

REDACTED VERSION

ARBITER'S REPORT

November 29, 2022

BETWEEN:

TELUS COMMUNICATIONS INC.

Supplier

AND

HIS MAJESTY THE KING IN RIGHT OF ALBERTA (GOVERNMENT OF ALBERTA)

Government Entity

Arbiter: Cory J. Furman, K.C.

Representation:

FOR TELUS:
Arif Chowdhury & Peter Mantas
Fasken Martineau Dumoulin LLP
3400, 350 – 7th Avenue SW
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FOR ALBERTA:
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Alberta Justice, Legal Services
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Edmonton, Alberta T5K 2E8

DECISION

1. This proceeding is under the Bid Protest Mechanism (BPM) adopted under the New West Partnership Trade Agreement (NWPTA) concerning a complaint by the Supplier, Telus Communications Inc. ("Telus") against the Government of Alberta ("Alberta") in respect of provisions of the Canada Free Trade Agreement (CFTA), regarding a procurement initiated by Alberta under the title "Negotiated Request for Proposals (NRFP) No. SA-TSO-SVS-18-2022, Wireless Services & Products (WSP)" (referred to herein as the "Procurement" or the "NRFP"). Telus provided a proposal in response to the NRFP (the "Proposal").

REDACTED VERSION

2. Telus alleges conduct of Alberta, including in respect of finding of non-compliance of the Telus Proposal and subsequent dialogue between the parties regarding rectification thereof, to be inconsistent with certain sections of the CFTA.
3. Alberta alleges that the present bid protest claim is time-barred and the handling of the process by Alberta in respect of the NRFP is compliant with the CFTA.

THE RECORD:

4. Counsel have provided a detailed written record for consideration in this matter. The record materials I have reviewed include the following:
 - a. Request for arbitration – letter from counsel for Telus to the NWPTA Administrator dated October 20, 2022, along with Affidavits of Trevor Lang, Darwin Statnyk, and Allister Cheung and Expert Reports of Christian Dugas and Jean Bedard;
 - b. Response – Written Submission on behalf of Alberta under cover of November 3, 2022, including Witness Statements of Leanne Heuman and Chris Evans with Exhibits and Book of Authorities; and
 - c. Telus Counter-Reply and Book of Authorities – dated November 10, 2022.
5. Alberta objected to the filing of the Expert Reports, dealt with in preliminary stages of my decision below.

REDACTED VERSION**FACTS:**

6. The NFRP was posted to Alberta's electronic procurement advertisement service on May 16, 2022, requesting submissions from potential providers of wireless services to Alberta for use across numerous verticals of communications devices and services in government-affiliated entities.¹
7. Ms. Heuman and Mr. Evans were tasked with facilitation of the procurement process for the NFRP for Alberta.² Trevor Lang was the lead for Telus on the NFRP, assisted in the dialogue by Mr. Statnyk.
8. As pointed out by both parties generally in their submissions, the NFRP was constructed around a consumption-based understanding of standard industry approach to wireless services and pricing (mobile wireless services being delivered based upon user consumption of services, and the selection of features or options for individual subscribers or endpoints).
18. Telus wished to take a different [REDACTED] and ultimately presented an alternative [REDACTED] proposal to Alberta for wireless services under the NFRP.
9. Tables 10, 11 and 12 in the NFRP were created as a means of the Alberta evaluation team being able to test and understand the proposals on offer from shortlisted proponents and to make an "apples to apples" comparison.³ Generally speaking, Table 10 appears to have been designed to capture the details of one-time onboarding, and termination or exit costs from the contract to subsequently be completed. Table 11 was developed to express an

¹ Affidavit of Trevor Lang sworn October 20, 2022, para. 6.

² Witness Statement of Leanne Heuman signed November 3, 2022, para. 32.

³ Written Submission of Alberta, paras. 11 and 12.

REDACTED VERSION

estimated monthly service cost for the ongoing wireless services required by Alberta in a hypothetical representative user count scenario, to allow Alberta to compare proponent offerings in assessing the award of the ultimate contract. Completion of the pricing tables was designated a mandatory component in the NRFP.⁴

10. The NRFP document includes the details of the scoring formulae and matrix to be applied to proponent submissions.
11. The established schedule for the NRFP contemplated Alberta potentially updating a final version of the NRFP based on the results of consultations with shortlisted proponents no later than July 8, 2022. This finalized version of the NRFP was issued to the shortlisted proponents including Telus on July 14, 2022, with an extended deadline for receipt of final proposals of August 9, 2022.
12. Telus provided their Proposal to Alberta on August 9, 2022.⁵ The Proposal proposed [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
13. Ms. Heuman was responsible for reviewing the compliance of proposals from each proponent including Telus to determine the compliance of each proposal with the mandatory requirements of the NRFP process and documentation (following the determination of compliance, the individual proposals would be assessed and scored in detail by Alberta's scoring team, made up of individuals other than Ms. Heuman and Mr. Evans). Neither Ms.

⁴ Witness Statement of Leanne Heuman, supra, paras. 10 and 11.

⁵ Affidavit of Trevor Lang, supra, Exhibit "E".

REDACTED VERSION

Heuman or Mr. Evans were involved in the actual scoring of the Proposal received from Telus in the competition, or those from other proponents, on behalf of Alberta, and did not share any details of the rectification dialogue with Telus with the scoring members of the Alberta team.⁶

14. On review of the Telus Proposal, it was determined by Alberta that the Proposal was not compliant with mandatory pricing requirements in the NRFP – particularly Appendix B, Section 3.5, 3.5.1 and 3.5.2 thereof. Appendix B, section 3.5 specifically required pricing to be provided as required in Tables 10 and 11.⁷
15. Alberta sent a rectification letter to Telus dated August 17, 2022, outlining certain items deemed non-compliant in the Telus Proposal surrounding the requested format for pricing from proponents to the NRFP.⁸ A deadline for response to the rectification letter was subsequently established on August 23, 2022.
16. Subsequent to the issuance of the rectification letter, Alberta and Telus also had several in-person or telephonic meetings to review the issues raised in the letter and in which Alberta endeavoured to answer questions from Telus about their proposal and the completion or rectification issues identified.
17. Follow-up discussions took place between Alberta and Telus in the August 17-19, 2022, timeframe. Each party obviously had their own impressions and understandings of these discussions.
18. The Alberta narrative of these rectification meetings is provided in the Statements of Heuman and Evans. Key points indicated to have been

⁶ Witness Statement of Leanne Heuman, supra, para. 32.

⁷ Witness Statement of Leanne Heuman, supra, paras. 6 to 9.

⁸ Affidavit of Trevor Lang, supra, Exhibit "G".

REDACTED VERSION

advanced on behalf of Alberta in this discussion include the following (verbatim):

- a. there was no request for the underlying business or service model to change, but that the costs of ongoing services could not be included in Table 10;
- b. regardless of how TELUS might propose to invoice for services rendered, Table 11 specifically requested monthly costs for ongoing services as the unit of measure, so this is what must be provided;
- c. Table 11 was developed with the expectation of unit-based pricing elements, which added together would arrive at a monthly total, and TELUS's model was [REDACTED] and therefore did not include explicit unit-based metrics. Therefore, TELUS did not have to complete each field [REDACTED];
- d. if the user/subscriber volumes in Table 11 did not match with the [REDACTED] user/subscriber volumes being proposed by TELUS (which were not included in the TELUS Proposal), then TELUS's pricing formula should be applied to the volumes in Table 11, to arrive at the "Total Monthly Cost"; and,
- e. there was no requirement to provide a [REDACTED], and the NRFP did not provide a mechanism to evaluate [REDACTED], or "reverse-engineer" [REDACTED].⁹ [emphasis added]

19. Ms. Heuman continues in her description of the rectification dialogue in her Statement as follows:

20. Mr. Statnyk pressed his position that the proposal was in fact compliant and stated that the Province was forcing TELUS to change its business model. I tried to clarify a number of times and in a number of ways that there was no request to change the business model, and that we weren't concerned about whether TELUS invoiced the Province based on a [REDACTED] or based on a fixed monthly rate. Mr. Statnyk continued to insist that the Province was forcing TELUS into a consumption-based pricing model, and further that three days would

⁹ Witness Statement of Leanne Heuman, supra, para. 18.

REDACTED VERSION

not be enough time to revise the bid and have it approved by TELUS management.

21. TELUS's representatives kept pressing me to name an amount that TELUS could put into Table 11 that would satisfy me. Mr. Statnyk kept naming amounts himself and asking if it would be sufficient and "how much of their Fixed Price they should take out of Table 10 and put into Table 11". Mr. Statnyk insisted that I if I could not evaluate their proposal as is, I should reissue the NRFP with new pricing tables. I stated that we could not reissue the NRFP. [REDACTED]

22. TELUS seemed to believe that its Rectified Proposal pricing would have to add up to the [REDACTED] pricing providing in its Original Proposal, distributed between Tables 10 and 11. In response to Mr. Statnyk's requests [REDACTED] needed to be moved to Table 11, Mr. Evans and I continued to explain that:

a. All costs of ongoing services should be in Table 11 – but at the volumes outlined in the table, which may not match with the subscribed volumes used by TELUS in formulating the TELUS Proposal.

b. Regardless of how the services are invoiced and paid (for example, [REDACTED], as TELUS seemed to be proposing) there is still a monthly cost, and these costs are not zero. "Monthly" is the unit of measure that is being evaluated, no matter now the services are actually paid. As an aside, I stated that I did not believe that [REDACTED] was likely to be approved.

c. There would not be any concerns if TELUS proposed [REDACTED] in the Rectified Proposal which, if [REDACTED], did not add up the [REDACTED] that TELUS proposed in its original proposal, since a [REDACTED] was not required to begin with, and the user/subscriber assumptions that TELUS included in the [REDACTED] may not match with the [REDACTED] assumptions in Table 11.

d. As the [REDACTED] model was [REDACTED], the Province recognized that TELUS would not be able to complete the unit-based fields in Table 11 [REDACTED]. As such, TELUS would be

REDACTED VERSION

compliant if it completed only the field for "Total Monthly Costs" of the services in Table 11.

[REDACTED]

f. If TELUS needed the Province to understand in the Rectified Proposal that TELUS was proposing a [REDACTED] for X number of users, but there was no evaluation pricing table for that, then TELUS should describe their [REDACTED] in the narrative of the Rectified Proposal. The evaluation pricing table for the services was based on a monthly use case for which TELUS needed to make calculations based on volumes in the pricing Table, [REDACTED]

[REDACTED]

TELUS's proposed fixed price was likely for a different number of users and different usage volumes than was set out in Table 11, and so TELUS needed to calculate its [REDACTED] pricing accordingly using the Table 11 format for rectification.¹⁰

19. Turning to a brief overview of the summary of the reaction of Telus to the issuance of the rectification and the substance of the rectification meetings as provided by Telus officials, paraphrased by me from the Lang affidavit:

a. Telus was surprised to learn Alberta considered the Proposal noncompliant insofar as in the view of Telus their submission was accurate [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED];

¹⁰ Witness Statement of Leanne Heuman, supra, para. 22.

REDACTED VERSION

- b. Telus' view was that Appendix B, Section 3.5 of the NRFP explicitly contemplated alternate business model proposals such as that of Telus so long as all of the relevant financial details were provided;
 - c. There was a feeling that Alberta did not understand the nature of the Telus proposal;
 - d. Telus felt they were being asked to and did not wish to submit a new price in their proposal, or could not do so without a significant extension of time since internal governance controls required approval of any changes at the highest executive level;
 - e. The Telus team felt they were at an impasse with Alberta officials.¹¹
20. Telus submitted a response to the rectification questions to Alberta on August 22, 2022 (the "Rectified Proposal").
21. Alberta's evaluation team working on the NRFP project proceeded to schedule and receive shortlisted presentations from all of the remaining proponents including Telus. The Telus shortlist presentation took place on September 2, 2022, to demonstrate their proposed customer portal, a key element of the desired outcome of the NRFP for Alberta, and Telus also provided responses to some follow-up questions that same day arising out of the presentation.
22. On September 6, 2022, Telus was notified that Alberta would be proceeding with negotiations with another proponent, but that if those negotiations with that other proponent turned out to be unsuccessful, pursuant to the terms of

¹¹ Affidavit of Trevor Lang, supra, paras. 24 to 36.

REDACTED VERSION

the NRFP, Alberta would then enter into negotiations with Telus, since they were the next highest scoring proponent.

23. On September 16, 2022, Telus sent a letter to Alberta requesting consultations pursuant to the BPM.

24. A debriefing meeting took place between the parties later on September 28, 2022. In that meeting the primary shortcomings of the Telus proposal were narrated as attributable to deficiency in the proposed portal product, and in pricing.¹² From the perspective of the remainder of my decision outlined below, the key issue in the debriefing feedback and assessment of the Proposal and Rectified Proposal by Alberta to Telus related to pricing and the completion of Table 10 and 11. The scoring and feedback provided on the portal product while provided, is not significant under issue.

ISSUES:

25. The issues presented for my consideration include the following:

- a. Are the expert reports of Dugas and Bedard properly filed by Telus for consideration by the arbiter?
- b. Is this proceeding time-barred by application and operation of Article 2(1) of the BPM?
- c. Was the Procurement inconsistent with Article 502.1 of the CFTA because:

¹² Witness Statement of Leanne Heuman, supra, paras. 41 and 42.

REDACTED VERSION

- i. The original Telus Proposal was compliant with and within the terms of the NRFP and thus should not have been ruled non-compliant;
 - ii. Alberta failed to articulate a cause or basis for non-compliance of the original Telus Proposal with the terms of the NRFP;
 - iii. Alberta required Telus to alter the pricing model in the original Proposal contrary to the NRFP permitting submission of alternative pricing models;
- d. Was the Procurement inconsistent with Article 509.7 of the CFTA because Alberta failed to specify within the NRFP that alternative bid models would not be evaluated;
- e. Was the Procurement inconsistent with Article 510.2(a) of the CFTA because Alberta used unpublished pricing model requirements and evaluation criteria in assessment of the Proposal or the Rectified Proposal;
- f. Was the Procurement inconsistent with Article 503.5(b), 510.2(b) and 511 of the CFTA for failing to allow reasonable time for Telus to rectify and resubmit their Proposal in the context of addressing dialogue concerns between the parties; or
- g. Was the Procurement inconsistent with Article 503.5(g) or 515 of the CFTA because Alberta advised and directed Telus on modifications to the Rectified Proposal?

ANALYSIS:

REDACTED VERSION***Are the expert reports properly filed?***

27. Telus filed two expert reports of Christian Dugas and Jean Bedard with the material requesting this arbitration.
28. Alberta objects to the filing of the expert reports, indicating that the BPM process is explicit in its contents and process and that in order for BPM proceedings of this nature to properly include expert testimony the consent of both parties would be required.
29. I agree with Alberta's general characterization of the BPM process as summary in nature and subject to an arbitration agreement between the parties aiding in establishing and reinforcing the ground rules between the parties.
30. I have reviewed the two reports summarily to ascertain if or how they might legitimately fit into the prescribed contents of the Request for Arbitration outlined in Article 3(3) of the BPM. BPM Article 3(3) provides:

The request pursuant to paragraph 1 shall contain the following: ...

(f) detailed information concerning the factual grounds of the dispute;

(g) detailed information concerning the alleged inconsistency with the trade agreement;¹³

31. Article 3(3) of the BPM does not explicitly permit the filing of expert reports, and in my view the expert reports:

¹³ Bid Protest Mechanism, Article 3(3).

REDACTED VERSION

- a. do not contain any necessary detailed information concerning the factual grounds of the dispute;
- b. do not provide any detailed information regarding the alleged inconsistency of the Procurement with the CFTA (the specifics of the allegedly offended CFTA provisions are outlined in the Request for Arbitration and the written materials of Telus submitted); and
- c. are not filed with consent.

On this basis I do not find the expert reports properly filed.

32. As arbiter of this matter, I can request further information from the parties in rendering of my decision, which presumably could include requesting expert assistance. I have not done so, thus not otherwise saving or requiring the filing of the purported expert evidence.

Is this proceeding time-barred?

33. Alberta alleges that the Request for Consultation in this case was not timely filed, resulting in the subsequent Request for Arbitration being time-barred.
34. The proper commencing step for the BPM process herein is the provision of a Request for Consultations by a party, which must be provided within ten ddays of knowledge of the issues giving rise to the need for consultation.
35. Alberta suggests there were two identifiable and latent triggering events which could have triggered the ten-day notice window pursuant to Article 2.1 of the BPM, specifically:

REDACTED VERSION

- a. The "First Measure" being the issuance/delivery of the actual non-compliance notice of the original Proposal provided to Telus dated August 17, 2022; and
 - b. The "Second Measure" being the establishment of the August 23, 2022, extended deadline for Telus to provide their rectification response to Alberta (which took place on August 18, 2022).¹⁴
36. In order to initiate consultations concerning a specific procurement, Article 2.1 of the BPM requires the supplier to deliver a written request for consultations within ten days after the day on which the supplier first knew, or reasonably should have known, of the alleged inconsistency with the trade agreement in question.
37. The indication to Telus by Alberta on August 17, 2022, that the original Proposal was found non-compliant and requiring rectification was a latent indication that the Proposal was deemed lacking and not in compliance with the mandatory requirements.
38. Based on the ten-day consultation window outlined in Article 2.1 of the BPM via which the supplier can ultimately gain access to this arbitration process, any Request for Consultation related to the finding of non-compliance dated August 17, 2022 was due to be served by August 27, 2022.
39. Telus provided a written Request for Consultations pursuant to the BPM to Alberta in this matter in a letter dated September 16, 2022.
40. I find that the Telus Request for Consultations, insofar as it pertains to any issues related to the finding of non-compliance of the original Telus Proposal

¹⁴ Written Submissions of Alberta, para. 36.

REDACTED VERSION

outlined in the August 17, 2022 rectification letter, was out of time, having been filed outside of the ten day window prescribed by Article 2.1 of the BPM.

41. On August 18, 2022, Alberta granted an extension of time to August 23, 2022, to Telus to file a response to the rectification letter/notice of non-compliance.

42. Insofar as the lack of sufficiency of the August 23, 2022, extended deadline forms the basis for certain of the allegations of Telus in the Request for Arbitration, the Request for Consultations in that respect would have been due to be served by no later than August 28, 2022. This was not done. Remedy sought related to the insufficiency of the time extension granted is also time-barred.

43. In respect of this aspect of the Telus request, namely the grounds related to Article 503.5(b), 510.2(b) and 511 of the CFTA, I find that the Request for Consultations dated September 16, 2022, was out of time.

44. The Request for Consultation was not timely filed to permit addressing Grounds 1 through 7 listed in the Request for Arbitration¹⁵ and Telus has forfeited the right to proceed with respect to these grounds pursuant to the BPM.

45. The BPM award in *Parker Johnston Industries Ltd. v. Calgary Board of Education* cites favourably the decision of the Federal Court of Appeal in *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.* regarding timeliness in procurement matters, noting that "in procurement matters time is of the essence".¹⁶

¹⁵ Fasken letter to NWPTA Administrator dated October 20, 2022, pages 3-4.

¹⁶ *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 para 18.

REDACTED VERSION

46. The ratio in *IBM Canada* cited favourably in *Parker Johnston Industries* is applicable in support of the parsing or granular construction of “in procurement” triggering events for the BPM consultation framework in Article 2.1 as outlined above – ie. parsing the NRFP process into the three triggering events outlined is appropriate as the best means of advancing the procurement as quickly as possible, with the opportunity for a party at any such interim triggering event to request the commencement of a consultation, potentially resulting in the ability to seek arbitration.

47. Furthermore, *Parker Johnston Industries* also supports the proposition that in respect of a triggering event the limitation period imposed by Article 2.1 of the BPM starts to run so long as there is no clarification or ongoing discussion required in respect of the triggering event in question.¹⁷ Both of the two triggering events pointed out by Alberta, being the issuance/delivery of the actual non-compliance notice of the original Proposal provided to Telus on August 17, 2022 and the establishment of the August 23, 2022 extended deadline for Telus to provide their rectification response to Alberta were latent and definite.

48. Telus received notice from Alberta on September 6, 2022, that on the basis of the Rectified Proposal they were not the leading proponent in the NRFP process.

49. The notice of this final determination of the NRFP process in my view comprises an additional trigger measure in the process which is legitimately the subject of a fresh 10-day notice window pursuant to Article 2.1 of the BPM.

50. To the extent that the September 16, 2022 notice to Alberta from Telus pertains to determinations in the NRFP process in respect of Telus' Rectified

¹⁷ *Parker Johnston Industries*, *supra*, para. 24.

REDACTED VERSION

Proposal, I am of the opinion that the Request for Consultations was within time specifically (and only) with respect to inconsistencies articulated by Telus in respect of the Rectified Proposal in the Request for Arbitration (listed as Grounds 8 and 9 in the Fasken letter requesting arbitration), namely:

- a. The Procurement was inconsistent with Article 515 of the CFTA since Alberta advised and directed Telus on modifications to the Rectified Proposal; and
- b. The Procurement was inconsistent with Article 503.5(g) of the CFTA since Alberta advised and directed Telus on modifications to the Rectified Proposal.

51. I will also speak briefly to the applicability of the following two additional grounds raised by Telus, only with respect to the Rectified Proposal:

- a. Was the Procurement inconsistent with Article 509.7 of the CFTA because Alberta failed to specify within the NRFP that alternative bid models would not be evaluated; and
- b. Was the Procurement inconsistent with Article 510.2(a) of the CFTA because Alberta used unpublished pricing model requirements and evaluation criteria in assessment of the Rectified Proposal?

Inconsistency with Articles 515 and 503.5(g) of the CFTA:

52. If Telus wished to aggressively pursue the avenue and argument that the initial Proposal was compliant on the basis of their initially chosen approach to completing Tables 10 and 11 and the other requirements outlined in the NRFP, in my view the time for them to do so pursuant to the BPM was by requesting

REDACTED VERSION

Consultation no later than August 27, 2022 as outlined above. Having failed to do so, Telus is now time-barred from pursuing these arguments in this forum.

53. Issues related to the non-compliance of the original Proposal are not germane to the outstanding remaining issues (namely the grounds related to Articles 515 and 503.5(g) of the CFTA applicable to the Rectified Proposal as articulated by Telus in the Request for Arbitration).

54. At the heart of this dispute is the fact that Telus wished to present an alternative [REDACTED] proposal to Alberta for wireless services under the NRFP - the NRFP documents as published and amended including their evaluation criteria and pricing comparison tools were created in a way to reasonably accommodate comparison of consumption-based based approaches which would typically ultimately be assessed and compared on the basis of monthly total cost, versus a [REDACTED] [REDACTED] structure.

55. Telus chose to subsequently file a Rectified Proposal with modifications to Tables 10 and 11 et al. when given the choice to do so in an effort by rectification to provide an assessment comparison for their bid. Appreciating the difficulty expressed by Telus officials in populating this information and particularly in expressing an estimated monthly cost given what they were trying to achieve, I am satisfied from my review of the record that Telus was explicitly not forced to change the business model of what they were proposing in filing the rectification response (which is the only issue being considered at this point, compliance of the original Proposal being a time-barred issue not worthy of further elaboration at present).

56. I appreciate the difficulty of these discussions for both parties, as is evidenced by the frustration in the minds of both sets of officials expressed in the record. I accept the evidence of Heuman and Evans that Telus were not directed

REDACTED VERSION

what numbers to fill in in terms of one-time and monthly cost components in the preparation of the Rectified Proposal – they could not or would not provide further direction to Telus in this regard given their obligation to the remainder of the process and other proponents.

57. Telus was free to submit an alternative structured business proposal, as contemplated by Appendix B, Section 3.5 of the NRFP, but it was incumbent on them to be prepared to defend or support their proposal and its format and structure in the context of the scoring framework established for the NRFP.
58. The difficulty for or unwillingness of Telus to disassemble their [REDACTED] number is not in my view a problem to be borne by Alberta. Alberta officials made efforts to help provide guidance to Telus to rectify their Proposal. The choices made by Telus in the Rectified Proposal, which was voluntarily filed by them to remain in the procurement (remembering that the propriety of any objection to the original Proposal are time-barred and irrelevant) – specifically most relevant [REDACTED] [REDACTED] – were their own.
59. Furthermore, as outlined throughout the record and in the NRFP materials, the problem for both Telus in responding and Alberta in scoring was that Table 11 provided a specific subscriber count scenario for use by proponents in their proposals, so that the Alberta scoring team could understand likely per user costs monthly etc. As understood from the evidence before me, the Telus Rectified Proposal pertained to a device count of some 4000 added devices, presented by Telus in their [REDACTED] proposal to accommodate growth in the needs of Alberta over 5 years. It is not for me to adjudicate the desirability of including a cushion of this nature [REDACTED] [REDACTED] [REDACTED] but again Telus in my view bore

REDACTED VERSION

the obligation to be prepared to respond to the headcount scenario outlined in Table 11 to have their proposal evenly compared.

60. Alberta was transparent in the measurement formulae and scorecard to be used in assessing proposals in the Procurement. There is no evidence that the established formulae and scoring were not used. They endeavored to assist Telus in presenting their proposal in a way that could be compared with other proposals of a traditional nature.

61. Article 515 of the CFTA reads as follows:

Treatment of Tenders

1. A procuring entity shall receive, open, and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process, and the confidentiality of tenders.
2. A procuring entity shall not penalize any supplier whose tender is received after the final date and time specified for receiving tenders if the delay is due solely to mishandling on the part of the procuring entity.
3. If a procuring entity provides a supplier with an opportunity to correct unintentional errors of form between the opening of tenders and the awarding of the contract, the procuring entity shall provide the same opportunity to all participating suppliers.
4. To be considered for an award, a tender shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the tender notices and tender documentation and be from a supplier that satisfies the conditions for participation.
5. Unless a procuring entity determines that it is not in the public interest to award a contract, the procuring entity shall award the contract to the supplier that the procuring entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the tender notices and tender documentation, has submitted: (a) the most advantageous tender; or (b) if price is the sole criterion, the lowest price.

REDACTED VERSION

6. If a procuring entity receives a tender from a supplier with a price that is abnormally lower than the prices in other submitted tenders, it may verify with the supplier that it satisfies the conditions for participation and is capable of fulfilling the terms of the contract.¹⁸

62. Telus did not reference a particular subsection of Article 515 in Ground 8 of their Request for Arbitration. Having considered the record against each of the subsections of Article 515, I fail to see any breach by Alberta in their conduct with Telus regarding the Rectified Proposal on or after August 17, 2022.

63. Turning to Article 503(5)(g) of the CFTA, which reads as follows:

503 (5) Except as otherwise provided in this Chapter, including Article 513, the following is an illustrative list of practices that are considered to be inconsistent with Articles 502.1, 502.2, or 502.3: ...

(g) providing information to one supplier in order to give that supplier an advantage over other suppliers: and¹⁹

64. Section 503 depends on section 502 of the CFTA which provides in its subsections general principles that Alberta, in this case, as a party to the CFTA will provide open, transparent, and non-discriminatory access to covered procurement by its procuring entities.

65. I disagree with Telus' position that the simple conduct of the rectification meetings with Alberta represent offside activity contrary to the CFTA. I find that:

- a. the rectification meetings and discussions were conducted with a view to provide a best-efforts attempt to assist Telus in finding a way to

¹⁸ Canadian Free Trade Agreement, Article 515.

¹⁹ CFTA, Article 503.

REDACTED VERSION

express their proposal details in a way that could be comparatively and fairly scored in comparison to other proponents;

- b. contrary to the explicit language of article 503(5)(g), there is no evidence that Alberta provided any information to Telus or to any other shortlisted proponent to give that proponent an advantage over others;
- c. beyond the bald assertion by Telus in their submission, there is no evidence in the record that Alberta did not provide some type of update of the status of the procurement in light of timing delays occasioned by permitting the rectification opportunity to Telus to other proponents;
- d. there is no evidence that any changes were made to the scoring formulae, pricing tables or any other aspect of the NRFP by Alberta which would have occasioned the need to provide an update to all other proponents (in fact anecdotally Heuman suggests in her evidence that Alberta at the appropriate time would likely have welcomed the opportunity to at least consult on the propriety of modifying the scoring framework for the Procurement to more adequately address a proposal of the format ultimately filed by Telus); and
- e. Telus was not directed as to how to fill in the numbers for their Rectified Proposal – their choice to respond to the rectification request, and how to do it, were their own.

66. Alberta did not breach any obligation under section 503(5)(g) of the CFTA in their conduct. Rather than finding Alberta's conduct to have been non-transparent and discriminatory towards Telus, it is my view on the evidence that Ms. Heuman and her colleague did their best to engage and assist Telus

REDACTED VERSION

in shaping their admittedly novel proposal into something that could be reviewed and scored alongside the proposals of others in the Procurement while remaining sensitive to the need for objectivity and transparency.

Inconsistency with Articles 509.7 and 510.2 of the CFTA:

67. I wish to summarily address the allegations of noncompliance by Telus with respect to Alberta's conduct related to Articles 509.7 and 510.2 of the CFTA.

68. Telus alleges that the handling of the Rectified Proposal was inconsistent with Article 509.7 because Alberta failed to specify within the NRFP that alternative bid models would not be evaluated.

69. Respectfully, any proponent reading the NRFP material would know from reviewing the pricing tables and score card and formulae the specific details of assessment including the fact that Table 11, yielding a monthly cost of service in a hypothetical headcount scenario, showed the importance of this metric to Alberta in assessing proposals.

70. A proponent seeking to make an alternative offering with different pricing model would need to be prepared to complete the pricing tables or defend their approach in a compliant way. There was no "refusal of Alberta to understand Telus' proposal" (to paraphrase the record) – if anything there was a refusal of Telus to acknowledge the defined and transparent measurement criteria established by Alberta in the NRFP. From a commercial perspective I appreciate Telus' desire to mask their intended [REDACTED] [REDACTED] structure from their competition, but the proper way for Telus to address the sufficiency of the scoring matrix if they felt it would have been desirable to secure a more favourable review of their proposal would

REDACTED VERSION

have been to raise it between all parties and proponents during the consultation stage or otherwise.

71. Regarding Section 510.2 of the CFTA, I find no evidence of unpublished criteria to have been used by Alberta. In fact, it is just as arguable that what Telus is really arguing here is that unpublished criteria should have been used by Alberta in their favour – ie. there is a complaint that the criteria were not modified, publicly or quietly, to better accommodate the Telus business model as proposed.
72. As borne out by the record, Alberta engaged with Telus to provide feedback regarding their Rectified Proposal and explicitly told them that the alternative bid model was welcome. Repeatedly enforcing that completion of at least the summary level of the monthly costing estimate for Table 11 was required for comparative purposes is not in any foreseeable way indicative of a position that alternative bid models would not be evaluated. Even as the incumbent provider, it is not to say Telus would necessarily win, but they were given every opportunity to put their best argument forward in terms of the completion of the pricing tables in the Rectified Proposal and to “swing for the fences” to sell their idea as compliant and/or desirable.
 - a. Alberta's handling of the Rectified Proposal did not breach Articles 509.7 and 510.2 of the CFTA.

DECISION:

73. In addition to the findings of fact outlined herein, Article 5.7 of the BPM provides that my report shall contain:

REDACTED VERSION

- a. a determination as to whether the specific procurement at issue is consistent with the applicable trade agreement;
- b. if applicable, recommendations for corrective action as to how the government entity may bring itself into compliance with the applicable trade agreement; and
- c. the amount of any awards, as determined in accordance with Article 7, and the time within which the awards shall be paid.

74. I find the Procurement as impugned in the Request for Arbitration was administered in accordance with the CFTA provisions raised. More specifically, with respect to the issues as first enumerated by me above:

- a. The expert reports of Dugas and Bedard are not properly filed and have not been considered in rendering my decision;
- b. As concerns the original Proposal, the issues raised by Telus are all time-barred. The deadline for requesting consultation was August 27, 2022. Even if Telus were given the benefit of the added time of ten days from the filing of the rectification response on August 22, 2022 to fully have understood the nature of the finding of non-compliance (which I do not think was necessary but I address here in any event for completeness), the deadline of September 1, 2022 was not met;
- c. The only subject matter of the Request for Arbitration which is not time-barred in my view are the issues in the Request specifically pertaining to the Rectified Proposal;

REDACTED VERSION

- d. Given the existence of the time bar I have not made any finding of noncompliance or compliance with Article 502.1 of the CFTA alleged in respect of the original Proposal;
 - e. Given the existence of the time bar I have not made any finding of noncompliance or compliance with Article 503.5(b), 510.2(b) and 511 of the CFTA in respect of the original Proposal for failing to allow reasonable time for Telus to rectify and resubmit their Proposal in the context of addressing dialogue concerns between the parties;
 - f. The Procurement insofar as it pertains to the Rectified Proposal was not inconsistent with Article 509.7 or 510.2(a) of the CFTA; and
 - g. The Procurement insofar as it pertains to the Rectified Proposal was not inconsistent with Article 503.5(g) or 515 of the CFTA.
75. The NRFP document explicitly indicated an accommodation for alternative business models to be proposed by proponents, which could include structures such as the [REDACTED] arrangement ultimately proposed by Telus firstly in the Proposal and then in an altered fashion in the Rectified Proposal. However, the pricing tables provided in the NRFP by Alberta for use by proponents did not easily lend themselves to transparently compare traditional consumption-based monthly billing contracts on an “apples to apples” basis with a structure such as that proposed by Telus in the Rectified Proposal.
76. Appreciating the governance and commercial constraints on them, Telus made an effort to modestly unpack their [REDACTED] quotation in a way to try to morph the Rectified Proposal in a way that it could be, in their view, roughly considered on all fours with other [REDACTED] proposals received by Alberta. Unfortunately for Telus, the Rectified Proposal was not

REDACTED VERSION

selected but this is not a necessary indicator of anything broken in the Procurement.

77. As a more broad recommendation in terms of the language around the desirability or propriety of submission of alternative business model approaches, Alberta could consider in future procurements at least a modestly heightened awareness to how to address same in establishing their scoring matrices or introducing a gate point into consultation stages where this could be appropriately and briefly canvassed with proponents (in cases where such proposals would be accepted – in cases where no alternate models are desired to be entertained this would be unnecessary)..
78. Wanting to propose a transformational service and pricing model as they wished to do, and being aware of the obvious limitations in the provided metric framework for Alberta to compare such a proposal with other proponents who might propose a more traditional [REDACTED] [REDACTED] structure, Telus should have been more forthcoming with Alberta about their intentions and the business model they intended to present earlier in the NRFP process. While this earlier disclosure would have tipped Telus' hand in terms of the transaction framework they were contemplating to other proponents, diminishing the potential exclusivity of such a "swing for the fences" [REDACTED] approach, it would have allowed the Alberta team to consider publishing modifications to the NRFP which would have more transparently accommodated Alberta's indicated intent in the NRFP document to permit alternate business models to be comparatively assessed with those of other proponents (which the evidence indicates Alberta even indicated a desire or ability to have done in later post mortem stages of the process).

REDACTED VERSION

ORDER:

79. The Procurement having been conducted in accordance with the impugned provisions of the CFTA, no remedial action is ordered.

80. The operational costs in this matter should be borne by Telus, consisting of \$4,906.70 arbiter costs and \$3,430.35 administrators' fees and expenses.

81. Tariff costs up to \$5,000 are awarded to Alberta upon presentation of accounts satisfactory to the Administrator.

82. Costs to be paid within 15 days of the expiry of the time for judicial review.

83. Thank you to counsel for your detailed submissions.

A handwritten signature in blue ink, appearing to read 'Cory J. Furman', is written above a horizontal line.

Cory J. Furman, K.C.