

IN THE MATTER OF THE TORONTO EXTERNAL CONTRACTS INQUIRY

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

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I. REPLY TO SUBMISSIONS OF DELL CANADA INC.

"Truth is stranger than fiction, but it is because fiction is obliged to stick to possibilities, truth isn't."

Mark Twain

1. In an attempt to explain its good fortune, Dell Canada Inc. ("Dell") has engaged in a contrived manipulation of the evidence, discounting uncontradicted facts while adopting a perverse reliance on a complex matrix of possibilities.
2. Although Dell ultimately achieved its objective, this Inquiry has forced it to defend and justify its decision to retain the services of Jeffrey Lyons ("Lyons"). With no disrespect to his considerable talents, the reason for Dell's success is self-evident. There were no clandestine meetings, no secret deals and no conspiracies. The truth is far less intriguing.
3. In fact, once you deconstruct the elaborate explanation offered by Dell, there lies the *raison d'être*.

How Dell Won the December 1998 Mini-RFQ

4. Dell acknowledged that the stated objective of August 1998 RFP ("August RFP") was to select at least two full-service vendors to supply hardware, software and support services, to the City of Toronto ("City") on a non-exclusive basis.¹ There was nothing in the August RFP that required the City to buy desktop computers, but if it did, it would not be prohibited from choosing any one of the Enterprise Tier manufacturers, either directly or through the VARs.²
5. Despite the fact that Dell was not recommended to be awarded a full service contract, the RFP Analysis Report expressly provided that "Dell computer systems may be acquired

¹ TEC019416 @ 19421

² Testimony of Kathryn Bulko, TECI, November 23, 2004, p. 42, lines 2-12

directly from Dell and shipped to one of the recommended full-service vendors for value added services."³

6. Lana Viinamäe ("Viinamäe") testified that she instructed Kathryn Bulko ("Bulko") to conduct an RFQ and to contact the Enterprise Tier manufacturers directly, in order to get standard pricing.⁴
7. Regardless of whether Viinamäe instructed Bulko,⁵ or instructed Michael Franey ("Franey") to contact Dell,⁶ Dell had been classified as an Enterprise Tier manufacturer⁷ and as such, would have been part of the group Bulko was instructed to contact.
8. Without passing judgment in respect to the fairness of the December 1998 Mini-RFQ ("December RFQ"), what happened is not a mystery. Viinamäe instructed Bulko or Franey to obtain quotes from each of the Enterprise Tier manufacturers, allowing Dell to submit its bid directly to the City. IBM and Compaq were not afforded the same opportunity and had to submit their bids through the VARs. There is no evidence that Jim Andrew ("Andrew") in any way influenced or instructed Viinamäe in this regard.
9. Dell is described as having won the December RFQ "hands down". Dell's quote was \$200.00 lower per unit. The decision to choose Dell was described as being both "easy" and a "no brainer".⁸
10. Depending on the evidence being considered, the decision to go with Dell was made by Bulko,⁹ Franey, Viinamäe,¹⁰ or some combination thereof.¹¹ There is no evidence that

³ TEC019478 @19479

⁴ Testimony of Lana Viinamäe, TECI, December 6, 2004, p. 99, lines 9-18

⁵ Affidavit of Kathryn Bulko, TECI, sworn September 15, 2004, p. 4, para. 24

⁶ Affidavit of Michael Franey, TECI, sworn October 25, 2004, p. 3, para. 12

⁷ TEC052879 @ 52886

⁸ Closing Submissions of Dell Canada Inc., TECI, Part III C(6), paras. 200 and 201

⁹ Testimony of Lana Viinamäe, TECI, December 8, 2004, p. 55, lines 5-15

¹⁰ Testimony of Kathryn Bulko, TECI, November 22, 2004, p.180, lines 8-13

¹¹ Testimony of Michael Franey, TECI, November 30, 2004, p. 246, lines 14-23

Andrew was involved in the decision to choose Dell as the winner of the December RFQ.¹²

¹² Affidavit of Jim Andrew, TECI, sworn September 22, 2004, p. 33, paras. 117-119

The Anatomy of Invention

11. The Y2K Business Continuity Plan was approved with some amendments at the November 25-27, 1998 Council Meeting.¹³ Between November, 1998 and January, 1999, Viinamae completed staffing the management of each of the thirteen program areas. Of these thirteen program areas were the six city-wide initiatives, including the desktop initiative.¹⁴ The governance structure for the Y2K Project required reporting to the Y2K Steering Committee, the Strategic Policies and Priorities Committee and Council, on a monthly basis.¹⁵
12. During the TCLI, Margaret Rodrigues ("Rodrigues") testified that by virtue of his position as Executive Director of Information and Technology ("IT"), Andrew had a "leadership role" in the Y2K Project.¹⁶ In an attempt to explain herself, she correctly stated that Andrew was accountable for every aspect of Information Technology... Y2K was an aspect of that ...".¹⁷ But in explaining Andrew's reporting relationship to Viinamae, she wholly ignored the governance structure of the Y2K Project and dwelled exclusively on the IT Division Organization Chart. While the IT Organization Chart indicated a direct reporting line from Viinamae as Y2K Project Manager to Andrew as Executive Director, IT,¹⁸ there was no such reporting relationship under the Y2K Project.¹⁹
13. As stated in paragraph 11 herein, Viinamae identified thirteen program areas, which fell under the Y2K Project.²⁰ It is respectfully submitted that while some of these programs involve IT issues requiring input from Andrew, his duties and responsibilities were not

¹³ COT077369

¹⁴ Closing Submissions of Lana Viinamae, TCLI, p.14, para. 63

¹⁵ Closing Submissions of Lana Viinamae, TCLI, pp.13-14, paras. 61 and 63

¹⁶ Testimony of Margaret Rodrigues, TCLI, November 20, 2003, p. 69, line 20

¹⁷ Testimony of Margaret Rodrigues, TCLI, November 20, 2003, p. 21, line 17-20

¹⁸ COT070848 @ 70850

¹⁹ COT064388 @ 64402

²⁰ Closing Submissions of Lana Viinamae, TCLI, p.14, para. 63

constant. His reporting relationship with Viinamae depended on the nature of the issue being considered.

14. A case in point is the desktop initiative. It clearly was of concern to the Executive Director, IT. Yet, Andrew played no discernable role in the decision making process. He was not a member of the Desktop Project team;²¹ he was not part of the Evaluation Committee for the August RFP;²² he did not instruct Bulko to conduct the December RFQ;²³ and, he played no role in the decision to choose Dell as a result of the December RFQ.²⁴
15. It is respectfully submitted that Andrew's role has been misconstrued. Despite the fact that he was the Executive Director, IT, the desktop initiative was an IT issue rooted in the Y2K Project. Any authority or influence Andrew had in respect to the desktop initiative, was derived from his position as a member of the Y2K Steering Committee. The failure to identify the dichotomy between those matters that related to the IT Division and those matters which were governed by the Y2K Project, extended to Dell. There was a fundamental misunderstanding as to the role Andrew played in the desktop initiative and a corresponding failure to understand the Y2K Project's policies and procedures.
16. Bruce Mortensen ("Mortensen") deposed that at the time of his appointment as Account Executive, effective November 1, 1998, he was aware that Dell had not won the August RFP and believed that Dell was not going to be able to secure Y2K business from the City.²⁵
17. David Toms ("Toms") stated that Dell lost because of a lack of understanding on the part of the people at the City who were evaluating the bids in response to the August RFP.²⁶

²¹ TEC052891

²² TEC019479

²³ Testimony of Lana Viinamae, TECI, December 6, 2004, p. 99, lines 6-18

²⁴ Affidavit of Jim Andrew, TECI, sworn September 22, 2004, p. 33, paras. 117-119

²⁵ Affidavit of Bruce Mortensen, TECI, sworn November 11, 2004, p.1, para. 4 and pp. 10-11, para. 40

²⁶ Affidavit of David Toms, TECI, sworn November 11, 2004, p. 6, para. 19

He admitted that Dell did not have a good understanding of how it could persuade the City that the Dell Business Model could be used to achieve its objective.²⁷

18. In an attempt to improve Dell's business opportunities with the City, Mortensen set out to identify the "influences and/or decision makers",²⁸ hoping to educate them about the Dell Business Model. In a demonstration of their lack of understanding, Andrew, who had no involvement with the desktop initiative, was identified as a decision-maker.²⁹ Yet Viinamae, who was the Y2K Project Director, was not identified as a key decision-maker.³⁰
19. Facing the challenge of educating the relevant City staff about the benefits of its business model,³¹ Dell retained the services of Lyons. But while Lyons may have understood the City's processes with regards to IT procurement and knew the people involved,³² it is respectfully submitted that Lyons' focus on Andrew belied an understanding of how the City functioned under the Y2K Project.
20. After being suitably impressed by the Dell Business Model and having been advised that Dell had not been recommended as one of the VARs,³³ Lyons contacted Andrew by telephone.³⁴ In a November 10, 1998 cover letter enclosing the November 4, 1998 Staff Report to the Corporate Services Committee, Lyons reported to Mortensen that he had had several discussions with Andrew regarding the report.³⁵ Lyons make no mention of any conversation with Andrew in either his testimony or his affidavits³⁶ except for the

²⁷ Affidavit of David Toms, TECI, sworn November 11, 2004, p. 8, para. 28

²⁸ Testimony of Bruce Mortensen, TECI, November 25, 2004, p.70, lines 9-14

²⁹ Testimony of Bruce Mortensen, TECI, November 25, 2004, p. 289, lines 14-24

³⁰ Testimony of Bruce Mortensen, TECI, November 25, 2004, p. 291, lines 8-13

³¹ Closing Submissions of Dell Canada Inc., TECI, Part II B, para. 16

³² Affidavit of David Toms, TECI, sworn November 11, 2004, p.7, para. 25

³³ Testimony of Jeffrey Lyons, TECI, January 17, 2005, p. 65, line 17 – p.66, line 3

³⁴ Testimony of Jeffrey Lyons, TECI, January 17, 2005, p. 67, lines 8-10

³⁵ TEC057089

³⁶ Affidavit of Jeffrey Lyons, TECI, sworn November 11, 2004, pp. 3-4, para. 18

one telephone call in early November. Nevertheless, Lyons make the assumption that Andrew was in a position to "get it turned around",³⁷ and hence the phone call.

21. On or about November 16, 1998, Toms, Lyons and Andrew met at Metro Hall.³⁸ Despite the recommendation made in the November 4, 1998 Staff Report, Toms had not believed that Dell "had actually lost yet."³⁹ He viewed the meeting as an opportunity not only to find out why Dell hadn't been recommended, but also as a way "to encourage Mr. Andrew... to reconsider and to keep Dell in the running."⁴⁰
22. Toms deposed that "as a result of the meeting with Andrew"... Andrew "understood that it could be advantageous for the City to be able to purchase Dell products, while at the same time utilizing the VARs for installation and other services."⁴¹
23. Lyons testified that either at the November 16, 1998 meeting or during a subsequent discussion with Andrew, he became hopeful that substantial progress had been made. Lyons said, "I got the sense that he was going to help to reopen it so that [Dell] could bid ... he didn't tell me the solution. I just thought that they were going to find an answer to it."⁴²
24. It is worth noting that despite its reliance on Lyons' testimony, at paragraph 92 of its Closing Submissions, Dell stated that since Lyons had no specific recollection of what was discussed at the November 16, 1998 meeting, his evidence of what could have happened at that meeting is "wholly speculative".⁴³ At paragraph 71 of its Closing Submissions, for the reasons specified therein, Dell submitted that no weight should be

³⁷ Testimony of Jeffrey Lyons, TECI, January 17, 2005, p. 68, paras. 24-25

³⁸ Closing Submissions of Dell Canada Inc., TECI, Part III B (9), paras. 82 and 83

³⁹ Testimony of David Toms, TECI, November 29, 2004, p.134, lines 19-22

⁴⁰ Testimony of David Toms, TECI, November 29, 2004, p.138, line 25 – p.139, line 6

⁴¹ Affidavit of David Toms, TECI, sworn November 11, 2004, p.10, para. 35

⁴² Testimony of Jeffrey Lyons, TECI, January 17, 2005, p. 253, lines 2-7

⁴³ Closing Submissions of Dell Canada Inc., TECI, Part III B(9), para. 92

placed on Lyons' evidence given during the desktop phase of TECI unless it is supported by documents or corroborated by another witness.⁴⁴

25. In its Closing Submissions, Dell addressed Mortensen's March 19, 1999 e-mail to David Kelly ("Kelly"), Toms and others.⁴⁵ The e-mail, referring to the subject line "Lobbyist Expense", provided what Mortensen believed was Lyons' contribution to Dells' success. Mortensen stated as though a fact, that Lyons "managed to wield his clout with both Staff and Politicians just enough to allow Dell to be added to the Council Resolution as a Hardware Supplier ONLY." Although Toms expected Lyons would speak to City Councillors,⁴⁶ Lyons asserted that he did not. When asked whether he engaged in any active work on the Councillors, Lyons said he did not recall. He may have given a couple of them a "heads up" but since he believed he had received a favourable response from Andrew he did not want to undermine him by going to the Councillors.⁴⁷
26. Mortensen's glowing account of Lyons' efforts was discounted by Lyons himself. Lyons testified that "this happened without getting all the Councillors involved or members of Council involved and as rightly it should have [a]nd he's given me a lot of credit [b]ut it didn't get -- it got solved much easier than that....".⁴⁸
27. In his affidavit, Mortensen stated that he was aware that in late November, 1998 an amendment had been made by City Council to the November 4, 1998 Staff Report and that the amendment effectively opened the door for the City to issue the December price refresh request for the desktops.⁴⁹ Yet as Dell's advocate, Lyons denied having anything directly to do with the amendment. Lyons testified that he learned of the amendment while preparing to testify at the TECI.⁵⁰

⁴⁴ Closing Submissions of Dell Canada Inc., TECI Part III B(7), para. 71

⁴⁵ TEC046780

⁴⁶ Affidavit of David Toms, TECI, sworn November 11, 2004, p. 10, para. 36

⁴⁷ Testimony of Jeffrey Lyons, TECI, January 17, 2005, p. 80, lines 20-24

⁴⁸ Testimony of Jeffrey Lyons, TECI, January 17, 2005, p. 100, lines 17-25

⁴⁹ Affidavit of Bruce Mortensen, TECI, sworn November 11, 2004, p.12, para. 48

⁵⁰ Testimony of Jeffrey Lyons, TECI, January 17, 2005, p. 88, lines 6-9

28. Councillor Shiner deposed that he drafted the amendment himself⁵¹ and had no specific recollection of speaking to Andrew about the amendment,⁵² nor did Andrew recall speaking to Councillor Shiner about the amendment.⁵³ Similarly, Lyons testified that he concurred with Councillor Shiner's recollection and that he had not spoken to him about the amendment before it was moved at the November, 1998 Council Meeting.⁵⁴
29. In its Closing Submissions, Dell stated that other than Mortensen's e-mail, Councillor Shiner's recollection and Lyons' recollection, no evidence was adduced at the hearing to support or contradict Mortensen's information and understanding.⁵⁵ While this may be true, it is respectfully submitted that Councillor Shiner and Lyons provide ample evidence to seriously question the credibility of Mortensen. Despite accolades worthy of being posted on Lyons' website,⁵⁶ Lyons testified that Mortensen's understanding of what Lyons had done was simply not correct.⁵⁷ Moreover, at paragraph 141 of its Closing Submissions, Dell admitted that contrary to Mortensen's information and understanding as of his March 19, 1999 e-mail, Mortensen was not correct when he stated that "a Council Resolution was passed on October 28th directing staff to purchase ONLY Compaq and IBM through SHL, GE and Questech". The amendment did not expressly "allow Dell to be added to the Council Resolution as a Hardware Supplier ONLY".⁵⁸
30. It is respectfully submitted that Mortensen's evidence is not based on fact, but on speculation. It is not what happened, but what he assumed had happened. At best, it could be said that he was prone to exaggeration. At worst, he conveyed information that he knew was false.

⁵¹ Affidavit of David Shiner, TECI, sworn October 3, 2004, p. 4, para. 17

⁵² Testimony of David Shiner, TECI, December 1, 2004, p. 141, lines 5-8

⁵³ Testimony of Jim Andrew, TECI, January 25, 2005, p. 179, lines 1-11

⁵⁴ Testimony of Jeffrey Lyons, TECI, January 17, 2005, p. 83, lines 3-12

⁵⁵ Closing Submissions of Dell Canada Inc., TECI, Part III B(12), para. 119

⁵⁶ Testimony of Jeffrey Lyons, TECI, January 17, 2005, p. 100, lines 2-5

⁵⁷ Testimony of Jeffrey Lyons, TECI, January 17, 2005, p. 100, lines 11-25

⁵⁸ Closing Submissions of Dell Canada Inc., TECI, Part III B (13c), para. 141

31. Notwithstanding the evidence of Councillor Shiner and Lyons, and the apparent shortcomings associated with Mortensen's information and understanding, Dell chose to attack Councillor Shiner's explanation of how and why the amendment to Clause 20 of Report 17 of the 1998 Corporate Services Committee Report arose. Mortensen deposed that the amendment "effectively opened the door" for Dell,⁵⁹ yet testified that his understanding of how the amendment achieved this objective was derived from either Lyons or his assistant Susan Cross ("Cross"),⁶⁰ but he couldn't recall. There is no evidence from Cross supporting this possibility and while Lyons doesn't discount this possibility, he testified that the amendment was not part of his strategy and in fact, he had nothing to do with the amendment.⁶¹ If one accepts Lyons' evidence that he knew nothing of the amendment at the time of the Council Meeting,⁶² it is difficult to believe that Lyons could have been the source of Mortensen's understanding.
32. Councillor Shiner deposed that the purpose behind his amendment was two-fold: to have the Commissioner of Corporate Services submit a further report on hardware and systems configuration so as to verify what equipment the City staff was buying; and, to encourage IBM not to leave the City.⁶³
33. When asked about what the amendment accomplished, contrary to the evidence of Mortensen, Andrew testified that he felt that it was a "fairly minor amendment" and that he was not "quite sure how it would open the door for anyone."⁶⁴
34. At paragraph 137 of its Closing Submissions, Dell stated that Andrew agreed that the objective of the amendment as provided by Councillor Shiner was "preposterous".⁶⁵ It is respectfully submitted that this is a gross mischaracterization of the testimony. Andrew was asked whether during discussions with representatives from IBM, he ever said to

⁵⁹ Affidavit of Bruce Mortensen, TECI, sworn November 11, 2004, p.12, para. 48

⁶⁰ Testimony of Bruce Mortensen, TECI, November 25, 2004, p.126, line 20 - p. 127, line 1

⁶¹ Testimony of Jeffrey Lyons, TECI, January 17, 2005, p. 90, lines 2-9

⁶² Testimony of Jeffrey Lyons, TECI, January 17, 2005, p. 88, lines 6-11

⁶³ Affidavit of David Shiner, TECI, sworn October 3, 2004, p. 4, paras. 17 and 19

⁶⁴ Testimony of Jim Andrew, TECI, January 25, 2005, p.179, lines 1-13

them, "if IBM doesn't move its research lab or its head office out of Toronto, we'll work with you on the computer contract". After stating that the subject never came up during the discussions, Andrew agreed that it would have been preposterous to make such a statement to a potential supplier.⁶⁶ Andrew did not criticize the stated objective of the amendment.

35. Lyons testified that he found Andrew receptive⁶⁷ to what he was saying and did not find it necessary to work through the Councillors. But what Lyons failed to explain is how Andrew's receptiveness culminated in an amendment which purportedly opened the door for Dell.⁶⁸ Lyons claimed to have gotten the sense that Andrew was "going to help to reopen it so [Dell] could bid",⁶⁹ but did not suggest that he played any role in bringing about the amendment.
36. This leaves Dell with having to accept that while it achieved its ultimate objective, Lyons was not instrumental in its success. Alternatively, it could concoct a wholly unsubstantiated hypothesis, implicating Andrew and Councillor Shiner in a scheme to circumvent the City's Purchasing By-Law and policies, all in an effort to assist Dell for no plausible reason.
37. At paragraph 191 of its Closing Submissions, Dell reiterated that both Toms and Kelly credited Lyons with helping to get the message across to the City that it was about to purchase end-of-life desktops and that it could get lower priced, technologically advanced products from Dell by unbundling the services and hardware. It then implied that Andrew was the obvious facilitator as evidenced by the fact that Andrew met with Toms and Lyons on November 16, 2004, while Lyons apparently did not have any discussions with Franey, Bulko or Viinamae.⁷⁰

⁶⁵ Closing Submissions of Dell Canada Inc., TECI, Part III B(13b), para. 137

⁶⁶ Testimony of Jim Andrew, TECI, January 26, 2005, p.102, line 18 - p.103, line 9

⁶⁷ Testimony of Jeffrey Lyons, TECI, January 17, 2005, p. 81, lines 11-21

⁶⁸ Affidavit of Bruce Mortensen, TECI, sworn November 11, 2004, p.12, para. 48

⁶⁹ Testimony of Jeffrey Lyons, TECI, January 17, 2005, p.253, lines 2-7

⁷⁰ Closing Submissions of Dell Canada Inc., TECI, Part III C(2), para. 191

38. While Dell impressively critiques the stated purpose of Councillor Shiner's amendment, the suggested alternative is not plausible. Not only is there is no evidence that Lyons or Andrew attempted to influence Shiner to table the amendment, there is no evidence to indicate that the actions of Viinamae, Bulko or Franey in relation to the December RFQ were a direct or indirect consequence of the amendment.
39. Cross had drafted a memorandum to file following a September 16, 1998 meeting between Lyons and Kelly, wherein she stated "David acknowledged that Jim Andrew wants Dell to succeed."⁷¹ Toms testified that this was understandable given their history with Novell. But Kelly, who purportedly gave Cross this impression, testified that Andrew was not a strong supporter of Dell. He described Andrew as having been "neutral".⁷²
40. Leaving aside the issue of Andrew's motivation, Lyons and Dell both made the assumption that Andrew as the Executive Director, IT was capable of doing what was necessary to overcome the result of August RFP. Even if we were to accept Andrew's complicity in the preparation of the amendment, one would have to believe that Andrew instructed Viinamae to have the Y2K Desktops team carry out the December RFQ and to give effect to the amendment, ensure that Dell was given the opportunity to bid directly. Viinamae has not implicated Andrew and in fact has denied that she instructed Bulko to include Dell in the December RFQ, or even knew Dell was an Enterprise Tier manufacturer.⁷³

⁷¹ TEC057087 @ 57088

⁷² Testimony of David Kelly, TECI, November 24, 2004, p. 55, lines 8-16

⁷³ Affidavit of Lana Viinamae, TECI, sworn November 14, 2004, pp. 2-3, para. 10

II. REPLY TO SUBMISSIONS OF THE CITY OF TORONTO

Dell Canada Inc.

41. The City described Andrew and Lyons as "traders in information".⁷⁴ It concluded that the information received by Andrew "allowed Andrew to stay on top of political and other issues which, as a high ranking bureaucrat, was valuable to him."⁷⁵ Yet the only specific information the City identified was the example of Andrew being advised that Joan Anderton was going to be appointed as Commissioner of Corporate Services, before this was made public.⁷⁶ It is respectfully submitted that unless the City has specific evidence of the information being exchanged, it is reduced to relying on conjecture.
42. If the City is inclined to speculate as to how Lyons was able to get "back in the door", perhaps it should give consideration to Lyons relationship with Viinamae. Both Viinamae's calendar and Cross' calendar indicated that a meeting between Lyons and Viinamae was held on November 26, 1998.⁷⁷ Bulko deposed that on December 3 or 4, 1998, Viinamae came to her office and asked her to request a quote for desktops from three Enterprise Tier manufacturers, including Dell.⁷⁸ Later that month, Viinamae advised Dell that it had been the successful bidder in the December RFQ.⁷⁹
43. Although it is not being suggested that credence be given to unsubstantiated hypotheses, it does stand to reason that equally conceivable explanations should not be discounted. If nothing else, this should demonstrate that absent concrete evidence, no definitive conclusion ought to be drawn.
44. In a similar vein, if the City has failed to present concrete evidence of the information it contends helped Dell to "get back in the door", it has also failed to explain how the

⁷⁴ Closing Submissions of City of Toronto, TECI, Ch. 2, p. 2, para. 8

⁷⁵ Closing Submissions of City of Toronto, TECI, Ch. 2, p. 3, para. 8

⁷⁶ Closing Submissions of City of Toronto, TECI, Ch. 2, p. 4, para. 8

⁷⁷ Testimony of Jeffrey Lyons, TECI, January 17, 2005, p. 86, lines 2-12

⁷⁸ Affidavit of Kathryn Bulko, TECI, sworn September 15, 2004, p. 4, para. 24

⁷⁹ Affidavit of Bruce Mortenson, TECI, sworn November 11, 2004, p. 15, para. 60

information Andrew received, gave him any advantage or benefit. Suffice it to say, unless we know precisely what information Andrew received from Lyons, we cannot determine its value to Andrew.

45. At paragraph 24 of its Closing Submissions, the City identified the fatal flaw in its argument. The City stated:

"The real question is: how did Andrew's conversation with Lyons, Toms and Mortensen filter down to other I&T staff and result in the December RFQ being issued to Dell?...The evidence of Bulko, Viinamae and Franey is frequently inconsistent as to the timing and/or content of their communications with one another and with Dell representatives. Further, none of them admit to having had any discussions with Andrew in which he suggested that Dell be allowed to "bid direct". There is no way to square their conflicting evidence and their silence on Andrew's involvement."⁸⁰

46. As stated at paragraph 40 herein (Reply to Submissions of Dell), in order to convincingly demonstrate that Lyons was able to influence Andrew and thereby enable Dell to bid, it is necessary to explain the obvious disconnect between Andrew and the Desktop team. In order for Lyons to succeed, it was necessary for him to not only win over Andrew, but also to persuade him to instruct Viinamae to direct the December RFQ in a way that would ensure a direct bid from Dell. While the City acknowledged that the evidence does not support its theory, it asks the Commissioner to support it nonetheless.
47. The City stated that "Lyons believed" that he and Dell had been successful in convincing Andrew to let Dell bid direct on only the hardware.⁸¹ Based on this, the City concluded that it wouldn't be plausible to believe that Viinamae, Bulko and Franey acted without direction from Andrew. Ironically, five paragraphs earlier, the City warned that Lyons' evidence should always be treated with caution.⁸²

⁸⁰ Closing Submissions of City of Toronto, TECL, Ch. 2, p. 12, para. 24

⁸¹ Closing Submissions of City of Toronto, TECL, Ch. 2, p. 12, para. 25

⁸² Closing Submissions of City of Toronto, TECL, Ch. 2, p. 8, para. 20

48. As much as the City would loathe to admit it, it is equally plausible that Lyons overstated Andrew's commitment to Dell. The overwhelming evidence suggesting that Viinamae, Bulko and Franey acted independent of Andrew, should be accepted.

Ball Hsu & Associates

(i) The Hiring Process – Taslim Jiwa

49. The City critiqued the hiring process employed by Corporate IT from 1998 through 2000. To support its position, it wholly accepted the evidence of Taslim Jiwa ("Jiwa") while attacking the credibility of everyone who disagreed, including Andrew,⁸³ Andy Lok ("Lok")⁸⁴ and Viinamae.⁸⁵
50. The City referred to the December 4, 1997 (sic) memorandum⁸⁶ from Andrew and Anne Olscher setting out a procedure for the hiring of IT contractors and consultants, but failed to conclude that this indicated the existence of a competitive hiring process. Instead, the City lambasted Andrew for not drawing Jiwa's attention to it, while conveniently ignoring the fact that everyone else was aware of, and followed the competitive hiring process. No one else was oblivious to the procedure and no one else required Andrew to direct them to the procedure.
51. The City accepted Jiwa's evidence that it was Andrew who directed her to go to Lok after approving her request to hire external contractors. Leaving aside Lok's evidence disputing Jiwa's assertion,⁸⁷ it is respectfully submitted that Jiwa's account is not credible. Not only was the competitive process followed by the other Directors in Corporate IT,⁸⁸ but it was Andrew himself who drafted the December 4, 1996 memorandum suggesting the procedure for the hiring of IT contractors and consultants. Jiwa was aware that she

⁸³ Closing Submissions of City of Toronto, Ch. 3, p. 15, para. 41

⁸⁴ Closing Submissions of City of Toronto, Ch. 3, p. 16, para. 43

⁸⁵ Closing Submissions of City of Toronto, Ch. 3, p. 16, para. 44

⁸⁶ TEC010212

⁸⁷ Affidavit of Andy Lok, TECI, sworn December 3, 2004, p. 7, paras. 43 and 44

⁸⁸ Testimony of Jim Andrew, TECI, January 24, 2005, p. 210, lines 14-19

alone acted contrary to the established competitive process and as she continues to be employed by the City, is hesitant to shed light on her own failings. A more plausible explanation is that, through her own ignorance, Jiwa went directly to Lok and never questioned the wisdom of engaging in a non-competitive process.

(ii) Contract Management

52. At paragraph 47 of its Closing Submissions, the City stated that the 1998 and 1999 Ball Hsu & Associates ("BHA") schedules relating to the January 15, 1997 contract were signed by Andrew.⁸⁹ These schedules referred back to the January 15, 1997 Metro Council Report stating that, pursuant to Report No. 1 (17) of the Corporate Administration Committee, the maximum fee payable under all schedules shall be \$500,000.00.⁹⁰ Accordingly, the City concluded that the spending authority was granted for 1997 only, and had thereby been "extended" without authority into 1998 and 1999.⁹¹
53. Contrary to the assertion of the City, the schedules to the BHA contract completed in 1998 and 1999 were not all executed by Andrew. In addition to the schedules executed by Andrew, schedules were also executed by Andrew and Viinamae⁹², Franey and Viinamae⁹³ and by Jiwa and Viinamae.⁹⁴
54. None of the schedules identified to in paragraph 53 herein, referred back to the January 15, 1997 Metro Council Report specifying the maximum fee of \$500,000.00. This included the schedule executed by Jiwa and Viinamae in 1999, which related to non-Y2K services.
55. As the City indicated, Andrew testified that the schedules were a standard form and hence the reference to Report No. 1 (17) in some of the 1998 and 1999 schedules. The City stated at paragraph 50 of its Closing Submissions that it was apparent "that no one was monitoring whether these standard forms had any basis in what Council had actually approved."⁹⁵

⁸⁹ Closing Submissions of City of Toronto, TECI, Ch. 3, p. 17, para. 47

⁹⁰ TEC056527

⁹¹ Closing Submission of City of Toronto, TECI, Ch. 3, p. 17, para. 48

⁹² TEC054377 and TEC054465

⁹³ TEC035978

⁹⁴ TEC054874

⁹⁵ Closing Submissions of City, TECI, Ch. 3, pp. 17-18, para. 50

56. The schedules executed by only Andrew, were sent to the City's Legal Division for review.⁹⁶ If Andrew had been executing schedules without authority, the Legal Division presumably failed to take notice of this, or alternatively, had shared Andrew's belief that pursuant to the January 15, 1997 contract, there were no limits on expenditures for 1998 or 1999.

⁹⁶ TEC010543, TEC010544, TEC010547 and TEC010548

III. REPLY TO SUBMISSIONS OF WANDA LICZYK

57. At paragraph 161 of her Closing Submissions, Wanda Liczyk stated that the Saunders (Beacon) and Maxson (Remarkable) contracts fell under the IT Division and ultimately it was the IT Division that negotiated and formalized those agreements under the Y2K Project.⁹⁷
58. Saunders and Maxson were hired to carry out Y2K – related work under the budget of the Y2K Project. Their services were supplied directly to the Finance (Revenue) Department.⁹⁸
59. The written contracts of Saunders and Maxson were neither negotiated or formalized by the IT Division. Although Andrew was asked by Giuliana Carbone ("Carbone") to initiate the contract process, his role was that of a conduit between Carbone and the External Partners and Agreements group ("External Partners group"). Andrew brought information to the External Partners group so that it could develop Y2K compliant contracts for Saunders and Maxson.⁹⁹
60. The External Contracts group worked with the City's Legal Division and the Purchasing and Materials Management Division in preparing the contracts.¹⁰⁰ The Saunders and Maxson contracts were executed by Viinamae and Michael Garrett.¹⁰¹ Attached to the contracts were schedules setting out the details such as hours of work and rate of pay, which were provided to the External Partners group by either the Finance Department or

⁹⁷ Closing Submissions of Wanda Liczyk, TECI, pp. 46-47, para. 161

⁹⁸ Affidavit of Lana Viinamae, TECI, sworn November 14, 2004, p. 14, para. 61

⁹⁹ Closing Submissions of Jim Andrew, TECI, p. 23, para. 91

¹⁰⁰ Closing Submissions of Jim Andrew, TECI, pp. 22-23, para. 90

¹⁰¹ Closing Submissions of Jim Andrew, TECI, p. 23, para. 92 and p. 24, para. 95

Saunders and/or Maxson.¹⁰² The schedules were negotiated and approved by the Finance Department¹⁰³ and were signed by Carbone, Viinamae and Brunning.¹⁰⁴

¹⁰² Closing Submissions of Jim Andrew, TECI, p. 24, para. 96

¹⁰³ Closing Submissions of Jim Andrew, TECI, p. 24, para. 96

¹⁰⁴ Closing Submissions of Jim Andrew, TECI, p. 23, para. 92 and p. 24, para. 95