



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2009-017

TELUS Communications Company

v.

Department of Public Works and
Government Services

*Determination issued
Monday, September 21, 2009*

*Reasons issued
Thursday, October 08, 2009*

TABLE OF CONTENTS

DETERMINATION OF THE TRIBUNAL.....i

STATEMENT OF REASONS 1

 COMPLAINT 1

 PROCUREMENT PROCESS..... 2

 POSITION OF PARTIES 3

 TELUS 3

 PWGSC 4

 Rogers..... 5

 ANALYSIS 6

 Majority’s Analysis 6

 Member Fry’s Analysis..... 11

 Remedy (Majority View)..... 13

 Remedy (Member Fry’s View) 15

 Costs 15

DETERMINATION OF THE TRIBUNAL 15

IN THE MATTER OF a complaint filed by TELUS Communications Company 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

TELUS COMMUNICATIONS COMPANY

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 valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal (Member Fry dissenting) recommends that the Department of Public Works and Government Services complete the customer reference check process for TELUS Communications Company in accordance with the requirements of Solicitation No. EN869-068067/C, in particular, (1) by verifying the meaning of the response, provided by the customer reference contact person originally provided by TELUS Communications Company, to the mandatory bidder experience item in the Department of Public Works and Government Services questionnaire relating to the provision of “[a]t least 2 global TFNs [toll-free numbers] terminating in Canada that were used for calls originating from at least 5 different international countries” during a period of six consecutive months during the period from March 19, 2004, to March 18, 2009, and, if necessary, (2) by determining whether an alternate customer reference provided by TELUS Communications Company (from the same customer organization) can confirm the bidder’s experience in respect of that item.

If the Department of Public Works and Government Services receives confirmation that TELUS Communications Company has the requisite experience, the Canadian International Trade Tribunal recommends either that the Department of Public Works and Government Services terminate the contract awarded to Rogers Communications Inc. and award it to TELUS Communications Company and compensate TELUS Communications Company by an amount equal to the profit that it would reasonably have earned from the date that the contract awarded to Rogers Communications Inc. is implemented to the date of the subsequent award to TELUS Communications Company or that the Department of Public Works and Government Services compensate TELUS Communications Company for the profit that it would reasonably have earned for the entire four-year contract term as if it had been awarded the contract. The basis for calculating the profit will be the price contained in the proposal submitted by TELUS Communications Company. In addition, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services not exercise any option to extend the contract beyond its initial four-year term.

The Canadian International Trade Tribunal recommends that TELUS Communications Company and the Department of Public Works and Government Services negotiate the amount of compensation and, within 30 days of the date of the issuance of the statement of reasons of this determination, report back to the Canadian International Trade Tribunal on the outcome.

Should the parties be unable to agree on the amount of compensation, TELUS Communications Company shall file with the Canadian International Trade Tribunal, within 40 days of the issuance of the statement of reasons of this determination, a submission on the issue of compensation. The Department of Public Works and Government Services will then have 7 working days after the receipt of TELUS Communications Company's submission to file a response. TELUS Communications Company will then have 5 working days after the receipt of the Department of Public Works and Government Services' reply submission to file any additional comments.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards TELUS Communications Company its reasonable costs incurred in preparing and proceeding with the complaint, 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 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 by the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Ellen Fry
Ellen Fry
Presiding Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

Stephen A. Leach
Stephen A. Leach
Member

Hélène Nadeau
Hélène Nadeau
Secretary

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

Place of Hearing: Ottawa, Ontario
Date of Hearing: September 9, 2009

Tribunal Members: Ellen Fry, Presiding Member
Pasquale Michaele Saroli, Member
Stephen A. Leach, Member

Director: Randolph W. Heggart

Investigation Manager: Michael W. Morden

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STATEMENT OF REASONS

COMPLAINT

1. On June 22, 2009, TELUS Communications Company (TELUS) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerned Solicitation No. EN869-068067/C issued by the Department of Public Works and Government Services (PWGSC) on behalf of various government departments for the provision of toll-free, intelligent contact management, interactive voice response and uninterrupted power supply services.

2. TELUS submitted that PWGSC failed to act in accordance with implied and explicit terms of the Request for Proposal (RFP) to carry out the required reference check reasonably and diligently, which resulted in PWGSC failing to follow the evaluation process outlined in the RFP. TELUS also submitted that PWGSC added language to an evaluation criterion during the evaluation phase that affected the manner in which its proposal was evaluated. For these reasons, TELUS objected to the manner in which PWGSC conducted this procurement and to the decision to award the contract to Rogers Communication Inc. (Rogers). According to TELUS, had PWGSC acted with care and followed the evaluation process stipulated in the RFP, it would not have determined that its proposal did not comply with a mandatory requirement. As a remedy, TELUS requested the following: (1) that PWGSC terminate the contract awarded to Rogers and award it to TELUS; or, in the alternative, (2) that TELUS be compensated for the profit that it could reasonably have expected to have made, had it not been disqualified. TELUS also requested that it be compensated for the costs that it incurred in preparing its proposal in response to the RFP and bringing its complaint before the Tribunal.

3. On June 29, 2009, 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*.²

4. On July 7, 2009, the Tribunal granted Rogers intervener status. On July 27, 2009, PWGSC submitted the Government Institution Report (GIR). On August 6, 2009, Rogers filed its comments on the GIR. On August 7, 2009, TELUS filed its comments on the GIR.

5. On August 17, 2009, the Tribunal advised the parties that it would hold a public hearing regarding the interpretation to be given to clause 3.2(a)(v) of Part 3 of the RFP, which reads as follows:

Alternate Customer Reference From Same Organizations: If during the bid evaluation it becomes apparent that a customer reference is unable to confirm the Bidder's experience, the Bidder will have one opportunity to provide, [within] 24 hours of the request by the Contracting Authority, a single customer reference (from the same customer organization) who can confirm the Bidder's experience. Should the alternate customer reference in that organization also be unable to confirm that the Bidder has the required experience, the bid will be declared non-responsive and will be given no further consideration.

6. The Tribunal held the hearing on September 9, 2009. It was limited to counsel presenting their respective arguments and responding to questions posed by the Tribunal.

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

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

PROCUREMENT PROCESS

7. On November 8, 2006, and September 18, 2007, PWGSC issued Requests for Information (RFIs), seeking input from interested bidders regarding the provision of toll-free services to the Government. According to TELUS, four major Canadian telecommunications companies, including TELUS and Rogers, were given the opportunity to provide input into what would become the RFP at issue. On December 23, 2008, PWGSC made the subject RFP to establish a four-year contract, with three one-year options, for the provision of toll-free, intelligent contact management, interactive voice response and uninterrupted power supply services, available through MERX.³ The bidding period closed on March 18, 2009. Both Rogers and TELUS submitted proposals.

8. It was a mandatory requirement of the RFP that a bidder provide customer references “. . . who collectively can confirm that the Bidder . . .” had provided various required services.⁴ As per clause 4.2(c)(i) of Part 4 of the RFP, PWGSC advised bidders that it would only verify the references for the top-ranked bidder. According to PWGSC, after the evaluation of the proposals, but prior to conducting the reference checks, TELUS was rated as the top-ranked bidder.

9. On April 9, 2009, PWGSC e-mailed a questionnaire to the customer reference person of one of TELUS’s designated customer reference organizations (Company X). Except for the possibility of leaving a question unanswered, the questionnaire only permitted a customer reference to select “YES” or “NO” in order to respond to the four questions that it contained. The e-mail, to which the questionnaire was attached, asked the customer reference person to respond within five working days, i.e. no later than close of business on Friday, April 17, 2009.

10. On April 15, 2009, PWGSC notified TELUS that it had not yet received responses from some of its customer reference organizations, including Company X. That same day, the customer reference person at Company X provided PWGSC with its response. In that response, the customer reference person at Company X selected “NO” from the drop-down box for question 3 relating to the provision of “. . . at least 2 global TFNs [toll-free numbers] terminating in Canada that were used for calls originating from at least 5 different international countries . . .” during a period of six consecutive months from March 19, 2004, to March 18, 2009.

11. As a result of that response, PWGSC determined that TELUS’s proposal was not compliant with the mandatory experience requirements of the RFP. On June 8, 2009, PWGSC awarded the contract to Rogers and informed TELUS of the contract award. According to PWGSC, the response of the customer reference organization was clear and unequivocal and, consistent with the terms of the RFP, was given precedence over the divergent information provided by TELUS itself on its experience in the supply of the toll-free services at issue.

12. On June 8, 2009, the customer reference person at Company X who had responded to the questionnaire e-mailed PWGSC advising that question 3 had been answered incorrectly. The customer reference person provided PWGSC with another completed questionnaire, with “YES” selected from the drop-down boxes for all questions, including question 3. On June 9, 2009, the customer reference person’s supervisor contacted PWGSC to confirm that TELUS had provided the toll-free services at issue and to advise PWGSC that the error arose because the customer reference person’s understanding of the term “Universal International Freephone Number (UIFN)” differed from PWGSC’s understanding based on the

3. Canada’s electronic tendering service.

4. RFP, Part 3, Section I, subclause 3.2(a)(iii)(D).

customer reference person's past experience.⁵ On June 12, 2009, PWGSC informed TELUS and Company X that, as the deadline for providing reference information had passed, the clarifications could not be used in the evaluation process.

13. On June 12, 2009, TELUS objected to PWGSC regarding the evaluation of its proposal. It also requested that the contract awarded to Rogers be terminated and awarded to TELUS.

14. On June 22, 2009, TELUS filed its complaint with the Tribunal.

15. On June 25, 2009, PWGSC responded to TELUS's objection, advising that there had been no reason for PWGSC to challenge the clear and unequivocal answer provided by the customer reference person at Company X. PWGSC also advised that it would have been inappropriate for PWGSC to suggest that the customer reference person reconsider or amend the answer.

POSITION OF PARTIES

TELUS

16. TELUS submitted that PWGSC designed an evaluation process that relied on a disinterested third party reference to fulfil a mandatory condition of the solicitation. It submitted that, in so doing, the bidder was effectively cut out of the reference verification process in the solicitation and that the success or failure of a bidder's efforts hinged on the reasonableness, care and diligence with which PWGSC carried out its part of fulfilling mandatory requirements on behalf of the bidder. TELUS argued that, if PWGSC elects, as it did here, to fulfill a mandatory requirement in a bidder's proposal, it is an implied term of the RFP that it has a duty to do so reasonably and with a high degree of care. It submitted that the parties intended PWGSC to exercise that high degree of care in ensuring that it had received the *correct* response, not just any response. TELUS submitted that it was not reasonable for PWGSC to conclude that TELUS would provide a customer reference organization that could not confirm that TELUS had provided it with the services at issue, which TELUS referred to as global toll-free services. TELUS submitted that, in both RFI processes and at an RFI debriefing on November 1, 2007, TELUS informed PWGSC verbally and in writing that it was compliant with the requirement for global toll-free services. Furthermore, in its proposal, TELUS explicitly and, with detailed information, expressly stated that Company X would confirm TELUS's experience for global toll-free services. TELUS submitted that PWGSC, by failing to act reasonably and diligently, failed to fulfil an implied term of the evaluation process and contravened Article 506 of the *Agreement on Internal Trade*.⁶

17. TELUS submitted that, in addition, PWGSC had an obligation to comply with the explicit evaluation process set out in the RFP. It argued that clause 3.2(a)(v) of Part 3 of the RFP stipulated that, if a reference was "... unable to confirm ..." a bidder's experience, PWGSC had an obligation to go back to the bidder for a second contact person at the same customer organization. TELUS argued that PWGSC had purposefully created, for this particular RFP, an electronic questionnaire for customer references which allowed for only two responses: "YES" or "NO". TELUS submitted that, given this structure, the only way in which a customer reference could respond that it was "... unable to confirm ..." a bidder's experience was by answering "NO" when presented with the choices of "YES" and "NO". It argued that, if a "NO" answer did not trigger the duty to seek a second contact name at Company X, there would be no circumstances under which PWGSC would ever seek a second contact person from the bidder.

5. Complaint, tab L-2.

6. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [AIT].

18. TELUS further noted that it was only after it had been advised that it would not be awarded the contract that it became aware that PWGSC had added the following underlined sentence to the question regarding the confirmation of providing the customer reference organization with the services noted in subclause 3.2(a)(iii)(D) of Part 3 of the RFP:

3/ At least 2 global TFNs terminating in Canada that were used for calls originating from at least 5 different international countries (the same TFN for at least 5 international countries) during a period of 6 consecutive months during the period of March 19, 2004 to March 19, 2009. (Note: we refer to this service as Universal International Freephone Number (UIFN)).

19. TELUS argued that the addition of this language acted to TELUS's detriment because TELUS was not able to apprise Company X of this language and, as noted in the customer reference person's supervisor's e-mail of June 9, 2009, "... [t]he error arose because [the customer reference person's] understanding of the term UIFN was different than PWGSC's based on [the customer reference person's] own past experience."

20. TELUS submitted that it never refers to its global toll-free service using the term "UIFN"; therefore, its clients would not be familiar with that term. It argued that, by departing from the language used in the RFP, PWGSC introduced language that was not used by TELUS when it apprised Company X of the evaluation process. TELUS submitted that, through the introduction of the UIFN nomenclature, PWGSC introduced a new factor in the evaluation process, contrary to its obligations under Article 506 of the *AIT*.

PWGSC

21. PWGSC submitted that the customer reference person's unequivocal answer indicated that TELUS had not been providing the required services. PWGSC submitted that TELUS's position is not reasonable, i.e. that PWGSC ought to have provided it with the opportunity to provide the name of a different contact person in the same customer reference organization who would contradict his or her colleague and correct or repair the previous answer. PWGSC also argued that it is not reasonable or logical to interpret the provisions of the RFP as intending to assist bidders in changing or repairing information provided by their customer references. It noted that there were no guidelines in the RFP to indicate how PWGSC would weigh different, contradictory answers and decide which was correct. PWGSC argued that this underscores the difficulty of TELUS's interpretation of the "Alternate Customer Reference" provision of the RFP.

22. PWGSC submitted that the onus was on TELUS to ensure that the customer reference that it identified in its bid was informed about the process and prepared to provide proper responses to the questionnaire. PWGSC noted that it had contacted TELUS when it had not yet received any response from Company X and that, at that point, TELUS ought to have exercised its proper diligence to ensure that the customer reference person at Company X understood the questions and could confirm that TELUS had provided the claimed services. PWGSC noted that TELUS further alleged that PWGSC was not careful in assessing the "clearly erroneous" answer. PWGSC submitted that it properly and fairly evaluated the customer reference person's clear, unequivocal answers and that it would have been unfair to other bidders and inconsistent with the RFP for it to have taken steps to repair Company X's answers.

23. Regarding clause 3.2(a)(v) of Part 3 of the RFP, PWGSC submitted that, on its plain reading, this provision applied only to a situation where a customer reference person would have indicated that he or she was unable to respond to a question. For example, it submitted that the "Alternate Customer Reference" provision of the RFP was intended to assist a bidder that had provided a customer reference person within an organization who had become unreachable (i.e. was on leave, no longer worked with the organization, etc.) or who did not know about the services provided by the bidder and who was therefore "unable to confirm" the bidder's experience in providing services to the organization.

24. Regarding TELUS's argument that the wordings of question 3 and subclause 3.2(a)(iii)(D) of Part 3 of the RFP were different, PWGSC submitted that, other than inserting exact dates for the convenience of customer references, the questionnaire reproduced the exact wording of subclause 3.2(a)(iii)(D). It noted that the term "Universal International Freephone Number (UIFN)" was referenced in several places in the RFP.⁷ PWGSC also claimed that there was no basis for the suggestion made by the customer reference person's supervisor that the understanding of the term "UIFN" was different from PWGSC's understanding based on the customer reference's own past experience. PWGSC argued that this suggestion substantiates that the customer reference person did intend to say that TELUS did not provide the services (regardless of whether it was based upon that misunderstanding), rather than to say "could not confirm" or "did not know".

Rogers

25. Rogers agreed with PWGSC's position and arguments. It also submitted that TELUS's complaint relied, in part, on the argument that PWGSC breached an "implied term" of the RFP. Rogers argued that this is an argument based on contract, not treaty, law, which cannot form the basis of a complaint to the Tribunal. It submitted that the *AIT*, which does form the basis for the Tribunal's jurisdiction in this matter, imposes an obligation on PWGSC to conduct its evaluation process in a fair and open manner and in a way that does not discriminate against any particular bidder. It argued that PWGSC's duty is to the process as a whole and to all bidders and that the *AIT* in no way imposed a duty on PWGSC to treat TELUS's bid with any particular duty of care.

26. Rogers submitted that the Tribunal has previously indicated that, when reviewing a mandatory component of a proposal, evaluators must do so strictly⁸ and that PWGSC had no ability to second guess the clear and unambiguous information provided by TELUS or, in this case, TELUS's customer reference organization. Rogers submitted that the onus was on TELUS to ensure that its proposal complied with all the essential elements, particularly the mandatory requirements of the solicitation, including ensuring that its customer reference provided the required confirmation. This was particularly the case, as TELUS had the ability to follow up with the customer reference to ensure that it provided the necessary confirmation. Rogers submitted that there was no indication that the customer reference person at Company X voiced any concerns to either TELUS or PWGSC in relation to the questionnaire or its terms, or that the customer reference person was unable to answer the questionnaire. Rogers argued that TELUS's arguments require the Tribunal to read language into clause 3.2(a)(v) of Part 3 of the RFP that was not present.

27. Rogers submitted that clause 3.2(a)(v) of Part 3 of the RFP was not triggered when the customer reference person had the full ability to respond and, in fact, did so. Rogers argued that clause 4.2(c)(i) of Part 4 of the RFP contemplated a situation when the customer reference submits information that conflicts with the information provided by a bidder and that the clause advised bidders that the answers provided by the customer reference would take precedence. Rogers also noted that, in *Fleetway*, the Tribunal warned against PWGSC seeking clarification from a bidder as to how its proposal met a mandatory requirement. Rogers submitted that the Tribunal had found that such a request for further clarification, once all the bid documentation was submitted, constituted impermissible bid repair.

7. PWGSC referenced sections 4.3.1.2, 4.3.3.1 and 4.3.3.2 of the "Statement of Work" that was attached as Annex A to the RFP.

8. *Re Complaint Filed by Fleetway Inc.* (21 April 2004), PR-2003-075 (CITT) [*Fleetway*].

28. Regarding TELUS's claim regarding the additional language found in question 3 of the questionnaire, Rogers submitted that it constituted a bracketed note, indicating that PWGSC refers to "this service" as "Universal International Freephone Number". Rogers argued that PWGSC did not add any further technical qualifications or require the reference to provide confirmation of an additional service and, therefore, did not breach Article 506 of the *AIT*.

ANALYSIS

Majority's Analysis

29. 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 the validity of the complaint 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 case, is the *AIT*.⁹

30. Article 506(6) of the *AIT* specifies that "...[t]he 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." Implicit in this requirement is the obligation on the part of the procuring entity to conduct the evaluation of bids fairly, in strict accordance with the methods and evaluation criteria that it has specified in the tender documents.

31. Paragraph 4.2(a) of Part 4 of the RFP provides the following warning with respect to the technical evaluation:

Each bid will be reviewed to determine whether it meets the mandatory requirements of the bid solicitation. All elements of the bid solicitation that are mandatory requirements are identified specifically with the words "must" or "mandatory". *Bids that do not comply with each and every mandatory requirement will be considered non-responsive and be disqualified.*

[Emphasis added]

32. This warning is reiterated in paragraph 4.3(a) of Part 4 of the RFP:

A bid must comply with the requirements of the bid solicitation and *meet all mandatory technical evaluation criteria* to be declared responsive.

[Emphasis added]

33. Pursuant to clause 3.2(a)(iii) of Part 3 of the RFP, the customer reference contact information formed a mandatory part of the technical bid. That clause read as follows:

Customer Reference Contact Information (mandatory at bid closing): The Bidder must provide in its bid contact information for one or many customer references who collectively can confirm . . .

9. According to the Federal Supply Classification codes, the services in question are classified under Goods and Services Identification Number D304A, "Data Transmission Service" which, in accordance with Section B of Annex 1001.1b-1 of the *North American Free Trade Agreement* is excluded from coverage for Canada. Similarly, section B of Annex Kbis-01.1-4 of the *Canada-Chile Free Trade Agreement* excludes the services from coverage with respect to Canada. Annex 4 of the *Agreement on Government Procurement*, which provides a list of the services offered for coverage by Canada, does not include the services at issue.

34. It is uncontested that TELUS complied with this mandatory requirement by identifying and providing the relevant contact information for its customer references.

35. Among the specific services that the customer reference had to confirm was the following:

... that the Bidder has provided to all its governmental and commercial customers combined, for a period of 6 consecutive months during the 5 years immediately prior to the bid closing date:

...

(D) *at least 2 global toll-free numbers terminating in Canada that were used for calls originating from at least 5 different international countries (the same toll-free number for at least 5 international countries).*

[Emphasis added]

36. The Tribunal therefore considers that the RFP advised bidders that it was a mandatory requirement of the technical bid that the bidder provide customer references that could provide the confirmation described in clause 3.2(a)(iii) of Part 3 of the RFP.

37. Under the terms of clause 4.2(c)(i) of Part 4 of the RFP, PWGSC had exclusive responsibility for conducting the customer reference checks as part of its technical evaluation of bids, as follows:

Canada will verify the references for the top-ranked bidder only. *Canada will conduct the reference check in writing by e-mail (unless the contact at the reference is only available by telephone). Canada will send all e-mail reference check requests to all the contacts supplied by the top-ranked Bidder on the same day. Canada must receive the responses within 5 working days. On the third working day after sending out the e-mails, if Canada has not received responses, Canada will notify the Bidder by e-mail, to allow the Bidder to contact its reference directly to ensure that it responds to Canada within 5 working days. Wherever information provided by a reference differs from the information supplied by the Bidder, the information supplied by the reference will be given precedence.*

[Emphasis added]

38. The scope of the reference check obligation on PWGSC, which forms part of its technical evaluation of the top-ranked bid, cannot be determined on the basis of clause 4.2(c)(i) of Part 4 considered in isolation. Rather, it must be discerned through a reading of that provision in the context of the RFP as a whole and, in particular, the fact that, under the terms of the solicitation, confirmation by the customer reference of the delivery of the services specified in clause 3.2(a)(iii) of Part 3 of the RFP was a condition precedent to the top-ranked bid being awarded the contact. Accordingly, compliance with Article 506(6) of the *AIT* would have required PWGSC, which, under the bid evaluation provisions of the RFP, had exclusive responsibility for checking the customer references of the top-ranked bidder (TELUS), to conduct the reference check (including as regards the formulation of the questionnaire) in a manner that would elicit clear and unambiguous responses from the references provided by the bidder.

39. In purported fulfilment of its obligation under clause 4.2(c)(i) of Part 4 of the RFP, PWGSC e-mailed a questionnaire to the designated customer reference person at Company X, which read as follows:

Public Works and Government Services Canada
Toll-Free Service
Solicitation # EN869-6-8067/C

Bidder Response Reference Check Questions

...

Telus has identified your organization as a customer reference in response to a Government of Canada (GC), Public Works and Government Services Canada (PWGSC) bid solicitation.

Definitions of terms and acronyms used in the questions are provided on the last page of this document.

Please confirm that Telus has been providing your organization with the following services:

...

3/ At least 2 global TFNs terminating in Canada that were used for calls originating from at least 5 different international countries (the same TFN for at least 5 international countries) during a period of 6 consecutive months during the period of March 19, 2004 to March 18, 2009. (Note: we refer to this service as Universal International Freephone Number (UIFN)).

Confirmation Response: *SELECT* [clicking on this field revealed a drop-down list with the “SELECTION” prompt indicating “YES” and “NO” options]

[Emphasis added]

40. The questionnaire also included a glossary of the terms used in the questionnaire. Relating to the complaint, the glossary provided the following definition:

Term	Definition
...	...
UIFN	Universal International Freephone Number service allows accessing the same TFN from multiple international locations.

41. It is uncontested that the drop-down structure of the questionnaire was such that the selection prompt only permitted one of two possible electronic responses, namely, “YES” or “NO”, to each of the specified services in respect of which confirmation was being sought from the customer reference. In this regard, there were no separate fields in the questionnaire to accommodate customer reference questions or comments.

42. Despite the claims of PWGSC and Rogers to the contrary, a customer reference’s “NO” response was neither clear nor unambiguous, as the limitations inherent in the “YES” and “NO” format of the questionnaire did not allow for such clarity. In this regard, the “NO” response by the customer reference to the third-listed service had to be read in light of the chapeau to PWGSC’s electronic questionnaire, which read as follows: “*Please confirm that Telus has been providing your organization with the following services . . .*” [emphasis added]. So read, the “NO” response could have denoted the following: (1) that the service had in fact not been provided; (2) that the customer reference was unable to provide the requested confirmation because of a lack of knowledge as to whether or not the service had in fact been provided; or (3) that the customer reference was unable to provide the requested confirmation because of a lack of understanding of the description of the specific service in respect of which confirmation was being sought. Accordingly, a “NO” response, viewed objectively, was neither clear nor unambiguous.¹⁰

43. Given the inherent ambiguity of a “NO” response to any of the service items described in the questionnaire as framed by PWGSC itself and the fact that this exercise was being done to confirm the compliance of TELUS’s bid, Article 506(6) of the *AIT* made it incumbent upon PWGSC to ensure that it conducted the reference check and the evaluation so as to obtain a clear and unambiguous response from

10. In this regard, the Tribunal agrees with TELUS that this peculiar structure of the questionnaire is significant and that there was nowhere in the questionnaire for the customer reference to make any comments. For example, there was nowhere for a customer reference to indicate “Do not Understand”, “Not sure” or any similar comments. See complaint, paras. 53-54.

TELUS's customer reference. As such, in the Tribunal's view, it became obligatory for PWGSC to look behind the "NO" response provided by the customer reference person at Company X to discern its true meaning. That, in the Tribunal's opinion, was necessary in order for PWGSC to determine whether the response provided by the customer reference actually differed from the information supplied by the bidder, as is required by clause 4.2(c)(i) of Part 4 of the RFP and, by extension, Article 506(6) of the *AIT*.

44. This ambiguity could have been avoided had PWGSC, for instance, included a third "UNABLE TO CONFIRM" option in its electronic questionnaire and/or had it simply rephrased the chapeau to read the following so as to elicit an unambiguous response: "Did TELUS provide your organization with the following services?" However, not having done so, it cannot now absolve itself of its obligation under the RFP to conduct a proper reference check by suggesting, among other things, that its interpretation of the "NO" response was "reasonable".

45. In *Northern Lights Aerobatic Team, Inc.*,¹¹ the Tribunal stated the following:

51. A procuring entity will satisfy its obligations under [Article 506(6) of the *AIT*] when it makes ". . . a reasonable evaluation, in good faith, of the competing bid documents submitted in response to the [solicitation] . . ." The Tribunal will interfere only with an evaluation that is *unreasonable*.

52. In *Law Society of New Brunswick v. Ryan*, referring to the Supreme Court of Canada's earlier decision in *Canada (Director of Investigation and Research) v. Southam Inc.*, Iacobucci J., stated as follows:

A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).

[Footnotes omitted]

46. In the Tribunal's view, the same principle applies with respect to the Tribunal's review of a procuring entity's evaluations under the trade agreements. In the past, the Tribunal has noted that it will substitute its judgment for that of evaluators only when the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.¹²

47. In the present case, given the ambiguity inherent in the "NO" response, which reasonably lent itself to at least three possible interpretations because of the manner in which PWGSC chose to word its questionnaire, there is no tenable explanation to support PWGSC's decision to opt for the interpretation that "NO" meant that the service had not been provided.

11. *Re Complaint Filed by Northern Lights Aerobatic Team, Inc.* (7 September 2005), PR-2005-004 (CITT).

12. *Re Complaint Filed by Excel Human Resources Inc (operating as excellTR)* (25 August 2006), PR-2005-058 (CITT); *Re Complaint Filed by Vita-Tech Laboratories Ltd.* (18 January 2006), PR-2005-019 (CITT); *Re Complaint Filed by Polaris Inflatable Boats (Canada) Ltd.* (23 June 2003), PR-2002-060 (CITT).

48. The Tribunal notes that, by virtue of paragraph 2.1(c) of Part 2 of the RFP, the following standard acquisition clause is incorporated by reference into the bid solicitation:

2.1 Standard Instructions, Clauses and Conditions

...

- (c) Standard Instructions – Goods or Services – Competitive Requirements 2003 (2008-05-12) are incorporated by reference into and form part of the bid solicitation. *If there is a conflict between the provisions of 2003 and this document, this document prevails.*

[Emphasis added]

49. Of particular note is section 15 of the “2003 (2008-12-12) Standard Instructions – Goods of Services – Competitive Requirements”, which provides as follows:

15 Conduct of Evaluation

1. In conducting its evaluation of the bids, *Canada may, but will have no obligation to, do the following:*
- (a) seek clarification or verification from bidders regarding any or all information provided by them with respect to the bid solicitation;
 - (b) contact any or all references supplied by bidders to verify and validate any information submitted by them;

...

[Emphasis added]

50. However, even if one were to argue that PWGSC’s obligation under the terms of the RFP, properly read, to bring its customer reference check to a clear and unambiguous conclusion conflicted with the discretion under section 15 above to verify and validate information with customer references, the former would prevail in accordance with the conflict resolution provision built into paragraph 2.1(c) of Part 2 of the RFP.

51. Finally, the claim that looking behind the customer reference’s “NO” response would have been tantamount to bid repair¹³ is not persuasive, as this would have constituted nothing more than the second step in PWGSC’s reference check exercise, which was made necessary by the manner in which PWGSC chose to frame its questionnaire in the first instance.¹⁴ Indeed, PWGSC’s verification and validation of the customer reference’s response to its questionnaire would have been entirely within the discretion conferred to PWGSC by section 15 above.

52. This second step in the reference check exercise was also necessary to render “apparent” whether the customer reference was “unable” to provide the requested confirmation because of a lack of knowledge as to whether or not the service had in fact been provided or an inability to understand the description of the

13. Bid repair is a term used to describe the improper alteration or modification of a bid either by the bidder or by the procuring entity after the deadline for the receipt of bids has passed.

14. However, in the second step of its verification, if the original customer reference confirmed that the initial “NO” response was intended to signify that the service had not been provided and PWGSC went ahead nonetheless to invoke clause 3.2(a)(v) of Part 3 of the RFP to request an alternate customer reference, the Tribunal is of the view that such an action would have constituted an improper bid modification.

specific service in respect of which confirmation was being sought, that is to say, whether there existed the basis for invoking clause 3.2(a)(v) of Part 3 of the RFP,¹⁵ which provides as follows:

Alternate Customer Reference From Same Organizations: If during the bid evaluation *it becomes apparent* that a customer reference is *unable to confirm* the Bidder's experience, *the Bidder will have one opportunity* to provide, [within] 24 hours of the request by the Contracting Authority, a single customer reference (from the same customer organization) who can confirm the Bidder's experience. Should the alternate customer reference in that organization also be unable to confirm that the Bidder has the required experience, the bid will be declared non-responsive and will be given no further consideration.

[Emphasis added]

53. Given that PWGSC failed to discharge its obligations under the RFP in accordance with Article 506(6) of the *AIT*, the Tribunal concludes that the complaint is valid.

Member Fry's Analysis

54. I agree with my colleagues that the complaint is valid, but for different reasons.

55. It is undisputed that TELUS was the responsive bidder with the lowest total bid price (i.e. the top-ranked bidder). It is also undisputed: that PWGSC e-mailed a questionnaire (reproduced in the majority's analysis) to the customer reference person that TELUS provided; that, in response to the question concerning the services described in subclause 3.2(a)(iii)(D) of Part 3 of the RFP, the customer reference person selected the "NO" response from the drop-down menu of the questionnaire; and that the customer reference person returned the questionnaire to PWGSC without any further comments at that point.

15. In this regard, it is apparent from a contextual reading of clause 3.2(a)(v) of Part 3 of the RFP that it is only intended to cover situations where the designated person in the customer reference organization is unable to provide the requested confirmation because of a lack of knowledge or understanding. In particular, with clause 3.2(a)(iii) requiring, as a condition of technical bid responsiveness, that the bidder identify one or more customer references that can confirm the provision of each of the services therein specified, and with clause 3.2(a)(iv) covering situations of incorrect contact information and customer reference unavailability, it seems logical that clause 3.2(a)(v) is intended to cover the remaining situations where the customer reference is unable to provide the critical confirmations by reason of a lack of knowledge as to whether or not the service in question was in fact provided or an inability to understand the service description in respect of which confirmation is being sought. In the Tribunal's view, clause 3.2(a)(v) should not be read as affording an opportunity to alter a customer reference's response. This view is supported by the closing sentence of clause 4.2(c)(i) of Part 4 of the RFP which reads as follows: "Wherever information provided by a reference differs from the information supplied by the Bidder, the information supplied by *the reference* will be given precedence" [emphasis added]. In particular, if a clear and unambiguous "NO" response from the original customer reference was not considered dispositive, i.e. if it was only the differing information provided by the "alternate customer reference" referred to in clause 3.2(a)(v) that was determinative of the issue of whether or not a listed service had in fact been provided, then this presumably would have been reflected in the language of the closing sentence of clause 4.2(c)(i). However, it is the Tribunal's view, that the use of the word "reference" instead of the words "alternate customer reference" in the primacy provision of clause 4.2(c)(i) was deliberate and indicative of the intention that, whether emanating from the original or the alternate "reference", a clear and unambiguous response that a listed service had not been provided would be given precedence over the conflicting claims of the bidder and would be considered dispositive of the matter. The Tribunal agrees with the arguments advanced by Rogers on this point (e.g. *Transcript of Public Hearing*, 9 September 2009, at 84-85). Indeed, to ascribe a broader meaning to the phrase "unable to confirm" in clause 3.2(a)(v), that would also encompass denials of particular services having been provided, would raise the very real possibility of conflicting customer reference responses as to the bidder's experience from within the same organization.

56. Clauses 3.2(a)(iv) and (v) of Part 3 of the RFP require PWGSC to take additional steps in certain situations that arise in communicating with (or attempting to communicate with) the customer references. These clauses provide as follows:

- (iv) **Correction of Customer Reference Contact Information:** If during bid evaluation it becomes apparent that the contact information for any of the representatives is incorrect, the bidder will be permitted to provide the correct address, telephone number, fax number or e-mail address. If the named individual is unavailable when required during the evaluation period, the Bidder may provide the name and contact information of an alternate contact from the same customer organization. Bidders will not be permitted to submit an alternate customer organization as a reference after bid closing.
- (v) **Alternate Customer Reference From Same Organizations:** If during the bid evaluation it becomes apparent that a customer reference is unable to confirm the Bidder's experience, the Bidder will have one opportunity to provide, [within] 24 hours of the request by the Contracting Authority, a single customer reference (from the same customer organization) who can confirm the Bidder's experience. Should the alternate customer reference in that organization also be unable to confirm that the Bidder has the required experience, the bid will be declared non-responsive and will be given no further consideration.

57. Clause 3.2(a)(iv) of Part 3 of the RFP permits a bidder to correct the contact information for its customer reference, such as its address, if it becomes apparent that the information initially provided is incorrect. It also permits the bidder to submit an alternative customer reference if it becomes apparent that the customer reference initially provided is unavailable when required during the evaluation period. Neither of these situations applies to the current fact situation.

58. In addition, clause 3.2(a)(v) of Part 3 of the RFP permits a bidder to provide an alternate customer reference "[i]f during the bid evaluation it becomes apparent that a customer reference is unable to confirm the Bidder's experience"

59. PWGSC did not give TELUS the opportunity to provide an alternate customer reference. This is because PWGSC considered that the phrase "unable to confirm the Bidder's experience" covers only situations where a customer reference is unable to respond to a reference question because the reference does not have sufficient information. PWGSC did not consider this phrase to cover a situation where the customer reference indicates that the services in question were not provided. In PWGSC's view, the "NO" response received in this instance meant that the customer reference was indicating that the services were not provided.

60. In my view, based on normal language usage, several different types of circumstances can give rise to a situation in which a person is "unable to confirm" an alleged fact. For example, a person can be "unable to confirm" a fact because the person considers that the alleged fact is incorrect or, alternatively, because the person does not have sufficient information to know whether the alleged fact is correct.

61. In my view, it is not clear whether the "NO" response by TELUS's customer reference meant that the services in question were not provided by TELUS or that the customer reference did not have sufficient information to know whether the services were provided. However, in my view, based on normal language usage, as indicated above, both of these possibilities fall within the ambit of the phrase "unable to confirm".

62. PWGSC and Rogers were not able to direct the Tribunal to any specific provision of the RFP in general, or in the context of clause 3.2(a)(v) of Part 3 in particular, that would require a narrower interpretation of this phrase.

63. In my view, the scheme of the RFP as a whole suggests that the broader interpretation is preferable. Under the RFP, if a customer reference does not confirm that the bidder provides the services in question, this results in the bidder's disqualification, obviously an extremely serious consequence for the bidder. Clause 3.2(a)(v) of Part 3 of the RFP appears to be the only clause that offers the possibility of remedying a situation where the customer reference makes a mistake, i.e. where the services in question have indeed been provided, but the customer reference erroneously gives a negative response. If the narrow interpretation argued by PWGSC were accepted, a bidder that provided the services in question could nonetheless be disqualified because of a range of erroneous responses by the customer reference person that are outside its control, such as a mistake of fact, a slip of the finger on the computer keyboard (so that "NO" is selected rather than "YES") or an intentionally incorrect response made by a customer reference person with a grudge against TELUS or the person's employer. The possibility of such a draconian result, due to circumstances beyond the bidder's control, suggests that a broader interpretation is more appropriate in the context of the RFP as a whole.

64. Based on the foregoing, it is my view that the phrase "unable to confirm" should be given a broad interpretation and that, in this particular situation, the response of the customer reference meant that it became apparent that the customer reference person was "unable to confirm the Bidder's experience". Therefore, clause 3.2 (a)(v) of Part 3 of the RFP required PWGSC to give TELUS one opportunity to provide, within 24 hours of the request by the contracting authority, a single customer reference from the same customer organization who could confirm TELUS's experience.

65. Because PWGSC did not fulfill this requirement, I consider the complaint valid.

Remedy (Majority View)

66. In recommending an appropriate remedy, the Tribunal is governed by subsections 30.15(2) and (3) of the *CITT Act*, which stipulate as follows:

(2) Subject to the regulations, where the Tribunal determines that a complaint is valid, it may recommend such remedy as it considers appropriate, including any one or more of the following remedies:

- (a) that a new solicitation for the designated contract be issued;
- (b) that the bids be re-evaluated;
- (c) that the designated contract be terminated;
- (d) that the designated contract be awarded to the complainant; or
- (e) that the complainant be compensated by an amount specified by the Tribunal.

(3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including

- (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.

67. Therefore, in recommending an appropriate remedy in this case, the Tribunal considered, in accordance with subsection 30.15(3) of the *CITT Act*, all the circumstances relevant to the procurement at issue, including the submissions of the parties with respect to possible remedies.

68. In this regard, there is no evidence to suggest, nor does the Tribunal believe, that any of the parties acted in bad faith.

69. Nonetheless, PWGSC's failure to conduct the reference check in accordance with the requirements of the RFP represented a serious deficiency in the procurement process, given that, under the terms of the solicitation, confirmation by the customer reference of the delivery of the services specified in clause 3.2(a)(iii) of Part 3 of the RFP was a requirement of technical bid responsiveness.

70. PWGSC's failure to properly conduct the reference check was prejudicial to the interests of TELUS, which was the top-ranked bidder. In addition, given that TELUS submitted the lowest-cost bid, PWGSC's failure to properly conduct the reference check frustrated the realization of a key objective of the procurement system, which, as explained in Article 501 of the *AIT*, is to "... contribute to a reduction in purchasing costs ..."

71. Rogers submitted that the Tribunal must consider the fact that it has begun performance of the contract in the time since its award. Rogers stated that it would be inappropriate for the Tribunal to recommend that the contract be rescinded when significant amounts of time and money have been expended in good faith and performance of the contract was well underway. Rogers submitted that TELUS's request that the contract be terminated and awarded to it is not appropriate in the circumstances. It argued that TELUS bore the responsibility for the failure of the customer reference to provide the required affirmative questionnaire responses. Rogers submitted that, as a result, TELUS should not be entitled to receive the benefit of the contract, but that, if anything, it be awarded its bid preparation costs.

72. The Tribunal acknowledges Rogers' submission that it has already taken important steps towards fulfillment of the contract. However, although having been awarded, the contract is not scheduled to start until December 2009 and could run for a total of four years with three optional one-year extensions. In addition, indemnification of Rogers, should the contract have to be terminated, will be a matter between Rogers and PWGSC.

73. Having regard to all of the above considerations, the Tribunal recommends as follows:

1. that PWGSC fulfill its obligation under the RFP to bring the reference check to an unambiguous and definitive conclusion (1) by verifying the meaning of the response, provided by the customer reference contact person originally provided by TELUS, to the mandatory bidder experience item in PWGSC's questionnaire relating to the provision of "[a]t least 2 global TFNs terminating in Canada that were used for calls originating from at least 5 different international countries" during a period of six consecutive months from March 19, 2004, to March 18, 2009, and, if necessary, (2) by determining whether an alternate customer reference provided by TELUS (from the same customer organization) can confirm the bidder's experience in respect of that item;
2. if, as a result of (1) above, PWGSC receives confirmation that the service was provided, that PWGSC, at its option:
 - (a) terminate the contract with Rogers and award it to TELUS, with TELUS also being awarded compensation for its reasonable lost profit for the period between the implementation of the contract awarded to Rogers and its award to TELUS; or

- (b) award TELUS compensation equivalent to its reasonable lost profit for the initial four-year term of the contract, if PWGSC decides not to terminate the contract;
3. that the contract be allowed to expire after its initial four-year term without exercising any options to extend it.

Remedy (Member Fry's View)

74. Correspondence from TELUS's customer reference person and the customer reference person's supervisor after the initial response to the reference check indicated clearly that the customer reference person did in fact consider that TELUS provided the services in question to that customer reference organization. Therefore, in my view, it is clear that, if PWGSC had given TELUS an opportunity to provide an alternate reference, the reference would have confirmed that TELUS provided the services in question. If this had occurred, TELUS would have been awarded the contract, since it was the lowest bidder.

75. Accordingly, I recommend as a remedy that PWGSC, at its option, either:

- (a) terminate the contract with Rogers and award it to TELUS, with TELUS also being awarded compensation for its reasonable lost profit for the period between the implementation of the contract awarded to Rogers and its award to TELUS; or
- (b) award TELUS compensation for its reasonable lost profit for the initial four-year term of the contract, if PWGSC decides not to terminate the contract, and allow the contract to expire after its initial four-year term without exercising any option to extend it.

Costs

76. The Tribunal awards TELUS its reasonable costs incurred in preparing and proceeding with the complaint. The Tribunal has considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*) and is of the view that this complaint case has a complexity level corresponding to the medium level of complexity referred to in Appendix A of the *Guideline* (Level 2). The *Guideline* contemplates classification of the level of complexity of complaint cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The complexity of the procurement was medium, in that it was for services relating to a defined project. The complexity of the complaint was medium, as the matter involved the interpretation of ambiguous evaluation criteria. Finally, the complexity of the complaint proceedings was also medium, as, although there was an oral hearing, the issue was straightforward, there were no motions, there was only a single intervener, and the 90-day time frame was respected. 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

77. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid.

78. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal (Member Fry dissenting) recommends that PWGSC complete the customer reference check process for TELUS in accordance with the requirements of Solicitation No. EN869-068067/C, in particular, (1) by verifying the meaning of the response, provided by the customer reference contact person originally provided by TELUS, to the mandatory bidder experience item in PWGSC questionnaire relating to the provision of "[a]t least 2 global TFNs terminating in Canada that were used for calls originating from at least 5 different international countries" during a period of six consecutive months from March 19, 2004, to March 18, 2009, and, if necessary, (2) by determining whether an alternate customer reference provided by TELUS (from the same customer organization) can confirm the bidder's experience in respect of that item.

79. If PWGSC receives confirmation that TELUS has the requisite experience, the Tribunal recommends either that PWGSC terminate the contract awarded to Rogers and award it to TELUS and compensate TELUS by an amount equal to the profit that it would reasonably have earned from the date that the contract awarded to Rogers is implemented to the date of the subsequent award to TELUS or that PWGSC compensate TELUS for the profit that it would reasonably have earned for the entire four-year contract term as if it had been awarded the contract. The basis for calculating the profit will be the price contained in the proposal submitted by TELUS. In addition, the Tribunal recommends that PWGSC not exercise any option to extend the contract beyond its initial four-year term.

80. The Tribunal recommends that TELUS and PWGSC negotiate the amount of compensation and, within 30 days of the date of the issuance of the statement of reasons of this determination, report back to the Tribunal on the outcome.

81. Should the parties be unable to agree on the amount of compensation, TELUS shall file with the Tribunal, within 40 days of the issuance of the statement of reasons of this determination, a submission on the issue of compensation. PWGSC will then have 7 working days after the receipt of TELUS's submission to file a response. TELUS will then have 5 working days after the receipt of PWGSC's reply submission to file any additional comments.

82. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards TELUS its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by PWGSC. The 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 Tribunal, as contemplated by the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Ellen Fry
Ellen Fry
Presiding Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

Stephen A. Leach
Stephen A. Leach
Member