evaluation of financial proposals and, on this basis, invite Bell Canada and Nuvo Network Management Inc. to submit new financial proposals. The Department of Public Works and Government Services will proceed thereon with these proposals to award Regional Individual Standing Offers according to the terms of the Request for Standing Offer (Solicitation No. EN994-7-3416/B) and the applicable provisions of the *Agreement on Internal Trade*.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Bell Canada its reasonable costs incurred in relation to filing and proceeding with the complaint.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.

Member

Michel P. Granger

Michel P. Granger

Secretary

Date of Determination: July 13, 1998

Tribunal Member: Robert C. Coates, Q.C.

Investigation Manager: Randolph W. Heggart

Counsel for the Tribunal: Hugh J. Cheetham

Complainant: Bell Canada

Counsel for the Complainant: Ronald D. Lunau

Intervener: Nuvo Network Management Inc.

Counsel for the Intervener: Marc Babinski  
Guy Pratte

Government Institution: Department of Public Works and Government Services

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

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### FINDINGS OF THE TRIBUNAL

#### INTRODUCTION

On March 27, 1998, Bell Canada (Bell) 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> (the CITT Act) concerning the award of standing offers<sup>2</sup> (Solicitation No. EN994-7-3416/A, cancelled and superseded on January 26, 1998, by Solicitation No. EN994-7-3416/B), by the Department of Public Works and Government Services (the Department), for network management and operations services for Government Telecommunications and Informatics Services (GTIS), a constituent of the Department.

Bell alleged that its financial proposal was improperly and unfairly evaluated by the Department. Contrary to Article 506(6) of the *Agreement on Internal Trade*<sup>3</sup> (the AIT), the Department used, in the evaluation of proposals, criteria and a methodology not clearly identified in the tender documents. Bell further alleged that, in so doing, the Department misinterpreted or misconstrued its proposal, thereby failing to give Bell full credit for the volume discounts that it offered in its proposal. As a result, Bell alleged that the value of its proposal was overstated, causing it to be significantly higher than the winning proposal.

Bell requested, as a remedy, that any call-ups or orders made against the Regional Individual Standing Offer<sup>4</sup> (RISO) be postponed until the matter was decided by the Tribunal. Bell also requested that its financial proposal be re-evaluated taking into account the volume discounts for all "managed devices" and, if the re-evaluation results in its proposal being ranked first, that the standing offer awarded to Nuvo Network Management Inc. (Nuvo) be granted to Bell. In the alternative, Bell asked to be compensated by an amount that recognizes that it should have been awarded the standing offer and would have profited therefrom. Finally, Bell requested its proposal preparation costs and its complaint costs.

1. R.S.C. 1985, c. 47 (4th Supp.).
2. An offer from a potential offerer which allows the Crown to purchase frequently ordered commercially and non-commercially available goods and/or services directly from suppliers at prearranged prices, under set terms and conditions, when and if these are requested.
3. As signed at Ottawa, Ontario, on July 18, 1994.
4. A particular type of standing offer for the exclusive use of a specific identified user, in this case GTIS, within a region, in this case the National Capital Region.

On March 31, 1998, the Tribunal determined that the conditions for inquiry set out in section 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>5</sup> (the Regulations) had been met in respect of the complaint and, pursuant to section 30.13 of the CITT Act, decided to conduct an inquiry into the complaint. On April 1, 1998, the Tribunal issued an order postponing the award of any contract in connection with the procurement until it determined the validity of the complaint. On April 28, 1998, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.<sup>6</sup> On April 29, 1998, the Tribunal granted Nuvo leave to intervene in the matter. On May 12, 1998, Nuvo filed comments on the GIR with the Tribunal. On May 15, 1998, Bell filed its comments on the GIR with the Tribunal and, on May 29, 1998, the Department filed with the Tribunal comments on Bell's comments on the GIR.

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 November 5, 1997, a Notice of Proposed Procurement and Request for Standing Offer (RFSO) (Solicitation No. EN994-7-3416/A) for the requirement were posted on Canada's Electronic Tendering Service (MERX) and in *Government Business Opportunities* with a closing date of December 29, 1997. The procurement was for three levels of network services: component monitoring,<sup>7</sup> service monitoring<sup>8</sup> and service delivery.<sup>9</sup> Three configuration examples (Cases 1, 2 and 3), one for each service level, were described in the RFSO.

No questions were raised during the bid solicitation period concerning the RFSO evaluation, in terms of how to count the devices or how the configuration examples used for evaluation purposes would be applied. Four proposals were submitted, including one from Bell and one from Nuvo. At the completion of the technical evaluation of the proposals, those from Bell and Nuvo were found compliant with the

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5. SOR/93-602, December 15, 1993, *Canada Gazette* Part II, Vol. 127, No. 26 at 4547, as amended.

6. SOR/91-499, August 14, 1991, *Canada Gazette* Part II, Vol. 125, No. 18 at 2912, as amended.

7. The active monitoring of alarmed conditions on Government Furnished Equipment (GFE) network elements via Simple Network Management Protocol Traps and Alerts. It includes the active monitoring and reporting of alarmed conditions to pre-defined entities in real time, the monthly gathering of alarms and outage situations associated with the network elements, and the monthly gathering and reporting of statistics associated with the performance of the network elements.

8. Builds upon the component monitoring model and adds the concepts of service warranty, where the proposed supplier would endeavour to meet service criteria specified at the time of call-up. This would be accomplished by participating in and making ongoing engineering recommendations to the technical authority. It implies that the proposed supplier becomes the agent for contracts that the Crown may have in place with organizations such as common carriers, hardware maintenance suppliers, software suppliers and equipment manufacturers to ensure that the service levels meet the contracted levels.

9. Builds upon the component monitoring and service monitoring models and adds the delivery of service on GFE. It implies that the proposed bidder, or its subcontractor, has agreements in place with hardware and software vendors such that ongoing hardware and software first-line maintenance, including hardware failure replacements, hardware upgrades and software upgrades can be delivered by the supplier. The supplier then becomes completely responsible for service level agreements on network agreements as specified at the time of call-up.

mandatory technical evaluation criteria. According to the Department, during the initial review of Bell's and Nuvo's financial proposals, it was determined by the Department that the criteria against which the financial proposals were to be evaluated were insufficiently precise to enable an evaluation of the proposals on a common basis. As a result, the Department decided to cancel and re-issue the solicitation. This was done on January 26, 1998, with Solicitation No. EN994-7-3416/B, at which time all bidders that responded to the initial RFSO were requested to resubmit their financial proposals based on the revised financial evaluation criteria. Bidders were also given the opportunity to change any other element of their proposals at that time.

The RFSO includes, in part, the following:

This Cancels And Supersedes Previous Solicitation No. EN994-7-3416/A dated November 5, 1997, which was due at 14:00 hours EST December 29, 1997, as the methodology for the evaluation of rates failed to achieve the intended objective.

This solicitation No. EN994-7-3416/B reinstates the contents of Solicitation No. EN994-7-3416/A dated November 5, 1997, and Amendment # 1 dated November 7, 1997, Amendment # 2 dated December 1, 1997, and Amendment # 3 dated December 8, 1997, included hereto by reference and with changes made as follows:

#### SECTION I: BIDDER INSTRUCTIONS AND INFORMATION

##### 5.0 ESTIMATED UTILIZATION DURING THE STANDING OFFER PERIOD:

It is currently estimated that the total cost of quantity of services to be called up by Canada against the proposed Standing Offer could total \$3,210,000 over three (3) years.

#### SECTION II

##### PROPOSAL PREPARATION INSTRUCTIONS AND EVALUATION CRITERIA

##### 2.0 EVALUATION CRITERIA AND CONTRACTOR SELECTION METHOD:

Proposals will be evaluated in accordance with the Evaluation Criteria and the Contractor Selection Method of Annex "B".

#### ANNEX B

##### PART II - FINANCIAL PROPOSAL

1.2 ... As a minimum, the bidder must provide a pricing basis so that call-ups can be made for periods less than one year and one year.

Volume discounts must apply to all devices managed under any resultant call-up, and [cannot] be only incremental in nature. An example follows:

Less than 100 devices: W% discount applies to all devices

Less than 200 devices, but more than 100 devices: X% discount applies to all devices

1.3 For evaluation purposes, the supplier must provide costed replies to the configuration examples found in Annex B, Appendices A, B, & C. For the purpose of evaluation, the bidders rates will be applied against the example listed in Annex B, Appendix A, B, and C.

Note: the volumes are estimates which may not reflect actual volume.

The volumes estimated for the period of the standing offer will be multiplied by the unit prices quoted by the bidder and one-item cost (if applicable) added to arrive at the three year cost to the Crown. For evaluation purposes, to take into account volume discounts, Case 1 will be used once, Case 2 will be multiplied three times, and Case 3 will be multiplied 10 times. Then the results will be multiplied

by 3 to come up with the three year cost to the Crown. The rates quoted for call-ups based on a 1 year commitment will be used for this evaluation, however the Bidder must provide rates as stipulated in 1.3 above in their proposal. Bidders must provide information in tabular format but must also include roll-up to case study totals including one time charges, bill volume discounts, etc. ... The two lowest priced valid proposals based on this calculation will be recommended for authorization of a standing offer.

1.4 The following is provided as an example of the pricing tables that are expected. Further granularity than what is shown below is expected; where small, medium and large devices may be categorized based on number of ports, etc. Should pricing differ from one year to the next, the bidder must state this, provide a breakdown for each year, so that a three year cost to the Crown can be calculated.

#### 1.4.1 SERVICE: Component Monitoring

Service Hours	Device A (sm)	Device A (lg)	Device B (sm)	Device B (lg)
00:00-24:00 X 7	\$ X.XX/Mo.	\$ X.XX/Mo.	\$ XXX/Mo.	\$ X.XX/Mo.
07:00-20:00 X 5	\$ X.XX/Mo.	\$ X.XX/Mo.	\$ X.XX/Mo.	\$ X.XX/Mo.

Ad-hoc reports:	\$X.XX per incident
Start-up:	\$X.XX per network/device
Options:	\$X.XX per call-up/incident/network/device

#### VOLUME DISCOUNTS

The volume discounts will apply to the total number of contracted devices.

# of devices	Device A (sm)	Device A (lg)	Device B (sm)	Device B (lg)
1-49	XX.X %	XX.X %	XX.X %	XX.X %
50-100	XX.X %	XX.X %	XX.X %	XX.X %

Attached to Appendix A (Case 1, "Service Delivery") were tables representing a collection of electronic communications devices generally referred to in the industry as routers and hubs. The tables consist of a number of columns that describe a typical end user inventory of network devices. They include a listing of all the parts, and quantities thereof, that will require hardware and software maintenance services, as well as the manufacturers' model numbers.

All four original bidders submitted revised financial proposals. The two bidders whose proposals were declared technically non-compliant in the initial solicitation did not change their technical proposals; therefore, their proposals remained technically non-compliant, and their financial proposals were not evaluated.

On February 5, 1998, in order to understand fully how Bell's proposed volume discounts were applied, the Department asked Bell to provide it with a description of how its volume discounts and invoicing would be applied under the following scenario:

CASE 1 (90 devices)- Used 1 (once)	Start date = Month 1 (12 month duration) End Month 12
CASE 2 (98 devices)- Used 3 times	Start date = Month 4 (12 month duration) End Month 16
CASE 3 (12 devices)- Used 10 times	Start date = Month 8 (12 month duration) End Month 20

Bell responded to the Department's query on February 11, 1998, in part, as follows:

MONTH	CASE 1 90 devices	CASE 2 294 devices	CASE 3 120 devices	Total Devices	% Discount on Mgmt Services for all devices
1	90			90	[XX.X%]
4	90	294		384	[XX.X%]
8	90	294	120	504	[XX.X%]
13		294	120	414	[XX.X%]
17			120	120	[XX.X%]

On the basis of the clarification provided by Bell and in accordance with the terms of the RFSO, Nuvo's offer was ranked the lowest-priced offer and Bell's offer the second lowest priced. Accordingly, on February 23, 1998, the Department issued to Nuvo, the primary supplier in this instance, a RISO in the estimated amount of \$2,568,000 and to Bell, the backup supplier, a RISO in the estimated amount of \$642,000.

## **VALIDITY OF THE COMPLAINT**

### **Bell's Position**

Bell submits that there are two fundamental flaws in the evaluation process followed by the Department. First, by establishing the "correct" number of devices under Case 1 at 90, the Department used, in the evaluation of Case 1, an evaluation criterion not previously disclosed in the RFSO. Second, the evaluation methodology actually applied by the Department in assessing Bell's proposal failed to conform to the evaluation criteria and weighting methodology specified in the RFSO.

Bell submits that the Department based the defence of its evaluation methodology on the fact that it reflected the probable use under the RISO. Bell submits that a distinction exists, however, between the evaluation criteria set out in the RFSO for the purpose of selecting a successful bidder and what actually happens after the RISO is awarded. Bell submits that the evaluation criteria do not necessarily reflect the plethora of contracting realities, and, in any event, under Article 506(6) of the AIT, it is the evaluation criteria set out in the RFSO which prevail.

Bell also submits that, contrary to the Department's assertions, it did not assume that all devices required during the three-year period of the RISO would actually be contracted at the very outset. It is the RFSO itself, Bell submits, which requires bidders to structure their proposals in this manner for purposes of application of volume discounts and evaluation. Indeed, there is no language in the RFSO which requires that bidders somehow account for the staggering of cases or call-ups. In fact, Bell submits that the evaluation methodology used by the Department itself makes the assumption that all devices required for a particular case would be contracted at the outset. Bell adds that the Department's clarification question of February 5, 1998, was the first indication given to Bell that the Department was considering staggering the cases for evaluation purposes. This scenario, Bell submits, was likely conceived by the Department when it became clear that difficulties arose when attempting to apply the evaluation criteria chosen by the Department. However, such staggering of cases was not set out as an evaluation criterion in the RFSO and, therefore, Bell submits, the Department could not subsequently adopt such an evaluation methodology. Bell further submits that the method finally used by the Department to conduct the evaluation, namely, three different three-year periods, was even less reflective of reality and was in violation of the evaluation method set out in the RFSO.

On the question of whether the services being procured were combined strictly for administrative expediency, Bell submits that the services are logically related to each other and fall within the same category of network services. These services represent three levels which are all applicable to the Government Furnished Equipment network elements. It is therefore logical, Bell submits, to expect that the discounts would be evaluated on the total number of devices managed, irrespective of the level of service required. This, Bell submits, is what the RFSO conveys at item 1.2 of Part II of Annex B, which states that: “[v]olume discounts must apply to all devices managed under any resultant call-up, and [cannot] be only incremental in nature,” and at item 1.4.1, which states that: “volume discounts will apply to the total number of contracted devices.”

Concerning the Department’s assertion that the discounts offered by Bell, i.e. an administrative adjustment made once a year, confirmed that there would be no staggering of call-ups, Bell submits that this is an incorrect characterization of its proposal. Indeed, its revised financial proposal clearly stated that “[d]iscount applies to the published rates based to the total number of “managed devices” and will change as the total number of GOC devices managed changes. Billing adjustments for the fluctuations in units will be performed once a year.” What Bell proposed in fact, for administrative reasons, was to adjust its monthly billing rates once a year. This method, Bell submits, represents a typical billing structure which is distinct from the underlying rate structure. The method is analogous to the equal billing method used by some utilities and fully complies with the RFSO.

Concerning its count of the number of devices associated with Case 1, Bell submits that Case 1 is a scenario where bidders are asked to provide to the Department the highest level of service described in the RFSO. Under the service delivery option, the bidder not only is responsible for actively monitoring the network for any problems and outages but is also completely responsible for maintaining and repairing the network when hardware and software problems arise. In this context, Bell adds that the Case 1 table lists a number of different devices which make up the network. Under any resultant call-ups, the successful bidder would be responsible for monitoring and repairing all the devices listed in Case 1. This, Bell submits, is not denied by the Department. Bell further submits that Case 1 does not indicate how these devices are interconnected or if they are to be considered co-located. The bidders were only asked to provide a quote based on the type of devices listed in Case 1, not on their interconnection properties or network configuration. The RFSO gave no information regarding the interconnection properties or network configuration of the devices, nor did it define what should be counted as a “device” for the purposes of bid response. Bell also submits that, even though these devices can be stacked and monitored as one device, this does not mean that they must, or even should, be considered a single device for pricing purposes. If the bidders were required to make such an assessment, as the Department now contends, this should have been clearly set out in the RFSO.

Bell submits that all the devices listed in Case 1 are either Simple Network Management Protocol (SNMP) “manageable” or SNMP “capable.” In addition, Bell submits that the Department expected non-manageable or SNMP “capable” devices to be monitored and maintained under the Case 1 service delivery option. In this context, Bell submits that, if a non-manageable device is not connected to a “managed device,” Bell would still be required, under the service delivery option, to maintain the devices and to solve problems which arise. Therefore, in its financial proposal, Bell attached a price to each device listed in Case 1.

Bell submits that no amount of additional “engineering rigour” would have had any impact on its pricing proposal, because bidders were not asked to bid on a particular network configuration. If the count of 90 devices for Case 1 was going to be considered the only “correct” total for evaluation purposes, this should have been clearly set out in the RFSO, but it was not. Furthermore, by using the 90 figure in evaluating



Bell's offer rather than the 202 figure set out in Bell's proposal, the Department gave Bell no credit whatsoever for the discounts contained in its proposal.

Bell submits that, during proposal clarification, it was told by a representative of GTIS that it did not matter how devices were actually counted and that it was the price that the government would pay for the level of effort which was important. Based on that information, Bell submits, it determined that it did not have to object to the Department's approach and answered the question of clarification in good faith.

In concluding its submission, Bell states that the Department's allegation to the effect that Bell failed to "devote adequate technical resources" in preparing its proposal is completely unfounded. Further, Bell submits that, if the Tribunal finds that the information in the RFSO could be interpreted in the manner suggested by the Department, then the RFSO is still flawed because the evaluation criteria were ambiguous and not clearly identified.

Finally, Bell submits that there is no substance to the Department's contention that the procurement at issue was not properly identified. Bell submits that the procurement began as Solicitation No. EN994-7-3416/A and that the proposals were submitted in response to that solicitation. Only the financial portion of the solicitation was later modified by Solicitation No. EN994-7-3416/B. Bell only resubmitted or amended the financial portion of its proposal. Bell submits that, when its complaint is read as a whole, there is no doubt about the identity of the procurement at issue. This, Bell submits, is supported by the fact that the Department had no difficulty identifying what procurement was at issue in preparing its GIR.

### **Department's Position**

The Department submits that Bell's complaint is essentially founded on the basis of two mistaken assumptions that it made in the preparation of its proposal. The first is that the total number of "managed devices," which Bell calculated as being 202, was in fact 90, and the second is that the number of devices included in the three cases to be used for evaluation purposes would be added together to form the basis of the application of the volume discounts. This, the Department submits, led Bell to propose a monthly rate and a discount structure that rendered its proposal the higher priced of the two technically compliant proposals.

The Department submits that, for administrative expediency, it was decided to combine three types of services in one RFSO and to manage the resulting call-ups accordingly, even if call-ups could be issued on behalf of different departments and for different services. In this context and for evaluation purposes, bidders were required to provide pricing for three cases which represented typical scenarios for each of the three types of services to be provided, namely, service delivery (Case 1), service monitoring (Case 2) and component monitoring (Case 3). The Department submits that the table presented with Case 1 consisted of a number of columns describing a typical end user inventory of network devices. It included all the information, i.e. equipment manufacturers' names and model numbers, specific inventory information and quantity for each component and model that a bidder needed to accurately assess, using the manufacturers' equipment literature, and the level of effort required to deliver the services. This included the determination of which models could be remotely monitored (manageable device) and which could not (non-manageable device).

The Department submits that Bell should have been able to accurately assess, from the information in the table attached to Case 1 and related manufacturers' documentation, not only the equipment that required hardware and software maintenance but also the total number of devices that would be remotely monitored. The Department further submits that, even if it had specified that Case 1 was constituted of 90 devices, Bell would have had to review the manufacturers' documentation to arrive at a maintenance

price based upon that documentation. The prices proposed by Bell suggest that it did not pursue this review; otherwise Bell would not have established the number of “managed devices” at 202 instead of 90. This had the effect of increasing Bell’s proposed monthly rate significantly.

The Department also submits that the multiplication formula set out in item 1.3 of Part II of Annex B of the RFSO served two purposes: First, it ensured that the evaluation criteria reflected more closely the anticipated use of the various types of services over the period of the standing offer. Second, it allowed suppliers the opportunity to propose a pricing discount scheme for each type of service. When the formula was applied by the Department to the two technically compliant proposals, Bell’s proposal ended up being priced higher than that of Nuvo. The Department submits that the figure calculated by Bell is based on three invalid assumptions: (1) Case 1 represents 202 devices; (2) all devices that may be required during the three-year period of the standing offer would be managed from the very outset; and (3) there would be no staggering of call-ups during the period of the standing offer and, in such instances, the discounts offered by Bell would be applied as an administrative adjustment made once a year and not as an immediate rate reduction.

The Department submits that bidders had the option of deciding the levels and the rate at which they wanted to provide discounts. Bell chose to provide a significant discount only when a very large amount of business was provided. Nuvo, for its part, chose a pricing methodology that did not require a significant business volume to achieve lower prices.

The Department finally submits that, since Bell has filed a complaint in relation to a solicitation which was cancelled, then, on this basis alone, Bell’s complaint should be dismissed.

### **Nuvo’s Position**

Nuvo agrees with the submissions made by the Department in respect of Bell’s apparent error in calculating the number of manageable devices. Nuvo also submits that Bell’s error in presenting its volume discount appears to rest on its assumption that the volume discounts would be evaluated only in the context of the price roll-up required for all three cases. Nuvo submits that such an assumption is inconsistent with the instructions given in the RFSO at items 1.2 and 1.3 of Part II of Annex B and with the nature of the service request made in the RFSO. Indeed, Nuvo submits that the RFSO did not envisage any fixed maximum or total number of devices and services being contracted out, as might be the case in a Request for Proposal. In addition, Nuvo submits that a volume discount structure, such as that proposed by Bell, was not appropriate for a standing offer scenario, where devices required for the three-year period were not managed at the outset. Nuvo submits that the case roll-up was merely an evaluation tool, not a distinct case scenario to which any volume discount would be applicable. Finally, Nuvo submits that Bell’s misinterpretation of the volume discount criterion and its overstatement of “managed devices” cannot be blamed on the clarity of the RFSO in these respects. If there was any ambiguity, Nuvo submits, Bell was free to seek the requisite clarification.

### **TRIBUNAL’S DECISION**

Section 30.14 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, in part, that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements set out in the AIT.

The Tribunal is satisfied that, when read as a whole, it is clear that Bell's complaint concerns Solicitation No. EN994-7-3416/A, which was cancelled and superseded by Solicitation No. EN-994-7-3416/B on January 26, 1998.

Article 506(6) of the AIT 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."

Essentially, the Tribunal must decide two questions. The first question is whether the RFSO clearly identified that the number of "managed devices" under Case 1 is 90. The second question is whether the RFSO clearly identified that the volume discounts apply separately to the various cases.

Concerning the number of devices included in Case 1, the RFSO, in Appendix A of Annex B, Case 1, "Service Delivery," includes a table which consists of three pages listing core SNMP manageable devices and edge SNMP capable devices. For each device, the name of the vendor, the type, the board, the protocols, the quantity and total port capacity are set out. The RFSO also specifies that the backbone cabling infrastructures are not covered by the service delivery option. The RFSO further specifies that volume discounts must apply to all devices managed under any resultant call-up and cannot be only incremental in nature. Finally, it indicates that volume discounts will apply to the total number of contracted devices.

The Tribunal notes that the term "managed device" is not defined in the RFSO. In addition, the RFSO did not indicate that the number of "managed devices" in Case 1 was 90 or, for that matter, 202, or any other number. The Department submits that any bidder that would carefully review the information contained in the list of equipment attached to Case 1, including the relevant manufacturers' literature, would necessarily conclude that the number of manageable devices under Case 1 is 90. For its part, Bell submits that a careful review of the same list leads it to conclude that 202 devices had to be managed one way or another under Case 1, and it priced its proposal, including its volume discounts, accordingly.

The Tribunal is satisfied that Bell's interpretation on this point is not unreasonable in the circumstances. Indeed, given that there was no definition of "managed device" in the RFSO or any indication as to the actual configuration of the various devices listed in Case 1 and, further, considering that all devices except the cabling infrastructures had to be managed under the service delivery option, the Tribunal is of the view that it is not surprising that Bell did not arrive at 90 "managed devices." The complexity and ambiguity of the criteria were such that the RFSO should have set out the number. Given that the Department is the author of the specifications, the Tribunal is of the opinion that Bell should not be penalized for the ambiguity in the RFSO. If this number was to be the only acceptable number under the terms of the RFSO, then the Department could have set this out. As well, the Tribunal is of the view that it is not reasonable for the Department to expect that bidders, after reviewing the applicable manufacturers' literature for the equipment listed in support of Case 1 and their interconnection properties, would necessarily conclude that a particular configuration was comprised of 90 manageable devices.

Concerning the evaluation methodology relating to volume discounts, the Tribunal is satisfied that Bell's interpretation on this point is also reasonable in the circumstances. The Tribunal is of the view that item 1.3 of Part II of Annex B, does not specifically provide that Cases 1, 2 and 3 will be disaggregated for evaluation purposes. In fact, it states that "[f]or the purpose of evaluation, the bidders rates will be applied against the example listed in Annex B, Appendix A, B, and C." When this is read in conjunction with the direction in the RFSO, under item 1.4.1, to the effect that volume discounts will apply to the total number of contracted devices, the Tribunal is of the opinion that it was not unreasonable for Bell to proceed on the basis that the cases would be evaluated on an aggregated basis. The Tribunal, therefore, determines that, on this point also, the RFSO was unclear.

The consequences of the above-mentioned ambiguities in the RFSO were such that, at the time of the evaluation of Bell's and Nuvo's financial proposals, the Department was incapable of evaluating both proposals in the same manner. In order to arrive at what it considered a reasonable result, the Department restructured Bell's financial proposal for evaluation purposes by applying Bell's volume discounts on a number of "managed devices" other than the one used by Bell in its financial proposal and on a disaggregated basis, even though Bell's proposal indicates that its discount structure was conceived, established and submitted for application on an aggregated basis.

The Department contends that, even if Bell was right in its allegations, Bell's proposal would remain the second-lowest proposal. The Tribunal is of the opinion that, as the RFSO did not clearly set out certain key criteria of the evaluation methodology, i.e. the number of "managed devices" and the basis for the application of volume discounts fundamental to the formulation of financial offers by bidders and for their subsequent evaluation by the Department, it is not possible to know what Bell's proposal would have been if Bell itself had bid on a different basis. Therefore, in the Tribunal's opinion, it is impossible to conclude, as the Department did, that Bell would have finished second lowest in any event.

Because it is impossible to determine now what price Bell would have proposed absent the above-mentioned ambiguities in the RFSO, the Tribunal is of the view that it is unreasonable to simply re-evaluate the offers as submitted by Bell and Nuvo. Accordingly, the Tribunal believes that a proper remedy, in the circumstances, is to allow Bell and Nuvo to submit new financial proposals once the Department has developed clear criteria and a methodology consistent with those criteria. The Tribunal also recommends that this reconsideration be limited to Bell and Nuvo, since the other two bidders involved in the solicitation submitted proposals that were technically non-responsive.

#### **DETERMINATION OF THE TRIBUNAL**

In light of the foregoing, the Tribunal determines, in consideration of the subject matter of the complaint, that the procurement was not conducted in accordance to the requirements set out in the AIT, specifically Article 506(6), and that, therefore, the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that the Department develop clear criteria for the production and subsequent evaluation of financial proposals and, on this basis, invite Bell and Nuvo to submit new financial proposals. The Department will proceed thereon with these proposals to award RISOs according to the terms of the RFSO (Solicitation No. EN994-7-3416/B) and the applicable provisions of the AIT.

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

Robert C. Coates, Q.C.  
Robert C. Coates, Q.C.  
Member