

IN THE MATTER OF THE TORONTO EXTERNAL CONTRACTS INQUIRY

**CLOSING SUBMISSIONS ON BEHALF
OF JAMES (JIM) ANDREW**

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Background

Jim Andrew ("Andrew") has worked in the information and technology field for over thirty-seven years. His career in Canada began in 1968 with his employment at the Province of Ontario. Andrew started as a member of the Treasury (Government Services), Corporate Services Department where he was involved in large computer installations. In 1984, Andrew was promoted to Manager, Technical Services at the Ministry of Natural Resources. In 1990, Andrew left the Province of Ontario to pursue alternative career opportunities with the Municipality of Metropolitan Toronto ("Metro").

At Metro, Andrew began his career as the Director of Operations. Immediately prior to amalgamation, Andrew was promoted to the position of Director, Information and Technology ("IT").

Under the newly amalgamated City of Toronto ("City"), Andrew was a successful candidate at a competition for the position of Executive Director, IT, on May 22, 1998. Also in 1998 through to June, 2000, Andrew was a member of the Year 2000 ("Y2K") Steering Committee which operated as an oversight committee to the Y2K Project. Andrew remained in his position as Executive Director, IT, until he resigned on February 2, 2001.

Upon Andrew's resignation as Executive Director, IT, he accepted the position of Vice-President of the Municipal Property Assessment Corporation, which he held until his retirement in May, 2004.

Response to Allegations of Misconduct

PART I - TMACS

Conflict of Interest

1. Andrew first met Michael Saunders ("Saunders") and his wife in early September, 1997 at his neighbour's house. At the time, Andrew was Director, IT at Metro. Saunders had

been working at the former City of North York ("North York") since 1987 as a consultant providing services in respect to North York's financial systems.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 1, para. 2 and
p. 22, paras. 72 – 73

Statement of Non-Contentious Facts for TMACS,
p. 1, para. 1

2. In 1997, Andrew attended Amalgamation IT Team meetings in North York. On some of those occasions, Andrew met Saunders and would have coffee with Saunders. On one occasion, Andrew had dinner with Saunders, Wanda Liczyk ("Liczyk"), Commissioner of Finance ("CFO") and Treasurer at North York, and Alan Shultz ("Shultz"), North York's Director of Accounting Services.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 23, para. 74

3. The dinner meeting was held at a restaurant on Yonge Street late in the evening. Andrew had been invited by either Saunders or Liczyk. During dinner, the discussions centred on IT issues. Andrew recalled having discussed the IBM product, Lotus Notes.

Testimony of Jim Andrew, TECI,
January 25, 2005, p. 70, line 22 - p. 71, line 13

4. On two occasions, Andrew golfed with Saunders and Liczyk:
 - (a) September/October 1997 – They discussed the benefits of various financial systems including Computron, SAP and Peoplesoft. Andrew recalled Saunders having a detailed knowledge of these systems; and
 - (b) October 4, 1999 – Also present was the newly appointed City Budget Chief, Glen Vollebrecht. Andrew recalled that business was discussed.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 27, paras. 93 - 94

Commentary

The encounters between Saunders and Andrew were informal and/or unscheduled. The 1997 meetings took place while Andrew was still at Metro and prior to Andrew's

participation in the evaluation or demonstration of Tax Management and Collection System ("TMACS"). Metro's interest in TMACS was limited by virtue of the fact that Metro had no revenue collection function.

By the October 4, 1999 golf outing, TMACS had long been established as the City's tax collection system.

There is no evidence that Andrew and Saunders shared a close, personal relationship, nor is there evidence that Andrew in any way exposed himself to a situation where he could be unduly influenced by Saunders. Andrew did not accept favours or advantages from Saunders.

Evaluation of TMACS and TXM2000

5. On July 15, 1997, the Metro Toronto Area Treasurers presented the Treasurers' decision to implement the Tax Manager 2000 ("TXM2000") system to Councillor Paul Sutherland ("Councillor Sutherland"), a member of the Toronto Transition Team overseeing the amalgamation of the six municipalities.

Affidavit of Paul Sutherland, TECI,
sworn October 14, 2004, p. 1, para. 2 and p. 3, paras. 13 – 14

6. On January 22, 1998, Ed DeSousa ("DeSousa") Director of Revenue, at the former City of Etobicoke, after attending at North York to see a TMACS demonstration, recommended to Liczyk that the City proceed with both systems to allow for a choice to be made between two fully developed, tested and implemented systems.

TEC010882

7. On April 27, 1998, Giuliana Carbone ("Carbone") commenced her position as Director of Revenue Services for the City. In this position she reported to Liczyk.

Affidavit of Giuliana Carbone, TECI,
sworn October 15, 2004, p. 1, paras. 2- 3

8. On May 13, 1998, Carbone directed a further demonstration and evaluation of TMACS and TXM2000. Wendy Quaintance ("Quaintance"), Co-ordinator of Customer Services

for the former City of Toronto, conducted the presentation for TXM2000. Saunders conducted the presentation for TMACS. At the request of Carbone, Andrew, Ben Smid ("Smid"), Internal Audit, and John DiLallo ("DiLallo"), the City's Senior Analyst, Budget Services, evaluated the two systems using a questionnaire adopted by Metro. The assessment compared the two systems in terms of size, technology and structure. Carbone asked users to evaluate the two systems in terms of major function and provide comments.

Affidavit of Giuliana Carbone, TECI,
sworn October 15, 2004, p. 5, paras. 17 -19

Statement of Non-Contentious Facts for TMACS,
p. 35, para. 126

Affidavit of Audrey Birt, TECI,
sworn September 23, 2004, p. 14, paras. 50 – 52

9. Andrew, DiLallo and Smid evaluated the systems based on the Risk Assessment Questionnaire.

TEC012223

TEC012228

10. Andrew prepared an updated report for Carbone outlining what the Risk Assessment Questionnaire revealed. This assessment report was attached to Carbone's memorandum to Liczyk dated May 26, 1998.

TEC013083

TEC013069

11. According to the report, the risk assessment procedure compared the two systems based on 34 questions asked of the developers relating to size, technology and structure. The result of the assessment indicated that TMACS had less risk than TXM2000. The areas of significant difference were technology risk and system complexity. The report clearly pointed out that the result of this risk assessment was only an "indication of risk" and noted that additional comparisons would have to be performed.

TEC013083

12. In addition to the risk assessment report of Andrew, all parties present submitted their findings: DeSousa (Etobicoke) [TEC012203]; Quaintance (Toronto) [TEC012539 and TEC012540]; Barb Baird and Ed Martin (Etobicoke) [TEC012242]; Margo Brunning ("Brunning") [TEC012248]; Nick Naddio (North York) [TEC012246]; Lesley Elkington (North York) [TEC012251]; Jennifer Nimmo (Scarborough) [TEC012255]; Theresa Scott [TEC012256]; Audrey Birt (Toronto) [TEC012257]; Tracy Lodge (Scarborough) [TEC012261]; Smid (City) [TEC010989]; and Robert Ripley ("Ripley") (Scarborough) [TEC012181].

Statement of Non-Contentious Facts for TMACS,
p. 36, para. 128

13. Carbone testified that she relied on the opinions of her staff and would take their views into account when making her decision.

Testimony of Giuliana Carbone, TECI,
November 4, 2004, p. 292, line 21 – p. 293, line 13

14. DeSousa sent a memorandum to Carbone on May 13, 1998 regarding the TMACS/TXM2000 demonstration. DeSousa concluded that no one system stood out dramatically. He recommended that they choose TXM2000, bring the system "in-house", compare the functionality of both systems and release a new version: possibly using TMACS as a template.

Affidavit of Ed DeSousa, TECI,
sworn August 20, 2004, p. 7, para. 29

TEC012203

15. On May 15, 1998, Quaintance submitted a memorandum wherein she opined that any decision should not be made based on a relatively cursory demonstration.

Affidavit of Wendy Quaintance, TECI,
sworn September 15, 2004, p. 3, para. 20

TEC012539

16. On May 19, 1998, Daniel Bill ("Bill"), a member of the TMX2000 Steering Committee sent an e-mail to various city staff in the Finance Department. In the e-mail he referred to a meeting he had that morning with Carbone. Bill advised that Carbone had made it clear

that TXM2000 had been chosen as the City's tax collection system and that the decision was final.

TEC012542

17. In her May 26, 1998 memorandum to Liczyk, Carbone reviewed the May 13, 1998 evaluation and risk assessment. Carbone concluded that although she had been concerned with the status of the TXM2000 project, she felt that they had no choice but to continue with TXM2000 for the time being. A change in direction at that point would pose risk in terms of being able to issue a tax bill on time. Carbone stated that if time permitted and the review had been done earlier in 1998, she would have recommended TMACS.

TEC013069

18. Carbone testified that she recognized that the May 13, 1998 demonstration was not a proper evaluation of the two systems and had admitted as much in her May 26, 1998 memorandum to Liczyk.

Testimony of Giuliana Carbone, TECI,
November 4, 2004, p. 311, lines 7 – 18

TEC013069

19. In the memorandum to Liczyk, Carbone recommended "[t]hat a complete evaluation of the two tax systems be conducted before the end of August 1998." Carbone made it clear that she did not want the May 13, 1998 demonstration and "the quick evaluation that Jim Andrew and John DiLallo did... to be the final evaluation.... It was not a proper evaluation."

TEC013069 at 13073

Testimony of Giuliana Carbone, TECI,
November 4, 2004, p. 316, line 23 – p. 317, line 4

Commentary

The May 13, 1998 demonstration enabled Carbone to familiarize herself with the two tax systems and assess whether the development and implementation of TXM2000 was proceeding on pace to ensure the timely issuance of the final 1998 tax bill.

The demonstration/evaluation was initiated by Carbone at the request of Liczyk. Carbone had specifically asked Andrew to assess the two systems in terms of size, technology and structure.

Andrew complied with the request and submitted a report to Carbone wherein he concluded that TMACS had less risk, although he admitted to her that "additional comparisons would have to be performed."

In addition to Andrew, Carbone sought and received findings and opinions from DiLallo, Smid, DeSousa and numerous City staff. Carbone testified that she relied on the opinions of her staff and took their views into account when making her decision.

Despite Andrew's findings and her own misgivings, Carbone concluded that the City should stay with TXM2000 "for the time being". Carbone did, however, acknowledge the limitations of the demonstration and stated that a more complete evaluation was required. Carbone testified that the May 13, 1998 demonstration was not a "proper evaluation".

The opinion and advice of Andrew, however qualified, does not appear to have been persuasive. Carbone's memorandum of May 26, 1998 indicated that she was not yet willing to abandon TXM2000.

The final decision to implement TMACS was not a direct result of the May 13, 1998 demonstration/evaluation, nor wholly based on the opinion and advice of Andrew. Regardless, the opinion and advice of Andrew was neither incomplete nor inappropriate.

Qualifications of Saunders and Maxson

(i) Saunders

20. Saunders was a Certified Public Accountant and a former Finance Director in several large American cities. While working with American Management Systems ("AMS") as Project Manager, Saunders successfully implemented Local Government Financial Systems at over 50 government sites.

Affidavit of Wanda Liczyk, TECI,
sworn October 14, 2004, p. 8, para. 30

TEC047737 at 047739

21. Saunders worked at North York's City Hall for 10 to 12 years, first as a consultant with AMS in the late 1980s. As upgrades were done to the AMS systems, Saunders returned periodically to provide assistance.

Affidavit of Alan Shultz, TECI,
sworn September 20, 2004, p. 1, para. 4

22. Saunders eventually left AMS but continued to work at North York as an independent contractor through his own company (Saunders & Associates/Beacon Software, Inc.).

Affidavit of Alan Shultz, TECI,
sworn September 20, 2004, p. 2, para. 5

23. Saunders helped to develop computer systems in the Building, Planning and Clerk's Departments, in addition to developing the tax and water collection systems. Although Frank Vizzacchero ("Vizzacchero") was the IT Director at North York, Saunders performed the function of IT Director in the development of new systems.

Affidavit of Alan Shultz, TECI,
sworn September 20, 2004, p. 2, para. 7

24. According to the Technical Review Team Integrated Tax System Presentation by Beacon Software, Inc. ("Beacon") dated June 17, 1997, Saunders had 20 years of government experience.

TEC047737 at 047739

(ii) Maxson

25. David Maxson ("Maxson") had worked as a consultant with AMS and had travelled to North York to conduct a presentation on the AMS tax systems. In or about 1994, Maxson left AMS and joined Saunders as a Project Manager in the development of North York's new tax system (TMACS).

Affidavit of Margo Brunning, TECI,
sworn October 17, 2004, p. 5, paras. 18 – 19

Affidavit of Edwin Ngan, TECI,
sworn September 1, 2004, p. 3, para. 12

26. Maxson was a Systems Analyst who was also capable of programming when required.

Affidavit of Edwin Ngan, TECI,
sworn September 1, 2004, p. 3, para. 15

27. Prior to working at North York, Maxson was involved in the implementation and customization of Real Estate and Personal Property Tax system for the City and County of Denver.

TEC047737 at 047739

Commentary

Regardless of how qualified Saunders and Maxson were to develop and maintain TMACS and the Water Management and Collection System ("WMACS"), Andrew was not involved in the decision to retain either of them. Saunders and Maxson were retained by North York prior to amalgamation. Any obligation to determine whether these two consultants were qualified to perform the task, fell upon North York.

Andrew became involved with Saunders and Maxson following amalgamation. Therefore, Andrew inherited the problems and the achievements of the former municipalities. Any due diligence with regard to these consultants should have been undertaken at the time they were first retained and not by Andrew over five years later.

Saunders and Maxson as Cost-Effective Option

28. The first version of North York's tax system, TMACS, was developed in the early 1990s. The decision to implement a more developed version as the City's tax collection system, was made in October, 1998.

Affidavit of Wanda Liczyk, TECI,
sworn October 14, 2004, p. 47, para. 144

Affidavit of Margo Brunning, TECI,
sworn October 17, 2004, TECI, p. 3, para. 10

29. TMACS is still in use today. It works.

Affidavit of Wendy Quaintance, TECI,
sworn September 15, 2004, p. 7, para. 46

30. WMACS has been in use since 1999. It works and is still in use today.

Affidavit of Wendy Quaintance, TECI,
sworn September 15, 2004, p. 7, para. 47

Commentary

Regardless of how successful TMACS and WMACS have been, Andrew was not involved in evaluating the cost-effectiveness of developing, implementing or maintaining either system.

Ownership of TMACS

(i) Mistaken Belief

31. It is Shultz's understanding that TMACS was owned by North York and is now owned by the City.

Affidavit of Alan Shultz, TECI,
sworn September 20, 2004, p. 7, para. 29

32. Ripley, former Manager of Financial Services for the former City of Scarborough, was under the impression that TMACS was owned by North York.

Affidavit of Robert Ripley, TECI,
sworn September 20, 2004, p. 15, para. 57

33. During a 1997 evaluation of TMACS and TXM2000, Brunning told evaluators that North York owned TMACS.

Affidavit of Robert Ripley, TECI,
sworn September 20, 2004, p. 15, para. 58

34. Liczyk always assumed and never questioned the fact that North York, and later the City, owned TMACS because these cities paid for its development.

Affidavit of Wanda Liczyk, TECI,
sworn October 14, 2004, p. 63, para. 195

Testimony of Wanda Liczyk, TECI,
November 8, 2004, p. 218, lines 20 – 23

35. Carbone understood at the time she issued the Request for Proposals ("RFP") for the development of TMACS and WMACS, that the City owned TMACS. Andrew advised her in 1998 that the City owned the source code because it had been developed on City hardware and on City time.

Affidavit of Giuliana Carbone, TECI,
sworn October 15, 2004, p. 41, paras. 126 and 128

(ii) Law Regarding Ownership

36. Where an independent contractor creates a computer program, the copyright in the program is assigned to another only by an explicit agreement in writing, which may be registered with the Registrar of Copyrights.

Affidavit of Bruce Stratton, TECI,
sworn October 26, 2004, p. 7, para.27

37. In Canada, copyright protection arises automatically upon the creation of an original work and does not require registration.

Affidavit of Bruce Stratton, TECI,
sworn October 26, 2004, p. 7, para. 30

38. Liczyk acknowledged that nothing was ever put in writing regarding the ownership of TMACS and that she never went to the Legal Division, Corporate Services Department ("Legal Division") regarding this issue.

Affidavit of Wanda Liczyk, TECI,
sworn October 14, 2004, p. 63, para. 196

Testimony of Wanda Liczyk, TECI,
November 8, 2004, p. 218, lines 24 – 25

39. Liczyk agreed in her testimony that she was primarily responsible for the fact that TMACS ownership was not clearly spelled out in the Beacon and Remarkable Software Inc. ("Remarkable") contracts.

Testimony of Wanda Liczyk, TECI,
November 9, 2004, p. 196, lines 7 – 10

40. Work Proposal letters ("proposal letters") from Beacon to North York, and later to the City, which were approved by Liczyk, did not contain a provision about the ownership and/or copyright of the documentation or materials prepared by Beacon.

TEC007512

TEC007506

TEC007508

41. Section 13 of Edwin Ngan's ("Ngan") contract contained a provision addressing document ownership and copyright of work performed by the contractor while under the employ of the City.

TEC017060 at 017062

Commentary

In order to avoid the confusion surrounding the issue of ownership, there should have been specific terms in the contracts specifying ownership of the source codes and intellectual property relating to TMACS. Since TMACS was initiated and developed in North York, it was its obligation and responsibility to ensure that the proper precautions were taken.

Treatment of Employees by Saunders

(i) General Behaviour of Saunders

42. Managers and end users were reluctant to oppose Saunders or speak their mind in his presence. It was assumed by all that he had the backing of Liczyk for whatever he did.

Affidavit of Cameron Currie, TECI,
sworn September 9, 2004, p. 4, para. 20

43. It seemed that Saunders had a good working relationship with Liczyk. He always gave the impression that he had Liczyk's backing and had influence with her.

Affidavit of Edwin Ngan, TECI,
sworn September 1, 2004, p. 5, para. 22

44. Saunders assumed authority beyond that of a usual consultant. In Carbone's view, Liczyk gave him authority.

Affidavit of Giuliana Carbone, TECI,
sworn October 15, 2004, p. 42, para. 130

45. Shultz found Saunders to be argumentative. If someone disagreed with him, he would at times, go over that person's head and discuss it with Liczyk.

Affidavit of Alan Shultz, TECI,
sworn September 20, 2004, p. 3, para. 11

46. In September, 1999, Quaintance was approached by Carbone regarding problems she was having with TMACS. On September 22, 1999, Brunning sent an e-mail to Quaintance informing her that Saunders was angry that she had gone to Carbone. Quaintance was told not to go to the Director without first going to Brunning.

Affidavit of Wendy Quaintance, TECI,
sworn September 15, 2004, p. 8, paras. 50 – 51

TEC048543

47. Saunders had referred to certain employees by derogatory nicknames.

Testimony of Margo Brunning, TECI,
November 4, 2004, p. 84, line 17 – p. 85, line 24

48. Vizzacchero saw Saunders as being arrogant, abrasive, disdainful and loud, saying that he would look down on people and referred to them with unflattering nicknames.

Affidavit of Frank E. Vizzacchero, TECI,
sworn October 26, 2004, p. 5, para. 25

(ii) Russell Brown

49. In October, 1998, Russell Brown ("Brown") and Saunders had a disagreement while in Brunning's office. Saunders called Brown "useless and worthless".

Affidavit of Margo Brunning, TECI,
sworn October 17, 2004, p. 21, para. 75

Testimony of Margo Brunning, TECI,
November 4, 2004, p. 73, lines 2 – 6

50. Brown was a desktop person and he was the lead for the installation of TMACS. Brown was also responsible for making sure that the right things were on each of the desktops in order to be able to converted to TMACS.

Testimony of Margo Brunning, TECI,
November 4, 2004, p. 72, lines 3 – 24

51. The heated discussion occurred in Brunning's office and probably took place because Brown could not meet the deadline set for the installation of TMACS. As a result, Saunders did not have very nice things to say about Brown.

Testimony of Margo Brunning, TECI,
November 4, 2004, p. 72, lines 3 – 24

52. Brown was extremely upset by the incident and notified the Human Resources Division ("Human Resources").

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 23, para. 75

53. This was a reported incident with all documentation retained by the Human Resources, Workplace Harassment Group.

Affidavit of Margo Brunning, TECI,
sworn October 17, 2004, p. 21, para. 75

54. Human Resources conducted interviews and based on those interviews, had drawn a conclusion of what had occurred.

Testimony of Jim Andrew, TECI,
January 25, 2005, p. 130, lines 2 – 7

55. Alan Deans, the Director of Human Resources for the Corporate Services Department, spoke with Andrew about the incident and subsequently drafted a letter dated August 12, 1999 under Andrew's signature. The letter was sent to Saunders. The letter was sent in Andrew's name because Brown was one of Andrew's staff members who had been working in the Finance Department. The letter clearly pointed out to Saunders that his behaviour in relation to Brown was "inappropriate" and did not belong in the workplace.

TEC051887

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 23, para. 75

56. This was the first and only incident that came to Andrew's attention.

Testimony of Jim Andrew, TECI,
January 25, 2005, p. 130, lines 20 – 22

Commentary

Licznyk's relationship with Saunders empowered him to the point where he felt he could act inappropriately with impunity. Liczyk made no apparent attempt to influence Saunder's behaviour and in so doing, permitted him to poison the work environment.

Saunders was retained by Liczyk and remained under her control throughout. He worked at the North York Civic Centre on an IT project for the Finance Department. As Andrew was located at Metro Hall, he was unable to observe Saunders' treatment of the employees and could only address those matters that were brought to his attention.

Andrew was not made aware of the behaviour of Saunders, on a daily basis. Rather, Andrew was only advised of one incident (Brown) and handled the matter in cooperation with Human Resources.

Training of City Staff on TMACS/WMACS

(i) TMACS

57. In late 1996 or early 1997, North York commenced work on the second version of TMACS. The original TMACS program had been written for the mainframe system. North York wanted it to be written in a different language and platform and moved to a GUI based system.

Affidavit of Margo Brunning, TECI,
sworn October 17, 2004, p. 7, para. 26

58. North York did not rewrite specifications or the business processes because this had been extensively done with the first version of TMACS in the early 1990s. The existing TMACS program was copied into a new language which duplicated the existing program. The new version underwent some modification primarily as a result of Current Value Assessment.

Affidavit of Margo Brunning, TECI,
sworn October 17, 2004, p. 8, para. 29

59. Ngan worked with Saunders and Maxson on the second version of TMACS, in addition to other North York staff, including a database administrator and programmers Robert Whiteman and Cameron Currie ("Currie").

Affidavit of Margo Brunning, TECI,
sworn October 17, 2004, p. 8, para. 30

60. Ngan was the technical lead, overseeing the technical construction of the program as designed by the Systems Analyst, Maxson. Once the template for the program structure had been created, other programmers could join the effort.

Testimony of Edwin Ngan, TECI,
October 27, 2004, p. 118, line 10 – p. 119, line 23

61. Currie testified that Ngan was well acquainted with the TMACS system and had the knowledge to run the system in the absence of Saunders and Maxson.

Testimony of Cameron Currie, TECI,
October 20, 2004, p. 240, line 3 - p. 241, line 8

62. Ngan testified that although he did not understand or know every aspect of TMACS, he did know which people were involved in the various business functions. Accordingly, in the absence of Saunders and Maxson, he would be able to resolve any problems or get the necessary assistance to resolve any problems.

Testimony of Edwin Ngan, TECI,
October 27, 2004, p. 177, line 14 – p. 178, line 11

(ii) WMACS

63. In or about 1996, Currie began work on a water billing system to replace the one in use in North York since 1990. Currie's memorandum to Shultz, Saunders, Denise Sanginesi, Director of Water Revenue, and Sue McDonald, Customer Service Manager Water Revenue, dated March 25, 1997, indicated that as at that date they had reached the "form" design stage for the new water billing system. This skeleton water billing system formed the basis of what would later be known as WMACS.

Affidavit of Cameron Currie, TECI,
sworn September 9, 2004, p. 1, para. 4

64. In the fall of 1998, Ripley advised Carbone that the City did not have a Y2K compliant water billing system. North York's system was 50 to 60 per cent complete. Carbone was advised that this system could be completed and tested by October, 1999.

Affidavit of Giuliana Carbone, TECI,
sworn October 15, 2004, pp. 26 – 27, para. 78
and pp. 27 – 28, para. 81

65. WMACS ran on the same platform as TMACS.

Affidavit of Edwin Ngan, TECI,
sworn September 1, 2004, p. 7, para. 33

66. Both TMACS and WMACS were built using the same tool (Powerbuilt) and used the same database (Oracle).

Testimony of Cameron Currie, TECI,
October 20, 2004, p. 183, lines 20 – 24

67. Currie had the requisite knowledge to run WMACS in the absence of Saunders and Maxson.

Testimony of Cameron Currie, TECI,
October 20, 2004, p. 240, lines 23-24

Commentary

The decision to retain Saunders and Maxson to develop and implement TMACS and WMACS rested with Liczyk, as did the willingness to place an extraordinary degree of reliance on two foreign – based consultants.

Although the situation was not optimal, through their involvement in the development and implementation of the two systems, City staff gained the experience required to maintain the systems after the departure of Saunders and Maxson. While admittedly, the reliance on Saunders and Maxson placed both North York, and later the City, in a precarious position, their centralized role was the creation of North York, in general, and Liczyk, in particular.

Documentation for TMACS/WMACS

68. Architectural documentation for TMACS was made available by Beacon to the Technical Group on June 17, 1997 during a demonstration of TMACS. Although Saunders did not permit the Technical Group members to take the documentation with them, a copy of the documentation was provided to Deloitte & Touche.

Statement of Non-Contentious Facts for TMACS,
p. 6, para. 18

Affidavit of Margo Brunning, TECI,
sworn October 17, 2004, p. 12, para. 42

69. Currie testified that Saunders and Maxson did not have much documentation, thereby making it difficult for someone from the outside to understand how the system worked and therefore, making it difficult to address problems.

Testimony of Cameron Currie, TECI,
October 20, 1994, p. 238, lines 8 – 23

70. Documentation of the proper methodology of the system would be created at the end of each step from the initiation of the project in order to scope definitions, timelines, systems design and functional design. Creating documentation is not a priority in a project that has to be completed in a short span of time. The documentation can be created later.

Testimony of Edwin Ngan, TECI,
October 27, 2004, p. 240, lines 9 – 16
and p. 241, line 22 – p. 242, line 2

71. Liczyk deposed that concerns about insufficient documentation were exaggerated. The choice of Powerbuilder/Oracle as a technical foundation would permit any capable programmer to understand the program.

Affidavit of Wanda Liczyk, TECI,
sworn October 14, 2004, p. 29, para. 97

72. In late 1998, Carbone shared her concerns with Andrew regarding the lack of sufficient in-house expertise in maintaining and running the two systems in Saunders and Maxson's

absence. Andrew allayed her fears, stating that software existed that could map or reverse engineer the programs to enable one to recreate the systems.

Affidavit of Giuliana Carbone, TECI,
sworn October 15, 2004, pp. 35 – 36, para. 106

Testimony of Jim Andrew, TECI,
January 25, 2005, p. 106, lines 14 – 24

Commentary

TMACS was developed in North York and was almost fully developed by the time Andrew became the Executive Director, IT on May 22, 1998. The responsibility to ensure that adequate documentation was created, fell on Liczyk.

That being said, both Andrew and Ngan seemed to share Liczyk's view that any inadequacies in the documentation could be remedied after the fact.

WMACS under the Y2K Project

73. The process for obtaining Y2K approval was as follows:

- (a) each department allocated a business analyst (Y2K coordinator) who was to request funding under the Y2K Project;
- (b) if the business analyst identified a particular initiative that they felt should qualify for Y2K funding, they would proceed with the preparation of a business case;
- (c) the business case would be signed off by the proposing department;
- (d) the business case would be reviewed by the Y2K Project Management Office ("PMO") and the PMO would designate it as a Y2K initiative; and
- (e) the business case would then be reviewed and approved by the Y2K Steering Committee and reported to Council.

Testimony of Jim Andrew, TECI,
January 25, 2005, p. 75, line 19 – p. 76, line 9

74. Mandy Rattner (Rattner") was the Y2K coordinator for the Finance Department. She was responsible for ensuring all Y2K work for Finance systems was completed. Rattner commissioned business cases for TMACS and WMACS.

Affidavit of Wanda Liczyk, TECI,
sworn October 14, 2004, p. 50, para. 151

75. On October 16, 1998, a "Y2K Business Case Document for Water Revenue" was signed by Carbone as Director of Revenue Services. The report was authorized by Bac Bhabha, Michael Ho and Kevin White, who were members of the Y2K Finance Project Team. The business case noted that the six water billing systems of the former municipalities were not Y2K compliant.

TEC005947

76. The business case for WMACS was subsequently reviewed and approved by the Y2K Steering Committee and reported to Council in July, 1999.

Affidavit of Wanda Liczyk, TECI,
sworn October 14, 2004, p. 50, para. 151

77. Carbone deposed that Andrew specifically told her that Beacon, Remarkable and Synerware EDP Services Inc. ("Synerware") "could" be contracted through the Y2K Project and "got the impression from him that there was no other choice."

Affidavit of Giuliana Carbone, TECI,
sworn October 15, 2004, p. 30, para. 90

Testimony of Giuliana Carbone, TECI,
November 5, 2004, p. 158, lines 4 – 15

Commentary

Andrew neither advised nor instructed Carbone that WMACS was to be designated as a Y2K initiative. Carbone's evidence is that Andrew said it "could" be contracted through the Y2K Project. Presumably, based on this possibility, Rattner in conjunction with Carbone, followed the established process and received the proper approvals required.

Beacon and Remarkable Contracts

(i) Procurement Procedures

78. The first version of North York's tax system, TMACS, was developed in the early 1990s. Work started on the second version at the end of 1996 or early 1997. Andrew did not assume the position of Executive Director, IT, at the City until May 22, 1998. Before this time, he was the Director, IT, at Metro. Metro did not have any tax collection responsibilities.

Affidavit of Margo Brunning, TECI,
sworn October 17, 2004, p. 3, para. 10
and p. 7, para. 26

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 1, para. 2
and p. 2, para. 3

79. In North York's IT Department, there was a long history of hiring individuals on contract if they had what were considered to be special skills. These particular individuals were not hired through a procurement process. Saunders was one of the individuals hired on this basis.

Affidavit of Alan Shultz, TECI,
sworn September 20, 2004, pp. 3 – 4, para. 14

80. Pursuant to section 7(4) of North York Purchasing By-Law 31623, the Director of Purchasing, in consultation with the Department Head, was authorized to contract without tender only under specific circumstances. The section specified that each purchase or contract negotiated under this authority shall be reported to the Executive Committee in a report signed by the Treasurer and appropriate Department Head, justifying the acquisition of goods and services.

TEC007580 at 07581

81. The agreements with Beacon for the development of TMACS in 1997 and 1998 were based on specific proposal letters submitted by Saunders to Liczyk. These proposal letters were approved by Liczyk and formed the basis under which Beacon and the City operated at that time.

TEC056692 at 56699

82. On December 7, 1998, Carbone wrote to Liczyk with respect to her recommendation to proceed to develop a water billing system built on the same platform as TMACS, and her recommendation that Beacon be contracted to complete development of WMACS. Liczyk supported the recommendation.

Affidavit of Wanda Liczyk, TECI,
sworn October 14, 2004, p. 49, para. 149

TEC013104

83. Carbone advised Ripley of her decision to use WMACS, which Ripley believed made sense since TMACS and WMACS had a shared database.

Affidavit of Robert Ripley, TECI,
sworn September 24, 2004, p. 16, paras. 64 – 65

84. There was no RFP issued for WMACS. Since there was no RFP issued, there should have been a report to Council for a request to sole source the project.

Affidavit of Robert Ripley, TECI,
sworn September 24, 2004, p. 17, para. 67

85. It did not occur to Carbone to issue an RFP for WMACS. With tight timelines in regard to Y2K and limited IT resources, there would not have been sufficient time to develop, evaluate and award an RFP.

Affidavit of Giuliana Carbone, TECI,
sworn October 15, 2004, p. 28, para. 84

(ii) Operating Without Contracts

86. On October 7, 1998, Carbone recommended to Liczyk that the City should switch from TXM2000 to TMACS. Liczyk agreed with the recommendation and advised the Chief Administrative Officer ("CAO"), Michael Garrett ("Garrett"), of the decision. Liczyk advised Carbone that Council approval was not required as it was an administrative decision. Garrett agreed that Council approval was not required.

Affidavit of Giuliana Carbone, TECI,
sworn October 15, 2004, pp. 23 – 24, paras. 67 – 70

87. In or about October, 1998, following the decision to switch to TMACS, Carbone spoke to Andrew about her concerns regarding the need to have Beacon and Remarkable enter into written contracts.

Affidavit of Giuliana Carbone, TECI,
sworn October 15, 2004, p. 29, para. 86

88. Up to this point, there were no written agreements. Liczyk testified that in the period of 1997 to 1999, she was primarily responsible for the absence of comprehensive contracts for Beacon and Remarkable.

Testimony of Wanda Liczyk, TECI,
November 9, 2004, p. 196, lines 11 – 17

89. Liczyk had not advised anyone that she had been receiving written proposal letters from Beacon and Remarkable, or that she authorized payments to Saunders and Maxson on that basis.

Testimony of Wanda Liczyk, TECI,
November 9, 2004, p. 213, lines 2 – 7

(iii) Preparation of Contracts

90. Subsequent to Carbone's discussion with Andrew regarding the need to have Beacon and Remarkable enter into written contracts, Andrew contacted Brendan Power ("Power") of the External Partners and Agreements group ("External Partners group"). The External

Partners group was responsible for identifying all contracts affected by Y2K, managing those contracts for Y2K compliance and creating new Y2K compliant agreements where none existed. In all cases, Power worked closely with the City's Legal Division and the Purchasing and Materials Management Division ("Purchasing Division").

Testimony of Jim Andrew, TECI,
January 26, 2005, p. 255, lines 1 – 8

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, pp. 12 – 13, para. 57
and p. 13, para. 59

Testimony of Lana Viinamae, TECI,
December 6, 2004, p. 187, lines 11 – 14

91. In contacting Power, Andrew was acting as a conduit. He brought information to the External Partners group so that it could develop Y2K compliant contracts for Beacon and Remarkable.

Testimony of Lana Viinamae, TECI,
December 7, 2004, p. 145, lines 14 – 25

92. On June 3, 1999, the City and Beacon executed an agreement, signed by Lana Viinamae ("Viinamae") and Garrett, for IT services expiring December 31, 2000. Attached to the contract was a schedule with a commencement date of January 3, 1999 for "Project Manager-Development and implementing a Water Revenue system replacement for year 2000 and modification to City Tax system for main billing and Phase-in adjustment." The schedule was signed by Carbone, Viinamae and Brunning.

TEC007748

Statement of Non-Contentious Fact for TMACS,
p. 54, para. 191

93. On the signing page was a box containing the following: "Authorized by Report No. 24 of the Corporate Services Committee adopted by Council on the 25th day of November, 1998."

TEC007748 at 07757

94. On September 14, 1999, Saunders sent an e-mail to Power stating in part, "Brendan, Attached are the contract and schedule for Remarkable Software which is the contractor

working on the water system. Please review and make changes to the contract for them to sign. I made some of the changes but, didn't know if we have others.”

TEC004601

95. On or about September 24, 1999, the City and Remarkable executed an agreement, signed by Viinamae and Garrett, for the provision of IT services, dated September 15, 1999, expiring December 31, 2000. Attached to the contract was a schedule for services commencing on January 3, 1999, signed by Carbone, Viinamae and Brunning. The contract and schedule was identical in form to the Beacon contract.

COT016818

TEC016489

96. Power deposed that he did not negotiate the terms and conditions of the Beacon and Remarkable contracts. If the City did not have a written contract with a particular supplier, he would facilitate the preparation of the contract by providing a standard form contract. The schedule setting out the details such as the hours of work and rate of pay, would be provided to him by either the department or the supplier. The schedules would usually be verified by the department hiring the contractor or consultant.

Affidavit of Brendan Power, TECI,
sworn January 18, 2005, p. 1, para. 2

97. The Beacon and Remarkable contracts appear to be standard form contracts. Power did not know who prepared the schedules. He would have received them from either the Finance Department or from Saunders and/or Maxson.

Affidavit of Brendan Power, TECI,
sworn January 18, 2005, p. 1, para. 3
and pp. 1- 2, para. 4

(iv) Extension of Contracts

98. The Beacon and Remarkable contracts were effective until December 31, 2000, with a one year option to extend at the City's sole discretion.

TEC007748

COT016818

99. On December 20, 2000, Andrew sent a memorandum to Joan Anderton ("Anderton") (Commissioner of the Corporate Services Department) regarding the extension of the contracts. The memorandum was in Andrew's name but was signed on his behalf by Viinamae. The memorandum advised that a report to the Administrative Committee was being prepared requesting an extension until June 30, 2001.

TEC016384

100. The Staff Report dated December 22, 2000, from Anderton to Council, does not include Beacon and Remarkable in the attached list of contractors.

TEC016984

TEC016986

101. The absence of Beacon and Remarkable from the list of contractors requiring the extension of their contracts, was remedied by the Staff Report dated January 23, 2001.

TEC017382

102. At its January 30, 2001 meeting, Council adopted the January 23, 2001 Staff Report, thereby approving the extension of the Beacon and Remarkable contracts to June 30, 2001.

TEC016391

103. In July, 2000, Viinamae learned from the Contract Management Office ("CMO") that the City's Accounts Payable Division had ceased paying the invoices of certain Y2K contractors whose work had continued beyond the June, 2000 expiry of the CAO's delegated authority.

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, p. 16, para. 70

104. Viinamae testified that she spoke to Lou Pagano ("Pagano") (Purchasing Division). Pagano explained that there were two options available. The first option was to go back to the market and issue an RFP. The second option was to get the CAO's approval to extend the funding of the retained resources.

Testimony of Lana Viinamae, TECI,
December 6, 2004, p. 205, line 12 – p. 206, line 1

105. A memorandum dated August 3, 2000 was sent to Garrett requesting his authorization to extend funding. The memorandum was prepared by Power and signed by Andrew. The memorandum was copied to Liczyk, Anderton, Pagano, Councillor Dick O'Brien ("Councillor O'Brien") and Jim Anderson ("Anderson") (Director, Legal Division).

COT031084

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, p. 16, para. 71

106. Although the CAO's delegated approval had expired in June, 2000, Garrett authorized continued funding for the affected contractors until December, 2000.

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, p. 16, para. 71

(v) Expense Provisions in Contracts

107. Pursuant to section 9(1) of the Beacon and Remarkable contracts, only expenses specified in the schedules were to be paid by the City.

TEC007748 at 07753

COT016818 at 16823

108. The schedules provided that the City would be responsible for all travel associated with the provision of contractual services, up to \$40,000.00 (Cdn). The schedules were signed by Carbone, Viinamae and Brunning.

TEC007748 at 07760 and 07761

TEC016489 at 16490 and 16491

(vi) Responsibility for Contractual Services

109. Carbone deposed that shortly after she started as the Director of Revenue Services in April, 1998, Andrew advised her that Saunders and Maxson were Corporate IT resources.

Affidavit of Giuliana Carbone, TECI,
sworn October 15, 2004, pp. 28 – 29, para. 85

110. While Beacon and Remarkable provided IT services, the services were supplied directly to the Finance Department.

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, p. 14, para. 61

111. According to the Auditor's Report dated May 31, 2002, the Beacon and Remarkable contracts were administered by the IT Division due to the fact that the budgets for the contract amounts were maintained in that Division. Yet, according to documented policy related to Y2K expenditures contained in a Y2K policy manual, the Finance Department was to "keep track of their own spending and not go over their stated amounts requested." The Auditor concluded that in his view, "there was a lack of an understanding in terms of who actually was responsible for the administration of the contracts because, even though the budget was maintained in the Information and Technology Division, the system being developed, in fact, was a Finance Department System."

TEC056692

Commentary

The decision to hire Saunders and Maxson without going through a procurement process was a decision made in North York and pre-dated Andrew's involvement with either individual.

The decision to forego the issuance of an RFP for WMACS, was made by Carbone, with Liczyk's concurrence.

The decision to have Beacon and Remarkable enter into formal written contracts was prompted by Carbone's recommendation that the City switch from TXM2000 to TMACS. Until the 1999 contracts were executed, the City relied on the policies and procedures carried over from North York. Liczyk accepted responsibility for the absence of comprehensive contracts.

Although Andrew was asked by Carbone to initiate the contract process, his role was that of a conduit between Carbone and the External Partners group. Andrew did not draft or

negotiate the terms of the contracts or the attached schedules, nor did he sign these documents.

As there was no prior written contracts between Beacon and Remarkable, and the City, it would appear that Power provided the standard form contract in respect to Beacon. Power did not prepare the schedules. He would have received them from either the Finance Department or from Saunders and/or Maxson.

The Remarkable contract and schedule were provided to Power by Saunders approximately three months after the Beacon contract was executed. Although Saunders provided the contract and schedule, one would have expected the Remarkable contract and schedule to closely mirror that of Beacon.

The Beacon and Remarkable contracts contained a one year option to extend it beyond December 31, 2000. When it became apparent that Beacon and Remarkable's services would be required beyond the currency of their contracts, Andrew undertook the steps necessary to obtain an extension, with Council's approval.

When the Accounts Payable Division ceased paying the invoices of certain Y2K contractors in July, 2000, Viinamae was advised that she could either issue an RFP, or obtain authorization from the CAO to continue funding. With this information, Andrew sought and obtained the CAO's authorization. It is now apparent that the CAO had no such authority at that time, since the Y2K delegated approval had expired in or about June, 2000. However, at the time of the request, this fact was not well known. The memorandum requesting the extended funding, was copied to Liczyk, Anderton, Pagano, Councillor O'Brien and Anderson. No one took issue with the request. Moreover, the CAO authorized the request, not knowing that his authority had expired.

Andrew did not draft or execute the contracts or schedules and therefore bears no responsibility for the deficiencies associated with the expense provisions.

Responsibility for the contractual services provided by Beacon and Remarkable ultimately rests with the Finance Department. Admittedly, the contractors were IT resources and the budget was maintained in the IT Division. Yet the services were provided directly to the Finance Department and accordingly, it was that Department who

was best suited to determine whether there had been compliance with the contractual provisions. Furthermore, the terms contained in the schedules regarding the work, rate of pay, hours and expenses, were negotiated and approved by the Finance Department, with IT playing no discernible role.

Beacon and Remarkable Invoices

(i) Approval Without Authorization

112. From the time Liczyk was appointed North York's Commissioner of Finance and Treasurer in 1992, to October 1997, Liczyk received invoices from Saunders and Maxson and confirmed with Brunning that the work had been performed to her expectations. The invoices would then be initialled and given to Shultz and Ken Colley ("Colley") for review and approval. From October to December, 1997, Liczyk believed the invoices went directly to Shultz and Colley for review and approval.

Affidavit of Wanda Liczyk, TECI,
sworn October 14, 2004, p. 62, paras. 188 – 189

113. From January, 1998 to Carbone's appointment as Director of Revenue Services, the invoices were sent to Shultz who in turn sent them to IT, Corporate Services Department. Andrew had not yet been appointed Executive Director, IT.

Affidavit of Wanda Liczyk, TECI,
sworn October 14, 2004, p. 62, para. 190

Affidavit of Alan Shultz, TECI,
sworn September 20, 2004, p. 9, para. 34

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 2, para. 3

114. Following Carbone's appointment in April, 1998 she took responsibility for authorizing payment of invoices submitted by Saunders and Maxson. Carbone would review the invoices and verify that the work detailed in the invoices had been completed.

Affidavit of Alan Shultz, TECI,
sworn September 20, 2004, p. 9, para. 34

Affidavit of Wanda Liczyk, TECI,
sworn October 14, 2004, pp. 62 – 63, para. 191

115. Even though contractors would be hired to carry out Y2K-related work under the Y2K budget, the services they provided were supplied directly to a particular City department. In the case of Saunders and Maxson, their services were supplied directly to the Finance

Department. Their invoices would be submitted to that Department for approval, After approval, the invoices would be sent to Viinamae so she could verify that funds had been budgeted for the department under the Y2K Project and assign a budget account number, against which payment of the invoice was to be applied.

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, p. 14, para. 61

116. Before approving payment of the invoices, Viinamae would ensure that Carbone had signed the invoices as responsible department manager. The signature indicated that Carbone had acknowledged receipt by her Department of the services and that the expenses being charged were reasonably related to the invoiced work. Thereafter, all Y2K-related invoices would be sent to Shultz for his approval.

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, p. 14, paras. 61 – 62

117. Andrew signed invoices only during the period of April 3, 2000 to June 2, 2000. On each occasion, Andrew approved the invoice payments while Carbone signed the invoices certifying that "all materials, supplies or services herein described [had] been received or rendered to [her] satisfaction." Reference was made to the purchase orders under which the services had been provided.

TEC004797; TEC004772; TEC004773;
TEC004804; TEC004811; TEC005109;
TEC005110; TEC005111; TEC005112;
TEC005113; TEC005114; TEC005115

(ii) Approval Without Review

118. The department receiving the services from Saunders and Maxson was the department responsible for approving the invoices. The recipient department was most familiar with what had been provided and would therefore be in the best position to make the assessment.

Testimony of Alan Shultz, TECI,
November 2, 2004, p. 190, lines 10 -21

119. The role of the IT Division, and later, the Y2K Project, was to review the invoices to track the amounts for budget purposes.

Testimony of Alan Shultz, TECI,
November 2, 2004, p. 190, line 22 – p. 191, line 2

120. Regardless of who was reviewing the invoices, they should have reviewed the invoices against the contracts to ensure that proper authority existed.

Testimony of Alan Shultz, TECI,
November 2, 2004, p. 172, lines 18 – 25

(iii) Approval of Hours in Excess of Time Worked

121. Carbone deposed that she did not question the hours charged by Saunders and Maxson on their invoices because she knew they worked long hours.

Affidavit of Giuliana Carbone, TECI,
sworn October 15, 2004, p. 34, para. 102

(iv) Unreasonable and Excessive Expenses

122. When Carbone first received the invoices, Liczyk told her to speak with Shultz if she had any questions regarding the invoices.

Testimony of Giuliana Carbone, TECI,
November 5, 2004, p. 94, lines 8 – 23

Affidavit of Giuliana Carbone, TECI,
sworn October 15, 2004, p. 32, para. 97

123. Carbone was assured by Shultz that the charging of expenses was consistent with past practices inherited from North York.

Affidavit of Giuliana Carbone, TECI,
sworn October 15, 2004, p. 32, para. 99

Testimony of Giuliana Carbone, TECI,
November 5, 2004, p. 96, lines 15 – 19

124. The schedules attached to the Beacon and Remarkable contracts provided that the "City is responsible for all associated travel expenses in providing services to the City. Travel expenses will be paid by the City when invoiced by the Consultant." Travel expenses are \$40,000.00 (Cdn).

TEC007748 at 07760

TEC016489 at 16490

125. Carbone assumed that the expenses charged by Saunders and Maxson were being reviewed by "IT contract management" and that when signing the invoices, Andrew was also approving the expense portion of the invoices.

Affidavit of Giuliana Carbone, TECI,
sworn October 15, 2004, p. 32, para. 96

126. During his testimony, Shultz stated that he would have expected Carbone in reviewing the invoices in the first instance, to have also reviewed the expenses.

Testimony of Alan Shultz, TECI,
November 2, 2004, p. 192, lines 18-25

(v) Time, Services, Expense in Excess of Contract Amount

127. Section 3 of the schedules to the Beacon and Remarkable contracts provided that "[t]he City will be charged for any hours worked on a time and material basis including for hours in excess of the estimated hours. However, any excess hours will be approved before they are incurred."

TEC007748 at 07760

TEC016489 at 16490

128. Carbone agreed during her testimony that the person whose department was receiving the services would be expected to know what work they did and ensure that they worked the hours they claimed to have worked on a particular day.

Testimony of Giuliana Carbone, TECI,
November 5, 2004, p. 176, lines 5 – 16

129. Carbone further agreed that Saunders and Maxson were working in her office and not with Corporate IT at Metro Hall. As such, she would be in a better position than someone at Metro Hall to assess the accuracy of the time and expenses charged.

Testimony of Giuliana Carbone, TECI,
November 5, 2004, p. 177, line 13 – p. 179, line 4

(vi) Billing Time while Entertaining

130. Carbone testified that the person whose department was receiving the services would be expected to know if Saunders and Maxson worked the hours they claimed to have worked on a particular day.

Testimony of Giuliana Carbone, TECL,
November 5, 2004, p. 176, lines 5 – 16

(vii) Failure to Submit Receipts

131. Section 9(3) of the Beacon and Remarkable contracts provided in part, as follows: "the City reserves the right to require further proof or documentation from the Consultant in respect of services performed or expenses incurred by the Consultant and the Consultant shall provide, without delay, such further proof or documentation."

TEC007748 at 07753

COT016818 at 16823

132. Neither North York nor the City had a policy requiring consultants or contractors to submit receipts to support the expenses claimed on their invoices. Expenses were not verified, reviewed for reasonableness or questioned.

Affidavit of Wanda Liczyk, TECL,
sworn October 14, 2004, p. 10, para. 35

Affidavit of Alan Shultz, TECL,
sworn September 20, 2004, p. 9, para. 35

(viii) GST

133. Shultz assumed that the invoices submitted by Saunders and Maxson did not have a GST component to them because they were American Contractors. This assumption was made in respect to the entire invoice, including expenses that were incurred in Canada and paid for in Canadian funds. The schedules attached to the Beacon and Remarkable contracts provided that the "[i]nvoice amounts will include taxes."

Affidavit of Alan Shultz, TECI,
sworn September 20, 2004, p. 10, para. 39

TEC007748 at 07760

TEC016489 at 16490

(ix) Exchange Rate

134. The schedules to the Beacon and Remarkable contracts indicated that "[i]nvoice amounts will be prepared in US dollars and will be paid in US funds." The contracts did not contain provisions in respect to the rate of exchange.

TEC007748 at 07760

TEC016489 at 16490

TEC007748

COT016818

Testimony of Alan Shultz, TECI,
November 2, 2004, p. 62, line 13 – p. 63, line 15

Commentary

Since amalgamation, the Beacon and Remarkable invoices were approved by Andrew on only twelve occasions, over a period of two months, in 2000. In each case, Andrew approved the invoices for payment, only after Carbone had certified that all materials, supplies or services described in the invoices had been received and rendered to her satisfaction.

Carbone testified that the person whose department received the services was in the best position to assess the invoices. Since Saunders and Maxson provided services directly to the Finance Department, Carbone bears that primary responsibility.

Yet Carbone admitted that while she received the invoices and time sheets, she did not question the hours billed by Saunders or Maxson.

In respect to the expenses, Carbone indicated that she had concerns, but seemed satisfied with Shultz's explanation that it was consistent with the past practices of North York.

Had this not been satisfactory, presumably she could have exercised the City's contractual right to require further proof or documentation of the expenses being claimed.

Carbone stated in her affidavit that she assumed that Andrew was also reviewing the expense portion of the invoices. She was apparently unaware that Andrew was involved in the approval of invoices for only a two month period, and only as a second signature, approving payment.

Responsibility for the City's failure to apply GST or to ensure proper exchange rates on Canadian dollar expenses, must be borne by the Accounting Services Division of the Finance Department.

PART II - Dell Computer Corporation

Mini –RFQ – December 7, 1998

(i) RFP

135. On August 25, 1998, the City issued an RFP (No. 3401-98-01030).

TEC019416

136. The purpose of the RFP was to select at least two full-service value-added resellers ("VARs") to supply hardware, software and related services to the City on a non-exclusive basis until December 31, 2001. The VARs would be treated as "vendors of record" such that the City would not be required to re-tender for each IT acquisition.

Affidavit of Kathryn Bulko, TECI,
sworn September 15, 2004, p. 2, para. 9

137. Kathryn Bulko ("Bulko") co-ordinated the RFP at the request of Andrew. Bulko drafted the RFP, together with the assistance of Kathy Savage ("Savage"), Assistant Project Manager of Y2K, and the late Brian Loreto of the City's Legal Division. The RFP was issued by the Purchasing Division in the ordinary course.

Affidavit of Kathryn Bulko, TECI,
sworn September 15, 2004, p. 2, paras. 8 and 10

138. The drafting team was provided with boilerplate terms to insert into the RFP. Those involved in the drafting had prior experience and were qualified to carry out the task.

Testimony of Kathryn Bulko, TECI,
November 23, 2004, p. 133, line 5 - p. 135, line 15

Testimony of Jim Andrew, TECI,
January 25, 2005, p. 150, line 3 - p. 151, line 9

139. Pursuant to Clause 9.6 of the RFP, entitled "Non-Exclusivity", "[t]he awarding of this contract to successful proponents is not a guarantee of exclusivity. Thus, the successful proponent(s)' products and solutions will be identified and recommended to the user community, but the users may go elsewhere for their acquisitions, if they so desire."

TEC019416 at 019438

140. The RFP closed on September 17, 1998. Thirteen proposals were submitted. The proposals were reviewed by a review committee made up of Bulko, Connie McCutcheon, Graeme Reading, Sandy Campbell, Savage and Zalina Maharaj ("Evaluation Team").

TEC019416

TEC019479

141. The Evaluation Team's Analysis Report for the RFP proposals identified Questech Services Inc. ("Questech"), SHL Systems Co. ("SHL") and GE Capital IT Solutions ("GE Capital") as the successful proponents to the RFP. Under the heading "Recommendation" the report stated that "Dell computer systems may be acquired directly from Dell and shipped to one of the recommended full-service vendors for added value services." This stipulation was included in the report because several departments (primarily the former Metro Public Works Department) within the City were already using Dell Computer Corporation ("Dell") desktops. The Analysis Report was sent with a memorandum to Frank Spizarsky ("Spizarsky") (Purchasing Division) on October 14, 1998. The memorandum was not copied to Andrew.

TEC019479

Affidavit of Kathryn Bulko, TECI,
sworn September 15, 2004, p. 2, para. 13

TEC019478

142. A Report to the Corporate Services Committee dated November 4, 1998 was submitted. The report was drafted by Bulko and was presented in the name of the CFO and Treasurer, Liczyk, and the then Commissioner of Corporate Services Department, ("Rodrigues").

TEC046612

143. The report recommended that "proposals submitted by Questech Services Inc., SHL Systems Co. and GE Capital IT Solutions be accepted to provide Microcomputer Hardware, Software and Services over a 3-year period to all City departments...as required". The report did not include the stipulation permitting Dell desktops to be acquired directly from Dell.

TEC046612

144. Report 17, Clause 20 of the Corporate Services Committee (based on the November 4, 1998 report) was adopted by Council at the Council Meeting of November 25, 26 and 27, 1998. There was an amendment to the report stating, "[i]t is further recommended that the Commissioner of Corporate Services be requested to submit a further report to the Economic Development Committee on the hardware and systems configuration."

TEC019485 at 19485

(ii) Y2K Plan for Desktop Computers

145. In August 1998, Viinamae recently appointed Director of the Year 2000 Project, asked Michael Franey ("Franey") to assist her with the technology assessment and development of the business cases for funding under the Y2K Project. With assistance from IBM Global Services (Project Management Team, Y2K Project), Franey undertook the preparation of the business cases for the remediation of desktops, mainframes and servers.

Affidavit of Michael Franey, TECI,
sworn October 25, 2004, p. 1, para. 2

146. The business case for the desktop environment was finalized in October, 1998. It contemplated the remediation or replacement of approximately 13,670 non-Y2K compliant desktops throughout the City.

COT074872

147. According to the Report to Strategic Policies and Priorities Committee from the CAO (Garrett), the CFO and Treasurer (Licyzk) and the Commissioner of Corporate Services Department (Rodrigues) dated November 3, 1998, "only those [desktops] that are deemed obsolete or are too costly to repair will be replaced."

COT030963 at 30975

148. A desktop would be replaced if the cost of remediation was to exceed \$1,000.00. On this basis 3,178 desktops were identified for replacement. The balance of the desktops were to be remedied and tested.

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, p. 2, para. 7

COT030963 at 30975

149. The desktop replacements were required to be "Enterprise Tier" as identified by the Gartner Group. Prior to late 1998, there were three Enterprise Tier manufacturers: IBM, Compaq and Hewlett Packard. Sometime in late 1998, Dell was upgraded to Enterprise Tier while Hewlett Packard was downgraded.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 33, para. 118

150. The City's Y2K Business Continuity Plan ("Y2K Plan") was approved by Council at its meeting on November 25, 26 and 27, 1998.

COT077369

151. The Y2K Project's strategy, wherever possible, was to utilize the existing city suppliers to meet its Y2K needs. The RFP process was a potential source for suppliers of Y2K – ready desktops.

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, p. 1, para. 5

152. The PMO was responsible for management of the Y2K Project and all of its components. All management, planning and administration functions reported to a team of executive and senior managers. The team consisted of:

- (a) Director, Y2K Project;
- (b) IBM Project Executive;
- (c) Assistant Project Manager;
- (d) Manager, Y2K Project Office;
- (e) two Executive Assistants; and
- (f) four Clerical Staff

COT064433 at 64434

- (iii) Mini-RFQ – December 1998

153. In December, 1998, Viinamae directed Bulko to carry out an RFQ ("Request for Quotes") to acquire desktops for the Y2K Project.

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, p. 2, para. 10

154. According to Bulko, she was directed by Viinamae to contact the three Enterprise Tier manufacturers: IBM, Compaq and Dell. Viinamae denied having instructed Bulko to include Dell. Franey asserted that Viinamae instructed him to inform Bulko to obtain hardware prices directly from the manufacturers, including Dell.

Affidavit of Kathryn Bulko, TECI,
sworn September 15, 2004, p. 4, para. 24

Affidavit of Michael Franey, TECI,
sworn October 25, 2004, p. 3, para. 12

155. On December 7, 1998, Bulko sent an e-mail to the City's contacts at Dell, IBM and Compaq, copying the three VARs. The manufacturers were asked to provide a common special bid price for a desktop with a specified configuration, to the three re-sellers. The manufacturers were asked to submit the quotes to the VARs on December 8, 1998. The e-mail stated that the "resellers will be asked to provide us [city] with a quote on their value added services in addition to the price provided....for the PC."

Affidavit of Kathryn Bulko, TECI,
sworn September 15, 2004, p. 4, para. 29

TEC052888

156. The expectation was that Dell would provide a quote to the three VARs.

Affidavit of Kathryn Bulko, TECI,
sworn September 15, 2004, p. 4, para. 31

157. On December 8, 1998, Bulko sent an e-mail to the VARs wherein she stated that "[i]f Dell does not provide you with a quote, please quote on your individual value added services only." The stipulation in the e-mail indicated that Bulko was aware that Dell may not be planning on dealing through the VARs in providing hardware to the City.

COT040953

158. Andrew was not copied on the e-mail correspondence between Bulko and the manufacturers and resellers.

COT040953

TEC052888

159. IBM and Compaq sent their bids to the VARs, as per the terms of the Mini-RFQ, while Dell sent its bid directly to the City.

Affidavit of Kathryn Bulko, TECI,
sworn September 15, 2004, p. 4, para. 32

160. The results from the three resellers were compared and the numbers were provided to Viinamae.

TEC052889

161. The Dell quote was \$200.00 less per desktop than the quotes of the other manufacturers. Bulko testified that the decision to go with Dell was made by Viinamae and that Spizarsky approved of the decision. Viinamae denied being involved in the decision to select Dell, despite being the Y2K Project Director and having instructed Bulko to carry out the RFQ.

Testimony of Kathryn Bulko, TECI,
November 22, 2004, p. 179, lines 1 - p. 180,
line 2 and p. 180, lines 8-25

162. Bulko deposed that on December 24, 1998 she spoke with Dan Loney ("Loney"), an IBM salesman. He said he was on his way to see Viinamae and was carrying an envelope. Later, Viinamae came to Bulko's office and advised that IBM had offered a counter-bid. Andrew supported her recollection stating that Viinamae had received the counter-bid on December 24, 1998, but did not open it because it was outside the tender period. Viinamae denied being aware of the counter-bid at that time and claimed not to have met Loney on that day.

Affidavit of Kathryn Bulko, TECI,
sworn September 15, 2004, p. 5, paras. 39-40

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 33, para. 120

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, p. 4, para. 19

163. In early November, 1998, Dell lobbyist Jeffrey Lyons ("Lyons") had contacted Andrew by telephone to discuss the Dell business model. The evidence suggests that by the time of the telephone conversation, Dell was aware that it was not chosen as one of the VARs pursuant to the RFP. Lyons testified that he expressed his dismay with the apparent decision not to include Dell as a potential supplier of the City's hardware. Andrew informed Lyons that if Dell wanted to supply hardware to the City it would have to go through one of the selected VARs. Lyons did not deny that Andrew had expressed this position.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 32, para. 115

Testimony of Jeffrey Lyons, TECI,
January 17, 2005, p. 71, line 11- p. 72, line 21

Commentary

Andrew asked Bulko to co-ordinate the August 25, 1998 RFP. The RFP pre-dated the creation of the Y2K Project. Andrew was not involved in the drafting of the RFP, nor was he involved in the analysis of the proposals submitted in response to the RFP.

At the same Council meeting that Council adopted Clause 20, Report 17 of the Corporate Services Committee, Council approved the Y2K Plan which contemplated the remediation or replacement of the City's non-Y2K compliant desktops.

It was Viinamae who directed Bulko to carry out the December 7, 1998 RFQ and based on the evidence, likely instructed Bulko directly or indirectly, to include Dell. Other than Andrew's very limited involvement regarding IBM's late counter-bid, there is no evidence supporting the allegation that he was in any ways involved with the December Mini-RFQ. The Mini-RFQ was clearly undertaken by the Y2K Desktop team, of which Andrew was not a member. Andrew held the position that Dell should be expected to sell through the VARs and not directly to the City.

Y2K Steering Committee Approval of Change Request

(i) Andrew and Viinamae's Reporting Relationship

164. Immediately prior to amalgamation, Andrew held the position of Director, IT at Metro. During a portion of the 1990s, leading up to amalgamation, Viinamae reported directly to Andrew. Viinamae testified that she respected the opinion of Andrew and would "bounce ideas off him and seek feedback." She looked to him as a mentor.

Testimony of Lana Viinamae, TECI,
December 6, 2004, p. 50, lines 20-24
and December 7, 2004, p. 102, lines 1-22

(ii) Y2K Steering Committee

165. Contained within the Orientation Guide for new Y2K staff is a "Y2K Project Orgchart" dated February 9, 1999, there was no mention of the Executive Director, IT. Andrew was listed as one of the members of the Y2K Steering Committee.

COT064388 at 64402

166. Under "Roles and Responsibilities" are listed: the IBM Executive Team, the PMO, Departmental Project Managers, Account Project Managers, Quality Assurance Managers, the Y2K Steering Committee and the Director of the Y2K Project.

COT064388 at 64403 and 64404

167. The Director of the Y2K Project "is responsible for developing the project strategy, overseeing the Project Office and all Y2K related Projects. The Director is accountable for the development, quality and successful delivery of the Y2K Program and project plan." The general functions of the Director include:

- (a) coordinating and overseeing the City's amalgamation activities that impact the Y2K Program;
- (b) representing the Y2K Program to internal and external entities;
- (c) reporting to the Y2K Steering Committee, Senior Management Team and the Strategic Priorities Committee;
- (d) reviewing and approving internal and external Y2K communications strategies;
- (e) developing and managing the Y2K budget;
- (f) overseeing and guiding all Y2K Projects;
- (g) coordinating Y2K policies and practices; and
- (h) ensuring alignment with major corporate objectives.

COT064388 at 64403 and 64404

168. The Y2K Steering Committee initially consisted of Andrew, Rodrigues, Garrett, Councillor O'Brien and three external partners. The Y2K Steering Committee was responsible for:

- (a) seeking approval for Y2K Project requirements;
- (b) escalating the importance and resolution of Y2K Project related issues;
- (c) ensuring alignment with major corporate objectives; and

- (d) ensuring that the Y2K Project and City amalgamation progress in partnership.

COT064388 at 64404

169. Andrew's only delegated authority under the Y2K Project was as a single member of the Y2K Steering Committee.

Testimony of Jim Andrew, TECL,
January 26, 2005, p. 245, lines 7-10
and p. 249, lines 4-10

170. Andrew did not have signing authority under the Y2K Project.

Testimony of Lana Viinamae, TECL,
December 7, 2004, p. 125, lines 20-23

(iii) Change Request

171. To maintain control over the massive Y2K Project, all changes to a business case had to be documented in a "Change Request" and approved by the Y2K Steering Committee.

Affidavit of Kathryn Bulko, TECL,
sworn September 15, 2004, p. 6, para. 44

172. The Y2K Steering Committee met on January 11, 1999. Present at the Y2K Steering Committee meeting were Councillor O'Brien, Rodrigues, Andrew and Viinamae. The Minutes of the meeting indicated, at point 11, that Councillor O'Brien requested an update on any steps that could be taken to escalate the completion timelines to the end of June, 1999. Viinamae agreed to identify any available opportunities.

COT031547

173. The Change Request involving the desktop issue was initially discussed at the Y2K Steering Committee meeting of January 21, 1999. Present at the meeting were Councillor O'Brien, Viinamae, Andrew, Jack Schachner ("Schachner") and Line Marks ("Marks"). During the meeting, the desktop team proposed replacing all clone desktops instead of repairing them in an effort to move up the timelines. The Y2K Steering Committee was advised that there would be no cost increase associated with the proposed change. The Minutes from the January 21, 1999 meeting stated, "[i]t was recommended

that the Project Director seek approval from the auditors regarding this strategy change prior to the next meeting."

COT000430 at 00430 and 00432

174. On January 25, 1999, the Change Request was requested by Peter Somerville ("Somerville"), contemplating the change in scope of the Desktop Project from the replacement of 3,178 desktops to the replacement of 8,780 desktops. The assessment of the Change Request was assigned to Franey.

COT040963

175. The Y2K Steering Committee met again on January 28, 1999. Present at the meeting were Councillor O'Brien, Viinamae, Rodrigues, Schachner and Marks. Andrew was noted as absent.

COT030749

176. Attached to the Minutes of the January 28, 1999 meeting (COT030749) was a document entitled "Update on Issues raised at the last meeting". At point 6 of the document, under the heading "Desktop" it stated, "[t]he City Auditor Jeff Griffiths has approved a change request, outlining the proposed revised strategy for desktops."

COT030752

177. There was no indication as to whom it was that prepared document COT030752. Viinamae had sought the approval of Audit but the statement is clearly erroneous. Although Andrew was not present at the January 28, 1999 and therefore not privy to the discussions leading up to the erroneous statement, Andrew testified that he believed that Audit agreed with the Change Request in principle, but now understood that Audit's function was not to approve change requests.

Testimony of Jim Andrew, TECI,
January 26, 2005, p. 246, line 22- p. 247, line 12

178. On February 10, 1999, the Y2K Steering Committee met. Present at the meeting were Councillor O'Brien, Viinamae, Andrew, Schachner and other parties involved on a different matter. According to the Minutes of the Meeting, the Change Request for the

desktop replacement had been approved. The Minutes indicated that the "External Partners felt that this was a better alternative, as it would save time."

COT069778 at 69779

(iv) Y2K Steering Committee Approval

179. Audit approval was sought by Viinamae, as per the direction of Councillor O'Brien. In January and February, 1999, Viinamae approached either Jerry Shaubel ("Shaubel") (Director, Auditor General's Office) or Smid (Senior Audit Manager, Auditor General's Office) to obtain a letter from Audit confirming that the revised desktop strategy was within the budget approved by Council.

Affidavit of Jerry Shaubel, TECI,
sworn September 9, 2004, p. 3, paras. 12-13

180. The following contacts were made between the Y2K desktop team and Audit:
- (a) February 24, 1999 – e-mail from Bulko to Smid (COT041010);
 - (b) February 25, 1999 – e-mail from Smid to Bulko (COT041010);
 - (c) March 11, 1999 – conversation between Smid and Franey;
 - (d) March 18, 1999 – e-mail from Shaubel to Viinamae (COT040995);
 - (e) March 19, 1999 – e-mail from Viinamae to Shaubel (COT040995);
 - (f) March 19, 1999 – e-mail from Shaubel to Viinamae (COT040995);
 - (g) June 7, 1999 – meeting between Shaubel, Viinamae and Franey;
 - (h) June 16, 1999 – draft letter and e-mail from Shaubel to Viinamae and Franey (COT040973), (COT040965); and
 - (i) June 16, 1999 – e-mail from Shaubel to Viinamae (COT040972).
181. None of these letters or e-mails were sent or copied to Andrew, nor did he engage in a conversation with anyone from Audit, or met with anyone from Audit.

COT041010; COT040995;
COT040973; COT040965;
COT040972

182. Shaubel's calendar indicated a July 6, 1999 meeting with Andrew and Viinamae. Neither Shaubel nor Andrew had any recollection of this meeting having taken place.

TEC054099

Affidavit of Jerry Shaubel, TECI,
sworn September 9, 2004, p. 9, para. 34

Testimony of Jim Andrew, TECI,
January 26, 2005, p. 134, line 12- p. 135, line 10

183. In the end, Viinamae obtained a draft letter from Audit confirming that the revised strategy did not result in costs higher than those anticipated in the original Y2K Project budget. The draft letter contained no recommendation.

Affidavit of Jerry Shaubel, TECI,
sworn September 9, 2004, p. 8, paras. 31-32

COT040973

184. Andrew testified that he did see the draft letter from Audit (COT040973). Otherwise, he had little or nothing to do with Audit in respect to the revised desktop strategy.

Testimony of Jim Andrew, TECI,
January 26, 2005, p. 129, lines 19-22

Commentary

Viinamae and Andrew enjoyed a long business relationship during which Viinamae grew to respect Andrew's opinion and advice. As his subordinate at both Metro and later in the City's Corporate IT Division, Viinamae took direction from Andrew.

With the creation of the Y2K Project, the nature of this reporting relationship changed. As the Director of the Y2K Project, Viinamae's responsibilities included overseeing and guiding all Y2K projects and coordinating Y2K policies and practices.

While the Project Director reported to the Y2K Steering Committee, the Y2K Steering Committee was not one man. If Viinamae sought the advice or the opinion of Andrew, it would be as her business colleague and mentor. Andrew did not make decisions

independent of the Y2K Steering Committee and did not represent to Viiname that he had any authority separate and apart from the Y2K Steering Committee.

Viinamae was asked by the Y2K Steering Committee to seek the approval of Audit in respect to the proposed change to the desktop strategy. Although it is unclear as to how or why the Y2K Steering Committee Minutes of January 28, 1999 indicated Audit approval, approval was not given. As the person entrusted to obtain approval, Viinamae was in a position to know that, in fact, no approval had been given. Yet the Minutes of the January 28, 1999 and the February 10, 1999 meetings were not corrected, but left to stand by Viinamae, thereby misleading the members of the Y2K Steering Committee.

From the time that the Y2K Steering Committee had been advised that Audit had approved the Change Request, Viinamae made extensive efforts to obtain a letter from Audit recommending the revised course of action. Andrew's involvement during this process was either very limited, or non-existent.

The failure of the Y2K Steering Committee to properly approve the Change Request was not the fault of the Y2K Steering Committee or any of its individual members. The Y2K Steering Committee approved the Change Request having been led to believe that Audit had given its approval, or at the very least, had approved it in principle.

Failure to Engage in a Competitive Tendering Process to Acquire PCs after June 1999

185. Since the December 1998 Mini-RFQ, the prices of desktop computers had continued to drop. Viinamae, on behalf of the City, negotiated a new price for the second phase of the rollout. The price per desktop had decreased, from \$1,649.00 to \$1,449.00.

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, p. 9, para. 41

186. The Purchase Requisition for the 3,500 desktops was approved by Franey. Viinamae approved the requisition of the funds and provided departmental approval.

COT021046

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, p. 8, para. 35

Testimony of Kathryn Bulko, TECI,
November 23, 2004, p. 19, lines 13-22 and p. 126, lines 2-14

187. On June 21, 1999, the Y2K Desktop team ordered an additional 3,500 PCs as per the Change Request. The decision not to issue an RFQ at the time, was based on the understanding that one was not required because Dell had already been awarded the contract for Y2K desktops through the December, 1998 Mini-RFQ. In addition, Viinamae deposed that switching manufacturers at that stage of the rollout would have generated a substantial risk to the City after the Y2K Desktop Team had already standardized and tested the critical applications on the Dell desktops. Changing to another manufacturer would have jeopardized the City's ability to meet its deadline.

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, p. 9, para. 41

TEC029846

Commentary

The second phase of the rollout was initiated and carried out by Viinamae and the Y2K Desktop Team. Andrew had no role in the decision not to issue an RFQ.

Influence by Representatives of Dell

- (i) Andrew as Decision-Maker

188. On March 9, 1998, David Toms ("Toms") was appointed Director, Public Sector for Dell. Dell was already a vendor of record with Metro and the City at the time the Public Sector was created as a separate segment of Dell, but was not a significant supplier to either.

Affidavit of David Toms, TECI,
sworn November 11, 2004, p. 1, para. 1
and p. 2, para. 5

189. To develop Dell's Public Sector strategy, Toms analyzed the market and identified Dell's existing and potential clients. In the municipal sub-segment, Dell focused on the largest Canadian cities and what they were purchasing. As part of the strategy, Toms contacted people he knew at the City, including Andrew and Franey. Toms had met Andrew through his prior employment at Novell.

Affidavit of David Toms, TECI,
sworn November 11, 2004, p. 3, para. 10
and p. 7, para. 22

190. Toms was not a personal friend of Andrew, but knew him in the context of having both worked in the IT community. Toms contacted Andrew by telephone in March, 1998 to let him know that he was now Director, Public Sector for Dell. In a future conversation of unknown date, Toms called Andrew to ask him how he thought Dell could improve its position as a supplier to the City.

Affidavit of David Toms, TECI,
sworn November 11, 2004, p. 7, paras. 22-24

191. Bruce Mortenson ("Mortenson") was appointed Account Executive for the City, effective November 1, 1998. By this time, Mortensen was aware that Dell had not won the August, 1998 RFP and believed that Dell was not going to be able to secure Y2K business from the City.

Affidavit of Bruce Mortensen, TECI,
sworn November 11, 2004, p. 1, para. 4,
and pp. 10-11, para. 40.

192. During the period October to December 1998, Dell continued to make sales to the City but they were generally small orders. Mortensen and the Account Team pushed the Dell Business Model, but it was apparent that it was not fully understood by the "decision-makers".

Affidavit of Bruce Mortensen, TECI,
sworn November 11, 2004, p. 11, para. 41

193. In an attempt to improve Dell's business opportunities with the City, Mortensen set out to identify the "influencers and/or decision-makers" upon which he could push the Dell Business Model. Mortensen identified Somerville, Franey, Rick Zwarun, Bulko and Andrew.

Testimony of Bruce Mortensen, TECI,
November 25, 2004, p. 70, line 4 – p. 72, line 22

194. Noticeably absent as an identified decision-maker was Y2K Director, Viinamae. Yet Mortensen and his Account Team identified Andrew despite not having any role in respect to the desktop rollout under the Y2K Project.

Testimony of Bruce Mortensen, TECI,
November 25, 2004, p. 288, line 24 – p. 292, line 11

195. On December 23, 1998, Mortensen and David Kelly ("Kelly") attended at a meeting with Viinamae. This was Mortensen's first introduction to Viinamae. At that meeting, Viinamae advised them that Dell had been the successful bidder on the contract but that it was expected to do a good job and deliver the order on time. Mortensen believed that as of December 23, 1998, Dell had won the Y2K desktop contract.

Affidavit of Bruce Mortensen, TECI,
sworn November 11, 2004, p. 15, paras. 59-60
and p. 16, para. 63

196. From that point on, including during the June, 1999 rollout, Mortensen viewed Viinamae as a decision-maker.

Testimony of Bruce Mortensen, TECI,
November 25, 2004, p. 292, lines 12-20

197. Mortensen met with Andrew on April 7, 1999 to discuss the desktop rollout and pursue additional business. Mortensen was interested in continuing and building the relationship. Mortensen believed he would have told Andrew that the City should go with a total replacement solution and that the City should remain with Dell for the balance of the City's Y2K desktop rollout instead of issuing another RFQ.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 36, para. 129

Affidavit of Bruce Mortensen, TECI,
sworn November 11, 2004, pp. 22-23, paras. 88-89

(ii) Andrew on Dell

198. On September 16, 1998, Kelly met with Lyons in order to gain a better understanding on how Lyons could help Dell to communicate the Dell Business Model to the City's decision-makers. Also present at the meeting was Susan Cross ("Cross"), Lyon's

Executive Assistant. Following the meeting, Cross drafted a memorandum to file wherein she stated, "David acknowledged that Jim Andrew wants Dell to succeed."

Affidavit of David Kelly, TECI,
sworn November 12, 2004, p. 8, para. 32

TEC057087 at 057088

199. Andrew testified that Cross' comment should not be interpreted as an indication of favouritism. Instead, any comments made by him were meant to wish Dell well in the tendering process.

Testimony of Jim Andrew, TECI,
January 25, 2005, p. 147, line 11
and p.148, line 16

200. Toms testified that it was understandable that, given their history (Novell), Andrew would not want to see Dell fail and would want Dell to be successful in any business they were going to do with the City. The comment was not directed at the RFP.

Testimony of David Toms, TECI,
sworn November 29, 2004, p. 93, line 24 – p. 96, line 4

201. Kelly got the sense that Andrew was not a strong supporter of Dell, but neutral.

Testimony of David Kelly, TECI,
November 24, 2004, p. 55, lines 8-16

202. Andrew was not particularly partial to Dell in late 1998 to 1999.

Affidavit of Jim Andrew , TECI,
sworn September 22, 2004, p. 34, para. 122

Commentary

Dell had a limited knowledge of the City's organization and structure as it related to Y2K issues. In an attempt to make inroads, the Dell Account Team set about to "influence the influencers". Logically from someone on the outside, Andrew was identified as a decision-maker by virtue of his position as Executive Director, IT. But unknown to Dell, prior to December 23, 1998, Andrew had no independent authority under the Y2K Project.

The decision to go directly to Dell with the December, 1998 Mini-RFQ was made by the Y2K Project Director, Viinamae, with no input from Andrew. Similarly, Andrew played no direct role in the evaluation of the RFP bids or the decision to choose Dell as the supplier of the Y2K desktops in December, 1998, June, 1999 or September, 1999.

While the Dell Account Team worked diligently to build their relationship with Andrew, there is no evidence that these efforts had, or could have had, any influence on the decisions that were made.

Jeffrey Lyons

(i) Dell's Decision to Retain Lyons

203. After becoming Director, Public Sector, Toms contacted Andrew to discuss how Dell could improve its position as a supplier to the City. Toms deposed that Andrew said that Dell might want to consider hiring Lyons as he understood the City's processes with regards to IT procurement and knew the people involved in the process.

Affidavit of David Toms, TECI,
sworn November 11, 2004, p. 7, para. 24

204. During his testimony, Andrew admitted that it was "entirely possible" that he mentioned Lyons' name to Toms, but he did not tell Toms to retain Lyons.

Testimony of Jim Andrew, TECI,
January 25, 2005, p. 143, line 17- p. 144, line 13

205. Toms believed that as the "CIO" of one of the top five public entities in Canada, Andrew's advice was worth considering. But Toms agreed that Andrew did not tell Dell to retain Lyons.

Affidavit of David Toms, TECI,
sworn November 11, 2004, p. 7, para. 25

206. Toms construed Andrew's comments to be a referral, but that before a decision was to be made to retain the services of Lyons, the Dell Account Team would conduct its own research and make its own determination.

Testimony of David Toms, TECI,
November 29, 2004, p. 81, line 12 - p. 88, line 14
and p. 256, lines 1 – 23

207. On September 16, 1998, Lyons submitted a proposal to Dell. Toms was interested to see that Lyons had done work for EDS Canada Inc. ("EDS"). Lyons association with EDS carried "the most weight in [his] mind."

TEC046591

Affidavit of David Toms, TECI,
sworn November 11, 2004, p. 8, para. 27

(ii) Special Access or Favouritism to Lyons

208. In the fall of 1998, Lyons spoke to Andrew as much as once a week, although Andrew recalled there being less frequent contact. Lyons had a number of IT clients which warranted discussions on a number of issues.

Testimony of Jeffrey Lyons, TECI,
January 17, 2005, p. 58, lines 1 – 22

Testimony of Jim Andrew, TECI,
January 26, 2005, p. 214, lines 23 – p. 215, line 9

209. Lyons and Andrew were reasonably good business friends with whom he would share gossip and stories. Andrew was interested in knowing what was going on around the City. There was a reciprocal sharing of information.

Testimony of Jeffrey Lyons, TECI,
January 17, 2005, p. 58, line 25 – p. 59, line 20

210. The information given by Andrews to Lyons was information that was generally known.

Testimony of Jim Andrew, TECI,
January 26, 2005, p. 215, lines 10 – 23

Commentary

Andrew referred Lyons to Toms when asked how Dell could improve its position as a supplier to the City. Andrew did not tell Dell to retain Lyons. Dell conducted its own thorough investigation and ultimately made its own determination on the issue.

The evidence indicates that there was relatively frequent contact between Andrew and Lyons, during which they exchanged information and gossip. Although it has been suggested that some of this information amounted to "intelligence" and had the potential of giving one an unfair advantage, there is no concrete evidence of this being the case.

PART III - Ball Hsu & Associates Inc.

BHA as Schedule "A" Supplier of Contractual Services

(i) RFP #34-9608-17425

211. The RFP was issued on August 30, 1996, by Mr. D. Beattie, on the letterhead of Management Services Department, Purchasing Division. The RFP was closed on September 20, 1996 and all proposals were to be submitted to the Executive Director, Purchasing Division. The RFP was managed by the IT Division.

TEC018747

212. The purpose was to request proposals from qualified proponents for the supply of contractual information systems services to meet the external resource requirements of its Corporate Services Department and other Departments, Agencies, Boards and Commissions for non-fixed price projects scheduled during the period of January 1, 1997 to December 31, 1999.

TEC056581 at 56584

213. The RFP was used to create a pool of pre-approved suppliers as a mechanism for bringing in standard skill set personnel. If there was a requirement for a special skill set, the City could go outside the list, but the pool of suppliers would be given the opportunity to bid on the special skill sets.

Testimony of Lana Viinamae, TECL,
December 7, 2004, p. 19, lines 18 – 24

214. Ball Hsu & Associates Inc. ("BHA") responded to the RFP.

TEC056651

215. At the close of the RFP, an evaluation of the proposals was made and a report was presented to the Corporate Administration Committee on November 28, 1996 by the Commissioner of Corporate and Human Resources. On January 15, 1997, the report was adopted by Metro Council "without amendment".

TEC056510

216. The report had recommended that:

- (a) umbrella contractual agreements for the provision of IT Contractual Services agreements be entered into with firms identified in Schedule "A" of the report for the years 1997, 1998 and 1999; and
- (b) contractual services agreements for the year 1997 be entered into with the respective firms and in the amounts identified in Schedule "B" of the report, in order to provide continuity in the development and support of information systems administered and managed by the Corporate and Human Resources Department.

TEC056510 at 56510 and 56511

217. There was no immediate financial implications associated with the report or Council's adoption of the report which related to the Schedule "A" umbrella agreements. Each Department, Agency, Board or Commission was to obtain the necessary expenditure approvals from either the applicable Standing Committee or Council each year, relating to the provision of services. The specific maximum amounts contained in Schedule "B" of the report were to reflect the expenditures required to complete or support existing initiatives administered and managed by the Corporate and Human Resources Department. Financing for the capital projects identified in Schedule "B" had previously been approved by Council.

TEC056510

218. There were ten companies listed as Schedule "A" suppliers and ten companies listed as Schedule "B" suppliers. BHA was listed as a Schedule "B" supplier with a maximum expenditure for 1997 of \$500,000.00.

TEC056510 at 56513

219. In reviewing the document, Viinamae interpreted the report to indicate that all of the Schedule "A" and Schedule "B" suppliers were to enter into umbrella agreements. The distinction between the two schedules was that the preferred suppliers listed under

Schedule "A" did not have committed resources at the time of the report, while Schedule "B" suppliers had their 1997 expenditures approved by Council.

Testimony of Lana Viinamae, TECI,
December 7, 2004, p. 30, line 14 – p. 31, line 2

(ii) BHA Contract – January 15, 1997

220. The contract between BHA and Metro for the provision of IT services, from time to time, was dated January 15, 1997 and continued until December 31, 1999.

TEC010502

221. On the face of the contract's first page was the stamp reading "Approved as to Form" by the Metropolitan Solicitor, Derek Brown for H.W. Osmond Doyle.

TEC010502

222. The contract stipulated that a schedule would be prepared indicating the consultant performing the services, the services to be performed, the hourly, daily or other rate(s) at which the consultant is to be compensated, the maximum fee, the duration of the services and deadline which are relevant in the circumstances.

TEC010502

223. Pursuant to section 1(5) of the contract, "[a] Commissioner may increase the maximum fee specified in any Schedule authorized by such Commissioner by issuance to the Consultant of a written Supplement thereto signed by the Commissioner or an authorized member of the Commissioner's staff citing the relevant authority of the Metropolitan Council..."

TEC010502

224. On the last page of the contract are the signatures of the contracting parties. The contract was signed on behalf of Metro by Deputy Metropolitan Clerk, Ralph Walton, and the Metropolitan Treasurer, Louise Eason.

TEC010502 at 10505

225. In addition, the last page of the contract contained a box which stated "Authorized by Report No. 1(17) of the Corporate Administration Committee adopted in Council on the 15th day of January, 1997" and the box contained the signature of Ralph Walton, Deputy Metropolitan Clerk.

TEC010502 at 10505

(iii) Effect of Amalgamation on Contracts

226. The BHA contract, along with all others in force on the date of amalgamation, was carried over to the new City.

Ball Hsu Phase, Statement of Facts, p. 3, para. 8

227. The City was continuing to use the former municipalities' existing procedures until a new process was defined.

Testimony of Lana Viinamäe, TECI,
December 7, 2004, p. 41, line 20 – p. 42, line 2

(iv) BHA Contract under Y2K Project

228. On November 25, 26 and 27, 1998, City Council adopted the Y2K Plan.

COT077369

229. The Y2K Plan required that the External Partners group review all City contracts with external suppliers and, where necessary, to renegotiate those contracts to ensure that they were Y2K compliant.

Affidavit of Lana Viinamäe, TECI,
sworn November 14, 2004, p. 22, para. 99

230. The PMO was authorized to recommended to the Y2K Steering Committee the extension or renegotiation of contracts that affected Priority one business functions, to ensure that there was no major disruption for business units doing remedial work. At the same time,

the CAO was authorized to enter into agreements using Council's delegated authority under the Y2K Plan.

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, p. 22, para. 99

231. Power, of the External Partners group, forwarded a draft Y2K contract to BHA on November 25, 1998.

TEC038546

232. A second letter was sent to BHA on March 9, 1999 on the letterhead of Viinamae, (executed by Power), attaching a draft Y2K contract. The draft contract was dated September 1, 1998.

TEC038469

233. On September 1, 1999, BHA executed a contract with the City expiring December 31, 2000, for the provision of IT services, with an option for the City to extend for one additional year.

COT016738

234. The only change to the contract provisions was the amendments required to make it Y2K compliant. The contract contained the stamp for "Approval as to Form", but there was no signature from the Legal Division. The contract also contained a box which stated "Authorized by Report No. W(24) of the Corporate Services Committee adopted in Council on the 25th day of November, 1998." This box was not executed. The contract was executed on behalf of the City by Viinamae, on behalf of the Commissioner, and by Garrett as CAO.

COT016738

235. Attached to the contract was a Y2K Delegated Approval Form. The value of the contract was blank. The form indicated that the personnel supplied by BHA were for various departments for the Y2K Project and the acquisition of the personnel was coordinated through the Project Human Resources group. Under "comments", reference was made to the Metro contract authorized by Metro Council, January 15, 1997. The RFP number is

handwritten. The form also indicated that approval was provided by the Y2K Steering Committee, Purchasing Division and the CAO. The form was executed by the Purchasing Division, Viinamae and Garrett. It was not executed by anyone from the Y2K Steering Committee or the Requesting Department.

COT016738 at 016749

236. Viinamae deposed that on the basis of the Y2K Delegated Approval Form she understood that BHA had been approved as a vendor of record to supply contractors to Metro, and subsequently to the City, pursuant to RFP No. 34-9608-17425.

Affidavit of Lana Viinamae, TECL,
sworn November 14, 2004, p. 22, para. 100

Commentary

The Corporate Administration Committee Report, adopted by Metro Council on January 15, 1997, indicated that BHA was to be a Schedule "B" supplier of services for the year 1997, although this was not a view shared by either Andrew or Viinamae.

Although it is unclear as to how exactly it came to be, the contract executed by BHA on or about January 15, 1997 was in a form consistent with the Schedule "A" umbrella agreements spanning three years and having no maximum expenditure.

Notwithstanding what Commission Counsel has indicated is an erroneous belief, the BHA contract with Metro was reviewed by the Metro Legal Department, approved as to form and executed by the Metro Solicitor. Moreover, the box indicating that the contract was approved pursuant to Council authority, was executed by the Deputy Metro Clerk, who along with the Treasurer, executed the contract on behalf of Metro.

If Andrew misinterpreted the actual authority granted by Council pursuant to Report No. 1, Clause 17 of the Corporate Administration Committee, he was not alone. In all probability, all of the signatories of the January 15, 1997 contract would have likely reviewed the report and shared Andrew's understanding. Similarly, the External Partners group and the signatories to both the Y2K Delegated Approval Form and the September 1, 1999 BHA contract, presumably, would have reviewed the report prior to acting.

Regardless of Andrew's belief, he did not draft or execute the January 15, 1997 BHA contract, nor did he draft or execute the September 1, 1999 Y2K BHA contract, including the Y2K Delegated Approval Form.

Hiring of BHA Consultants

(i) The Need for Contractors

237. Obtaining approval to hire additional full-time employees was a time consuming process involving the budgetary process. It could take as long as three to four months before the process was complete.

Affidavit of Taslim Jiwa, TECI,
sworn September 30, 2004, p. 6, paras. 25-27

Testimony of Taslim Jiwa, TECI,
January 18, 2005, p. 40, line 3 – p. 41, line 2

238. In contrast, the hiring of external contractors was viewed as a quick measure to deal with critical and immediate resource requirements.

Affidavit of Taslim Jiwa, TECI,
sworn September 30, 2004, p. 3, para. 14

Testimony of Taslim Jiwa, TECI,
January 18, 2005, p. 32, lines 16-25

239. Contractors were required on an urgent basis to address two issues:

- (a) day to day operational support; and
- (b) special projects like the Y2K Project.

Testimony of Taslim Jiwa, TECI,
January 18, 2005, p. 33, line 17 – p. 34, line 5

240. Often the day to day operational staff were moved to special projects, in particular, the Y2K Project. This left too few staff to support the day to day operations.

Testimony of Taslim Jiwa, TECI,
January 18, 2005, p. 33, line 11 – p. 34, line 5

241. In the years leading up to amalgamation, few if any new staff had been hired by the former municipalities. A hiring freeze followed in the wake of amalgamation due to budget constraints. The City was grossly understaffed and departments had no choice but to use external contractors to meet their staffing needs.

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, p. 21, paras. 91 – 92

242. Brenda Glover, Executive Director of Human Resources and Amalgamation, would not have even supported the hiring of permanent staff since there was not a post-Y2K need for them.

Affidavit of Brenda Glover, TECI,
sworn September 13, 2004, p. 12, para. 50

(ii) Hiring Procedures under Corporate IT

243. A memorandum dated December 4, 1996 was issued by Anne Olscher (Director of IT Application Services) and Andrew to all Department Heads.

TEC010212

244. The memorandum referred to the November 28, 1996 report to the Corporate Administration Committee that was later adopted by Metro Council on January 15, 1997, establishing Schedule "A" and Schedule "B" preferred suppliers of IT services.

TEC010214

245. The memorandum established a process used by Corporate and Human Resources to retain IT contractors and suggested its adoption by each Department, Agency, Board and Commission. The process outlined, included sending descriptions of job functions to each of the ten suppliers on the preferred list chosen to enter into three year umbrella agreements. Each supplier would be limited to two resumes for qualified personnel from which interviewees would be chosen. Once a contractor had been identified, a work schedule referring to the umbrella agreement would be prepared and executed by the appropriate parties.

TEC010212

246. This procedure would have continued to be the recommended procedure in the amalgamated City until a new process was defined.

Testimony of Jim Andrew, TECI,
January 24, 2005, p. 209, lines 1-6

Testimony of Lana Viinamae, TECI,
December 7, 2004, p. 41, line 20 – p. 42, line 2

247. Taslim Jiwa ("Jiwa") maintained that she followed a different procedure for hiring external contractors. According to Jiwa, the process was as follows:

- (a) advised Andrew that she required a person and orally justify the need;
- (b) if justified, oral approval would be given;

- (c) Andy Lok ("Lok") would bring in a candidate or candidates for Jiwa to meet;
- (d) if a candidate's skills met the required needs a work schedule would be prepared; and
- (e) the work schedules would be executed by Andrew, Viinamae and on occasion, by Jiwa.

Affidavit of Taslim Jiwa, TECI,
sworn September 30, 2004, pp. 6 – 7, para. 29

Testimony of Taslim Jiwa, TECI,
January 18, 2005, p. 49, line 19 – p. 50, line 14

Testimony of Andy Lok, TECI,
January 18, 2005, p. 185, line 2 – p. 186, line 14

(iii) Hiring Procedures under Y2K

248. A report entitled the "Staff and Equipment Acquisition Process" dated January 21, 1999 was prepared by the Y2K Project office. The report provided a step by step procedure for hiring contractors.

COT076753 at 76755

249. If a candidate was selected under the Y2K procedure, the External Partners group would ensure that a work schedule was established. The work schedule would be executed as per the Y2K guidelines.

Testimony of Lana Viinamae, TECI,
January 27, 2005, p. 125, line 24 – p. 126, line 20

Commentary

The process for hiring external IT contractors was established by Metro and used successfully by Corporate and Human Resources. This process was to have continued and been implemented in the City in the post – amalgamation period. With the exception of Jiwa, there is no evidence to suggest that the process was not followed.

BHA as Sole Source Supplier

250. During the post-amalgamation/Y2K period from 1998-2001, BHA had many contractors employed throughout the City. The combined pressures of amalgamation and Y2K caused the demand for qualified IT professionals to exceed supply.

Affidavit of Andy Lok, TECI,
sworn December 3, 2004, p. 6, paras. 36 – 37

251. Subject to the hiring process utilized by Jiwa, prior to the Y2K Project, IT contractors were hired pursuant to the procedure set out in the December 4, 1996 memorandum.

Testimony of Jim Andrew, TECI,
January 24, 2005, p. 210, lines 3 – 19

252. BHA resources were used extensively by the City because of their excellent work and their low price. Departments would go out looking for contractors with the best skill sets in a competitive market. BHA was usually successful.

Testimony of Lana Viinamae, TECI,
December 7, 2004, p. 64, line 15 – p. 65, line 2

253. The City always received quality, dependable workers from BHA. Ball Hsu ("Hsu") screened his contractors effectively. Their work was reviewed to ensure they were doing a good job.

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, p. 21, para. 95

254. BHA's fees were extremely competitive compared to other companies. While some companies would place a 100 per cent mark up on amounts charged for contractors they would supply to the City, BHA would typically limit the mark-up to 10 to 20 per cent.

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, p. 21, para. 96

255. BHA contractors were very technically adept and had excellent work habits.

Affidavit of Taslim Jiwa, TECI,
sworn September 30, 2004, p. 5, para. 24

256. BHA did very good work and the City received cost-effective results from the work performed by its contractors. Andrew considered BHA to be the "Wal-Mart" of IT

service contractors. The comparison was based on the fact that one could purchase pretty much whatever IT service or expertise one sought and receive quality and performance, at the right price.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 4, para. 10

257. Under the Y2K Project, a competitive hiring process was pursued. However, if a contractor was already working in the City and a need arose, they could be assigned to a new initiative. If a contractor was brought in to supplement staff in day to day operations, they could be assigned to the Y2K initiative without competition.

Testimony of Lana Viinamae, TECI,
December 7, 2004, p. 71, lines 6 – 17
and December 8, 2004, p. 185, lines 4 – 22

Commentary

With the exception of the hiring process utilized by Jiwa, the City engaged in the competitive process when hiring IT contractors.

BHA contractors were universally regarded as being highly-skilled, hardworking and relatively inexpensive. As a result of having these attributes, BHA contractors were often the successful candidates. Their frequent success and corresponding high numbers, gave it the appearance of being a sole source supplier of IT personnel.

Due Diligence when Approving Invoices

258. Work schedules forming part of the January 15, 1997 contract between Metro and BHA set out the description of the services to be provided, the hourly rate charged by the specific personnel undertaking the work, the period during which services are to be rendered, the authority underlying the contract and the maximum fee payable under the schedule "in combination with all other work schedules."

TEC018199

TEC010512

259. These work schedules were executed (on behalf of the Commissioner) by the department who was to be the recipient of the consultant's services. Following the provision of services, an invoice was rendered by BHA. Viinamae would execute the invoice to verify that the services had been provided as per the work schedule. Andrew then executed the invoice to verify that payment could be made. Once the invoice had been executed to verify the work and approve payment, it would be sent to the Purchasing Division. The Purchasing Division would ensure that the authority (\$500,000) was not being exceeded. If it was being exceeded as a result of this invoice, the Purchasing Division would require that further authority first be obtained. If authority was not being exceeded, payment would be made.

Testimony of Lana Viinamae, TECI,
December 7, 2004, p. 42, line 19 – p. 43, line 7
and p. 44, line 5 – p. 45, line 14

TEC009977

TEC009960

260. A mechanism did exist to address situations where it appeared that work undertaken by the contractors pursuant to the work schedules, was likely to exceed the authority granted. This function was discharged by the CMO. Although not a formal process, the CMO would engage in the forecasting of expenditures over the course of a year in an attempt to avoid exceeding authority.

Testimony of Lana Viinamae, TECI,
December 7, 2004, p. 45, line 15 - p. 46, line 14

261. The process for approving invoices underwent a change as a result of the Y2K Project. A "Time Sheet and Invoice Process" dated July 8, 1999, was established by the Y2K Project Team and issued by the PMO. The "Outline of the Procedure" for approving invoices was as follows:

- (a) the employees would record their time weekly;
- (b) the employee's entered time would then be approved by the reporting manager;
- (c) the approved time sheet was to be printed and submitted to the appropriate agency, and their billing to the City would be based on this time sheet only;

- (d) when the agency invoiced the City, the invoice had to match the total hours recorded by the employee and shown on the approved time sheet;
- (e) PMO would process the invoice; and
- (f) Viinamae would give final approval to the invoice before sending it to Account Payable.

COT016710 at COT016711

262. If the time sheet was NOT approved by the reporting managers then:

- (a) the time sheet would have to be resubmitted by the employee with the appropriate modifications made; and
- (b) the agency could not use the time sheet and could not be paid until the corrections were made.

Testimony of Lana Viinamae, TECI,
January 27, 2005, p. 135, line 6 – p. 136, line 24

COT016710 at COT016711

263. Lok testified that he seldom had reason to report directly to Andrew on any project. However, he did say that Andrew would approach him if his work exceeded the scheduled budget and advised that before BHA could be paid as per the invoice, it was necessary to obtain further approval.

Affidavit of Andy Lok, TECI,
sworn December 3, 2004, p. 11, para. 61

Testimony of Andy Lok, TECI,
January 18, 2005, p. 222, line 15 – p. 224, line 1

264. The hourly rates of the BHA contractors listed in the work schedules, did not always correspond to the hourly rates listed in the related invoices. Viinamae testified that the discrepancy between the two rates resulted from the necessity of the City to remain competitive. During the period leading up to Y2K, the market for IT contractors was hot. In order to prevent IT contractors from leaving the City and taking more lucrative positions, the City was, from time to time, compelled to increase the contractor's hourly rates.

Testimony of Lana Viinamae, TECI,
December 7, 2004, p. 47, lines 11 – 24

Commentary

Under both the pre-Y2K and Y2K regimes, a process for approving the invoices of external contractors had been developed and implemented.

Andrew's role in approving invoices for payment was restricted to those work schedules relating to the January 15, 1997 contract. Under the Y2K Project, this function fell to Viinamae.

As supported by the evidence of Lok, Andrew did take steps to ensure that work schedule budgets were adhered to, and if exceeded, that proper authority was obtained before payment was made.

BHA as an Arm's Length Contractor

265. With the demands of amalgamation and Y2K, an enormous demand arose within the City for qualified IT professionals. During the period from 1998 to 2001, BHA had many contractors employed throughout the City.

Affidavit of Andy Lok, TECI,
sworn December 3, 2004, p. 6, paras. 32, 35, 36
and 37

266. Hsu actively managed his personnel. As a result of his active management style and the fact that he had contractors in numerous City departments, Hsu was well informed about what was going on in the City.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 4, para. 9

267. Hsu had his finger on the pulse of what was happening in the City. With contractors spread throughout the various departments, he was able to further promote his organization.

Testimony of Jim Andrew, TECI,
January 24, 2005, p. 86, lines 1 – 13

268. Lok deposed that during the time he worked for the Ball Hsu companies (BHA and Andall), both Metro and the City generally treated its contractors as an extension of its workforce.

Affidavit of Andy Lok, TECI,
sworn December 3, 2004, p. 3, para. 19

Commentary

BHA has been referred to as the "Wal-Mart" of IT service contractors. Its skilled and dedicated workforce earned its way into virtually every department in the City. BHA personnel became an indispensable component of the City's IT community during a very demanding time.

The City, as a whole, relied heavily on BHA to meet its needs.

BHA personnel became an extension of the City's workforce not by design, but rather as a necessary response to the circumstances of amalgamation and Y2K.

Conflict of Interest

(i) Andrew's Relationship with Hsu

269. Hsu began working for Metro in or around 1991, as a replacement for Viinamae, who had gone on maternity leave. Viinamae had met Hsu approximately 20 years earlier while they both worked for Aetna Insurance. She had recommended him to Andrew as a replacement during her leave. Hsu began to supply consultants to Metro through BHA in 1992 or 1993.

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, p. 19, paras, 81 - 82
and 84

270. Andrew described his relations with Hsu as a professional friendship.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 3, para. 8

Testimony of Lana Viinamae, TECI,

December 7, 2004, p. 67, line 25 – p. 68, line 2

271. Andrew received, on average, one phone call per week from Hsu between 1999 and 2002. Hsu would discuss projects, contracts, schedules and contractors with Andrew. In addition, he would provide status reports and updates on projects and activities.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 4, para. 9

272. Viinamae continued to be in occasional contact with Hsu after their time together at Aetna Insurance. She had more frequent contact with Hsu after he worked for Metro. They would see each other socially, having lunch together and have been to each other's home. Viinamae described Hsu as a "business friend".

Affidavit of Lana Viinamae, TECI,
sworn November 14, 2004, p. 19, paras. 82-83

273. Viinamae spoke to Hsu at least once a week, if not more frequently during the post-amalgamation period.

Testimony of Lana Viinamae, TECI,
December 7, 2004, p.68, lines 3-8

(ii) Trips to China

274. In March, 1993, the Commissioner of Corporate Services (Metro) received an invitation to send a representative to China to speak to various interested parties about the installation and use of fibre-optics and sophisticated routing systems at Metro Hall. Andrew was chosen to attend.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 5, para. 12

275. Prior to leaving in May, 1993, Hsu attended at Andrew's office and informed him that he would be in Shanghai at the same time. Hsu informed Andrew that he would contact him at Andrew's hotel and would meet him there. Hsu contacted Andrew as planned and they had breakfast together.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 5, para. 13

276. In October, 1993, Andrew was invited to speak at the Conference of South East Asian Computer User Groups. The trip had been approved by Metro and Andrew travelled alone. Andrew saw Hsu in the audience during his speech and briefly at a reception given by the Canadian Embassy at the conference facility. In addition, Andrew accepted an invitation to go to dinner with him and a Chinese couple who were interested in immigrating to Canada.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 6, para. 14

(iii) Socializing in Toronto

277. In the summer of 2001, Hsu contacted Andrew by telephone and asked him to join a group of people including Tom Jakobek (“Jakobek”) to go to the Beaches Jazz Festival. Andrew declined the invitation.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 10, para. 26

278. In 2000, shortly before Jakobek’s trip to China, Andrew went to lunch with Jakobek and Hsu at the La Huahene restaurant. The purpose of the lunch was to discuss Jakobek’s upcoming trip.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 10, para. 27

279. At no time was Andrew invited, nor did he attend, at either Hsu’s cottage or home. Hsu was never invited to Andrew’s home.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, pp. 4- 5, para. 11

280. Hsu frequently travelled outside Canada. Andrew would receive telephone or e-mail messages from Hsu advising him that he would be out of town. Hsu would leave Andrew a contact number by which to reach him during his absence.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 6, para. 15

Commentary

Andrew's relationship with Hsu was aptly described as a professional friendship. The evidence suggested that their contact while in Toronto, was rooted in their business relationship. The frequent telephone conversations, were no more frequent than those between Hsu and Viinamae, and dealt directly with the business at hand.

The encounters with Hsu in China were innocent meeting. Andrew was in a foreign place and had breakfast and dinner with someone he knew. It is noteworthy that while in Toronto, there was only a very limited amount of social contact between Andrew and Hsu.

The telephone contact while in Toronto and the decision to leave Andrew with a contact number while absent, is consistent with the nature of their business relationship. BHA was a significant supplier of IT contactors to the City. Hsu managed his personnel very closely to ensure quality and satisfaction.

At no time did Andrew accept favours or advantages from BHA.

Toronto East General Hospital

281. In 2000, Jakobek left municipal politics and accepted a senior management position at Toronto East General Hospital ("TEGH"). Thereafter, Jakobek asked Andrew to review and assess TEGH's information technologies in furtherance of achieving cost-effective management at the hospital.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 13, paras. 36 – 37

Testimony of Jim Andrew, TECI,
January 24, 2005, p. 168, lines 2 - 7

282. Andrew prepared a report of his findings in July, 2000. He then discovered that Jakobek had engaged T.K. Tong ("Tong"), a BHA contractor, to undertake a parallel review. After submitting his report, Andrew was approached by Hsu and asked to compare the two reports and edit the BHA report.

Testimony of Jim Andrew, TECI
January 24, 2005, p. 170, lines 8 – 21
and p. 176, line 18 – p. 177, line 19

283. In late August and early September, 2000, a string of nine e-mails flowed between Andrew and Tong. Three of the nine were sent during work hours.

COT076855

COT076858

COT076860

COT076857

284. Andrew and Tong had attempted to schedule a meeting at Lexmark. After discussing various possibilities, Andrew stated that “the 12th [September] in the PM should be OK.”

COT076857

285. The work undertaken by Andrew did not result in any form of compensation, although Andrew had hoped that it would result in some contract work down the road. By this point in time, Andrew had already decided to leave the City.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 13, para. 37

Testimony of Jim Andrew, TECI,
January 24, 2005, p. 168, lines 8 – 14

Commentary

The work conducted by Andrew in respect to TEGH was undertaken largely, if not entirely, outside of regular business hours. The three e-mails sent during work hours account for a negligible segment of the work day and may have been sent during Andrew’s breaks. Similarly, the meeting at Lexmark was scheduled for September 12, 2000 in the “PM”. This could refer to the evening or night.

Andrew did not receive compensation for his efforts.

Andall Technologies Corporation

286. On February 2, 2001, Andrew resigned from his position as Executive Director, IT.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 2, para. 3

287. In April, 2001, Andall Technologies Corporation ("Andall") responded to the City's "Invitation to Pre-Qualify for the Provision of Information Technology Contractual Services" ("ITP"). Andall qualified for the roster list in June, 2001 and become a vendor of record. Andall's contract with the City commenced on January 14, 2002.

Affidavit of Andy Lok, TECI,
sworn December 3, 2004, p. 10, para. 56

TEC038716

TEC043551

TEC054103

TEC007067

288. Andrew was unaware that he had been named as a reference in Andall's submissions to the City, both before and after his departure. He had never been asked if he would stand as a reference for Andall, nor did he grant Andall this privilege.

Affidavit of Jim Andrew, TECI,
sworn September 22, 2004, p. 16, para. 49

TEC044321 at 44344

Commentary

Andrew was wholly uninvolved in the ITP and as such, would not have known that both BHA and Andall had been placed on the City's list of contractors.

PART IV – CONCLUSION

289. Based on the foregoing, it is respectfully submitted that the allegations of misconduct brought against Andrew be dismissed.

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