

TORONTO EXTERNAL CONTRACTS INQUIRY

Reply Submissions on Behalf of Lana Viinamae

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A. Reply to the Submissions of the City of Toronto

Beacon/Remarkable Phase

1. The City has submitted – at page 74, paragraph 227 of its TMACS submissions – that the selection of Beacon and Remarkable to complete the WMACS system ought to have been subject to a competitive process because Michael Saunders and David Maxson had no “specialized knowledge that would have justified sole source procurement”. This ignores the evidence of various witnesses:

- (a) While WMACS was not a “module” of TMACS, the two systems shared the same architecture and were designed to incorporate ratepayer data from a common database. As a result, it only made sense, once the City decided to adopt TMACS (a decision in which Ms. Viinamae had no role), that Beacon and Remarkable were in the best position to complete WMACS as a Y2K-ready water system;

E. Ngan, October 27, 2004, p. 195, lines 7 – 19

- (b) a competitive process would not have been feasible in the lead-up to Y2K and was not required under the City’s Y2K Plan. The approach taken was expressly authorized by Council when it approved the Y2K Plan in November 1998. The Y2K Project’s strategy was to make use of existing resources and contracts wherever possible to ready the City for Y2K. To the extent that Beacon and Remarkable were existing contractors with the City, who were positioned to complete WMACS based on their work with TMACS and the relationship between the two systems, their selection to prepare WMACS as a Y2K-compliant water system was consistent with Council’s direction through the Y2K Plan;

Affidavit of L. Viinamae, para. 5, Exhibit 14, Tab I

COT030963 at 30965 (recommendation no. 11); and at 30971 – 30972 (City-wide Initiatives)

- (c) in any event, the selection of a supplier was the responsibility of the department receiving the services, which in this case was the Finance Department.

L. Viinamae, December 7, 2004, p. 144, line 20 – p. 146, line 16

Desktop Phase

2. The City submits, at paragraph 4 and elsewhere in its Desktop Phase submissions, that City Staff did not obtain “required approvals” from either Council or the CAO to purchase PCs from Dell directly rather than from the VARs. The City further submits at paragraph 4 that City Staff did not adequately report their activities “thus giving rise to a suspicion of improper activity.”

3. The City’s position on these points is not supported by the evidence. Rather, there is uncontested evidence before the Commissioner that:

- (a) City Council approved funding for the Y2K Project, including funding for the acquisition of desktop computers, when it approved the Y2K Plan in November 1998;
- (b) the actual purchase of desktops for the Y2K Project from Dell was based on an open and competitive process, the December 1998 RFQ, that was conducted with the knowledge and approval of the City’s Purchasing Department; and
- (c) the decision to go with Dell was reported to the Y2K Steering Committee, which included Councillor Dick O’Brien, who was Council’s designated representative on that committee.

4. Ms. Viinamae did not engage in any improper activity and there is no evidence to support this “suspicion”. In fact, Commission counsel, in her opening statement during this phase of the Inquiry, said the following:

... I want to make it very clear that we’re not suggesting any wrong doing [sic] on any - - on [the]

part of Dell *or anyone else*, we're simply questioning the selection process for these desktops. [emphasis added]

Opening Statement, November 22, 2004, p. 8, lines 8 – 11

The December 1998 RFQ was about Pricing not Lobbying

5. At paragraphs 24 and 25 of its Desktop Phase submissions, the City suggests that a “preponderance of evidence” supports the conclusion that Jeff Lyons’ lobbying of Jim Andrew and the issuance of the December 1998 desktop RFQ were “causally connected”. There simply is no evidence to support such a conclusion, let alone a preponderance of evidence. The evidence, instead, points to a different conclusion:

- (a) About the time or shortly after the August 1998 RFP, Mike Franey and Kathryn Bulko identified differential pricing as an issue that would cause the City more for desktop computers than could be obtained through “special bid” pricing from the various desktop manufacturers.
- (b) Ms. Bulko and Mr. Franey recommended to Ms. Viinamae that the City could obtain the best prices for desktop computers by requesting such special bid pricing through an RFQ – a competitive bid process commonly utilized by the City for such purchases;
- (c) An RFQ would have been necessary, in any event, to supply the Y2K Project with desktop computers, as the City could not issue purchase orders based on the RFP alone;
- (d) Ms. Viinamae instructed Ms. Bulko to carry out the December 1998 RFQ to obtain the best prices for the City from Tier One manufacturers. Dell was a Tier One manufacturer and, therefore, was invited by Ms. Bulko to bid in the RFQ;
- (e) The RFP, by its very terms, was non-exclusive and did not preclude the City from continuing to buy desktop computers from Dell;

- (f) Dell's prices were significantly lower than the other bidders and it won the RFQ. Dell did so on an even playing field, as the VARs' mark-up was not a significant portion of their desktop pricing; and
- (g) There is no evidence that Ms. Viinamae ever was influenced by Jim Andrew or Jeff Lyons in respect of the December RFQ. Instead, the evidence suggests that Dell won the RFQ solely based on the merit of its low bid, which saved the City in excess of \$700,000.

6. The foregoing evidence explains the issuance of the December 1998 RFQ, and it is submitted that there was no connection between Jeff Lyons' lobbying of Jim Andrew and the decision to proceed with December 1998 RFQ.

7. The City, at paragraph 24 of its Desktop Phase submissions, alludes to Ms. Viinamae's "silence" regarding Jim Andrew's involvement in the December RFQ. It also suggests that the evidence of Ms. Bulko, Mr. Franey and Ms. Viinamae is "frequently inconsistent" as to the timing and/or the content of their communication, with one another, and with Dell representatives. In response, it is submitted:

- (a) If Ms. Viinamae was "silent" as to Mr. Andrew's involvement, it only was because she was not asked about it during her testimony. If she did not "admit" to having discussions with Mr. Andrew, to use the City's term, that is because it did not happen – but, again, she never was asked;
- (b) While Ms. Viinamae's evidence concerning the genesis of the RFQ may have conflicted with that of Ms. Bulko and Mr. Franey, it is submitted that Ms. Viinamae's evidence was internally consistent throughout her testimony at this Inquiry. For that reason, Ms. Viinamae's evidence ought to be believed over the evidence of Ms. Bulko and Mr. Franey, to the extent that there is any inconsistency between their various accounts. (Please refer to Ms. Viinamae's Closing Submissions regarding the evidence of Ms. Bulko and Mr. Franey that calls their credibility into question); and

- (c) Ms. Viinamae had limited contact with Dell representatives prior to the December 23, 1998 meeting at which Dell was advised that it had won the RFQ.

Y2K Project Was Entitled To Look Beyond the VARs

8. According to the City, desktop computers *had* to be purchased for the purposes of the Y2K Project through the VARs selected in the August 1998 RFP. In reaching this conclusion, at paragraphs 48 to 53 of its submissions, the City has stretched a very narrow slice of Ms. Viinamae's evidence (during her lengthy cross-examination by the City's counsel) to fit this point. The City suggests that Ms. Viinamae's "admission" that she expected or intended to purchase Y2K computers from the VARs supports a conclusion that Council authorized the acquisition of those computers *only* from the VARs. The City suggests that this so-called "admission" by Ms. Viinamae, made during testimony given more than six years after the fact, is "determinative" of the meaning of the Y2K Plan.

9. The meaning of the Y2K Plan (COT030963 at 30975) is apparent on its face: Nowhere does the Y2K Plan say that desktop computers for the Y2K Project would be acquired through the VARs. Ms. Viinamae's evidence on this point must be read as a whole from pages 70 to 78 of her January 27, 2005 testimony. In doing so, it can be seen that the substance of Ms. Viinamae's evidence bears no relation to the so-called "admission" relied upon by the City.

10. In her evidence, Ms. Viinamae dealt with this point at some length, both in response to questions from Mr. Lewis, for the City, and from the Commissioner herself. Ms. Viinamae was steadfast that, while she initially had

intended that the Y2K Project would be supplied with desktops from the VARs, that was not mandated by Council. The Y2K Plan, as approved by Council, spoke expressly of using VARs to provide services for the desktop rollout. The Y2K Plan was silent as to whether the VARs would supply the hardware.

11. Ms. Viinamae explained that, as of November 1998 when the Y2K Plan was approved by Council, the Y2K Plan was silent concerning the source of the hardware because “at that point... we don’t know who’s going to provide the hardware.” Logically, this is consistent with the evidence of Ms. Viinamae (and other witnesses) that the RFQ was a necessary step, following the RFP, to identify the desktop supplier for the Y2K Project. But the RFP was not exclusive. In the words of Ms. Viinamae (echoed by other witnesses like Ms. Bulko and Mr. Franey), the RFP only meant that the VARs were pre-qualified to supply the City with hardware and services from 1999 to 2001:

MADAM COMMISSIONER: Okay. When the RFP goes out, the RFP tells whoever is wanting to compete for the RFP that both the hardware and the services is going to be done by the VARs; is that not right? Have I got it wrong?

THE WITNESS: It’s not that it will be, it’s that it could be... it’s not an exclusive. It’s not that we have to go there. It’s that they are the pre-qualified vendors.

MADAM COMMISSIONER: Okay.

L. Viinamae, January 27, 2005, p. 78, lines 4 - 22

12. The RFP did not prohibit City staff from selecting other vendors through a competitive process like the December RFQ. The Commissioner should not make such a finding.

Authority to Purchase from Dell

13. The City again has chosen to rely, unfairly, upon a selectively narrow slice of Ms. Viinamae's testimony at paragraphs 54 to 58 of its submissions, dealing with the authority to purchase from Dell. In doing so, it is submitted that the City again has mischaracterized the substance of Ms. Viinamae's evidence.

14. The City makes two definitive statements in its submissions on this point:

- (i) that there was no transaction authority under the Y2K Plan unless the CAO approved it; and
- (ii) there is no delegated approval form in the Commission's document database pertaining to the purchase of desktop PCs from Dell and, therefore, the Commissioner should conclude that the CAO never authorized the purchase.

15. At one point in her testimony, relied upon by the City, Ms. Viinamae accepted an assertion put to her by Mr. Lewis that a competitive process (i.e. the December 1998 RFQ) did not mean that the CAO's delegated approval under the Y2K Plan was not required. However, earlier, Ms. Viinamae had suggested that a delegated approval form may not have been required where a competitive process was followed. And later, when asked by Mr. Lewis why a delegated approval form might not have been executed for the Dell desktop purchase, Ms. Viinamae answered:

...my recollection is that [for] certain competitive processes we didn't create the Y2K delegated approval form, and this is the process that we went through with Purchasing. So, you know, I can't tell you specifically why, but I could tell you that we always had Purchasing working with us, and whenever we felt we needed the Y2K delegated approval

form, *once it had been established*, they would ask for it, then actually would sign it. [emphasis added]

L. Viinamae, January 27, 2005, p. 36, line 1 – p. 38, line 10

16. As alluded to by Ms. Viinamae in the foregoing answer, it is unclear when the Y2K Project adopted the Y2K Delegated Approval Form. There is no clear evidence that this form had come into use as of December 1998. There is evidence that the Y2K Project Management Office (PMO) was not yet up and running as of that time (the first 200 desktops ordered from Dell were to supply the PMO starting in early January).

L. Viinamae, December 6, 2004, p. 120, lines 12 – 16

17. This suggests that the forms would not yet have been in use at that time, if the PMO was not even operational. The City says that Ms. Viinamae “conceded” it was unlikely that a form was executed for the Dell purchase. Ms. Viinamae’s answer on this point must be considered in context:

Q: To be fair to you, I’ll put it another way. You think it’s - - it is unlikely, given what we’ve just discussed, that a delegated approval form was executed? Unlikely that one was executed?

A: I’d say, yes, it’s unlikely. But, at the same time, there are so many factors. When I go back to the desktop process, I’m not even sure at what point the Y2K delegated approval form was established.

So, to my knowledge - - the actual use of this form may have only been established, either at the end of December or in January. And part of the - - the reason being that we were constantly going to Mr. Garrett and saying, okay, we need to do this.

And Mr. Garrett said, wait a minute, you know, I need some information on what’s going on, we need to establish a form...

L. Viinamae, January 27, 2005, p. 34, line 13 – p. 35, line 3

18. The delegated approval form relied upon by Mr. Lewis in his questioning of Ms. Viinamäe on this point (TEC017353) included several boxes that could be checked off (i.e. "RFP", "Existing Vendor - Purchase Order Only", "RFQ" or "Sole Source") under the heading "Selection process for *new contract only*" [emphasis added]. The Commissioner has heard that there were instances where the City would award a contract resulting from a competitive process (i.e. the umbrella contracts flowing from the 1997 Metro RFP at issue in the Ball Hsu Phase of the Inquiry).

19. On this foundation, Ms. Viinamäe accepted Mr. Lewis' proposition that a delegated approval form was required where the City was to enter into a contract resulting from a competitive process:

Q: ... What my point is, that if - - when you're not in a Y2K circumstance, the fact that there is a competitive process doesn't mean that Council isn't - - doesn't have to authorize *entering into a contract* with the winner of a competitive process? [emphasis added]

A: Agreed.

Q: Right? And so I suggest to you, it was no different under the Y2K process that the fact that there was a competitive process didn't mean that the CAO didn't have to exercise his delegated authority in order to make it a properly authorized transaction?

A: Okay.

L. Viinamäe, January 27, 2005, p. 31, line 22 – p. 32, line 8

20. Of course, no contract ever was entered into with Dell as a result of the December 1998 RFQ. Instead, purchase orders were requisitioned by Y2K staff and issued by the City's Purchasing Department. It is submitted that Ms. Viinamäe's evidence has been unfairly construed by the City as accepting that a delegated approval form was required in all instances, and that there was no

authority to acquire desktops from Dell in the absence of such a form (which may not even have been in use at the material time). City staff, including Ms. Viinamäe, were entitled to rely on the purchase orders issued by the City's Purchasing Department. Only the Purchasing Department could issue purchase orders, and it would do so only once satisfied that all necessary approvals were in place.

L. Viinamäe, December 8, 2004, p. 56, lines 12 – 22

21. Unfortunately, no evidence on this point was adduced by Commission counsel – either from officials in the City's Purchasing Department, or from former CAO Michael Garrett (even though Mr. Garrett did submit affidavit evidence on other points raised in this Inquiry) – to assist the Commissioner in understanding the required process as of December 1998. It is submitted that, in the absence of clear evidence on this point, no conclusive findings should be made.

22. Further, Ms. Viinamäe clearly (and reasonably given the passage of time) struggled, in answering Mr. Lewis's questions, to recall the process in place at the time of the December RFQ. As a result, her evidence should not be taken as conclusive on this point and should not serve as the basis for the Commissioner to make any determination of the actual process. The evidence does not support the conclusions suggested by the City. As well, considering Ms. Viinamäe's evidence regarding when the delegated approval form was implemented, the absence of a form with respect to Dell – in and of itself – should not be taken as conclusive the CAO did not approve the decision to buy from Dell.

23. The City places some emphasis on the suggestion that neither the CAO nor Council was ever made aware of the decision to award the RFQ to Dell. Nowhere does the City explain why this is significant. While the City refers to the CAO's obligation to report to the Strategic Policies and Properties Committee ("SPPC") regarding the status of the Y2K Project, it does not explain why any failure to report on the selection of Dell to SPPC was improper.

24. This is not to suggest that the decision to go with Dell was insignificant. However, it is submitted that the brand of whichever desktop computer were being acquired by the Y2K Project would have been primarily significant to the City's IT staff and largely insignificant to anyone else at the City. Council had approved the funding for desktop acquisitions as part of the Y2K Plan. The selection of a particular computer model through the December 1998 RFQ represented a staff-level decision. As Ms. Viinamae explained, to Commission counsel, Council had bigger concerns in relation to Y2K:

A: And to be honest even from the Councillors' perspective they saw the city wide initiatives you could say as plumbing. And they were really very interested in how the whole building was going to work.

You know, because the things that the public sees are, you know, do they have their water when they turn on their tap. If they call the fire department, does the fire engine turn up?

Q: Yes.

A: Those were the things that they wanted to understand because that's where the liability to the City was.

L. Viinamae, December 6, 2004, p. 112, lines 12 – 23

25. In any event, as the City concedes, it is clear that the members of the Y2K Steering Committee were aware of the decision to buy Dell desktops.

They included Councillor Dick O'Brien, the chair of the Steering Committee, who was the designated representative of Council on the committee. There simply is no basis for suggesting, as the City has, that an effort was made to keep the issue of the purchase of Y2K desktops "under the radar" of Council and senior management.

26. The City also makes note of the apparent failure to report the desktop change request to SPPC. No such report was required, because the change request fell within the original budget envelope for the desktop rollout. It is submitted that Ms. Viinamäe's evidence should be accepted on this point. (As an aside, this may explain the request from the Y2K Steering Committee that the Audit Department be asked to confirm whether the change request could be accomplished within the original Y2K desktop budget.)

L. Viinamäe, January 27, 2005, p. 162, line 7 – p. 163, line 25

27. At paragraph 74 of its Desktop submissions, the City refers to other purported instances in which Ms. Viinamäe allegedly reported change requests to SPPC that had no budgetary implications. These documents were not put by the City's counsel to Ms. Viinamäe in his cross-examination of her, so she was afforded no opportunity to provide her perspective on these documents. As a result, the City's submission on this point should not be considered or given any weight.

28. Similarly, the City failed to ask Ms. Viinamäe any questions about the content of point-form minutes from a meeting of the City's Senior Management Team (SMT) held on February 5, 1999 (TEC054076). Yet the City

now relies on the on those sparse minutes to make definitive statements regarding the substance of that meeting at paragraphs 97 and 98 of its Desktop submissions. As a result, the City's submissions in these paragraphs should not be considered or given any weight.

L. Viinamäe, December 8, 2004, p. 96, line 19 – p. 98, line 3

Dealings with Audit Department

29. In response to the City's submissions regarding consultations concerning the desktop change request with the Audit Department, please refer to paragraphs 69 to 84 of Ms. Viinamäe's Closing Submissions. Ms. Viinamäe in no way "jumped the gun" (as the City suggests at paragraph 81 of its Desktop submissions) in informing the Y2K Steering Committee that Audit supported the Change Request, based on her discussions with Ben Smid. The fact that Mr. Smid submitted a memo to Jeff Griffiths in late February 1999 has no bearing on whether he discussed the issue with Ms. Viinamäe prior to that date.

Ball Hsu Phase

30. Ms. Viinamäe testified that a competitive process was followed for obtaining contractors for the Y2K Project. The City concedes, at paragraph 44 of its Ball Hsu submissions, that there is no evidence to contradict Ms. Viinamäe. Ms. Viinamäe's evidence on this point should be believed and is supported by the documentary evidence (COT076755) detailing the competitive hiring process established for the purposes of the Y2K Project. There simply is no basis for the

City's suggestion that Ms. Viinamäe's evidence should be viewed with scepticism on this point. Again, the City has based its submission on an incomplete slice of Ms. Viinamäe's evidence, completely ignoring detailed evidence that Ms. Viinamäe gave on this point (referring to the supporting documentation) during her January 27, 2005 testimony.

L. Viinamäe, January 27, 2005, p. 124, line 12 – p. 131, line 20

31. It is respectfully submitted that the City's submissions, as a whole, ought to be treated with some scepticism, for the reasons canvassed previously at paragraphs 1 to 6 of Ms. Viinamäe's Reply Submissions in the Toronto Computer leasing Inquiry.

B. Reply to the Submissions of Jim Andrew

32. At paragraph 161 of his submissions, Mr. Andrew makes the entirely unsubstantiated assertion that Ms. Viinamae “denied being involved in the decision to select Dell...” No corresponding reference to the transcript of Ms. Viinamae’s evidence is provided in support of this statement. This statement is not true. By way of example, on cross-examination by Dell’s counsel Ms. Dyer, Ms. Viinamae acknowledged her involvement in signing the purchase requisition for the initial order from Dell on December 23, 1998:

Q: Okay. So, the -- when people talk about a decision being made, the -- I suggest to you there were two (2) decisions really. One (1) is a decision of -- an evaluation of who is the lowest cost bidder, who has won the mini-RFQ, correct?

A: Correct.

Q: And the other decision is, whether you're going to act on the results of the mini-RFQ, and issue a purchase requisition and a purchase order?

A: Correct.

Q: So, to the extent that you're involved, you have to exercise your discretion and judgment to follow what Kathryn has told you before you sign your name on the purchase order?

A: Correct.

L. Viinamae, December 8, 2004, p. 57, line 17 – p. 58, line 6

33. On a purely factual point, Mr. Andrew submits at paragraph 177 that there was no indication who prepared the minutes of the Y2K Steering Committee dated January 28, 1999. Ms. Viinamae’s evidence was that Line Marks recorded the minutes of the Y2K Steering Committee meetings.

L. Viinamae, December 6, 2004, p. 129, line 16 – p. 131, line 8

34. There is a suggestion, at paragraph 182 of Mr. Andrew's submissions, that Jerry Shaubel had no recollection of a meeting "having taken place" between Audit staff, Ms. Viinamae and Mr. Andrew on July 6, 1999. This is not entirely accurate. Mr. Shaubel testified that his calendar entry lead him to believe that the meeting did take place, because Audit staff tracked their time and he entered "2.0" or two hours in his calendar reflecting a two-hour meeting. "[T]hat makes me think that it actually did occur," said Mr. Shaubel, on examination by Commission counsel.

J. Shaubel, December 1, 2004, p. 323, line 2 – p. 324, line 20

35. It is submitted that Mr. Viinamae's evidence regarding Mr. Andrew's involvement in the dealings with Audit staff should be preferred over that of Mr. Andrew, who attempted both in his evidence and his submissions to minimize his degree of involvement.

36. In the "Commentary" following paragraph 184 of Mr. Andrew's submissions, it is suggested that "approval" of the desktop change request by Audit was not given. No evidence is cited in support of this submission. In fact, this is inconsistent with Mr. Andrew's own testimony, referred to at paragraph 66 of Ms. Viinamae's Closing Submissions in this Inquiry. Mr. Andrew's submissions on this point should not be accepted.

37. With all respect, Mr. Andrew's submissions at paragraph 264 mischaracterize Ms. Viinamae's evidence concerning an apparent discrepancy between a work schedule of a BHA contractor and corresponding invoices. While Ms. Viinamae said that contractor rates could change over time due to

competitive pressures, she maintained that there must have been a new schedule put in place, approving any increased rate. Otherwise, invoices would not be paid at the higher rate.

L. Viinamae, December 7, 2004, p. 46, line 18 – p. 51, line 11

38. Mr. Andrew submits at paragraph 272 that Ms. Viinamae and Ball Hsu had been to each other's home. Ms. Viinamae's evidence was that she visited Mr. Hsu's home only because he had an office there, while he visited her home only after she had left the City.

L. Viinamae, December 7, 2004, p. 12, lines 21 – 25

L. Viinamae, December 8, 2004, p. 193, line 11 – p. 194, line 19

C. Reply to the Submissions of Dell Canada Inc.

39. Paragraph 85 of Dell's submissions makes reference to the Y2K Project "that had been the subject of the August RFP". With respect, the Y2K Project was not the subject of the RFP – the purpose of the August RFP was much broader. It was intended to identify pre-approved vendors to the City, in the wake of amalgamation, for a period from 1999 to 2001 (well beyond the Y2K deadline of January 1, 2000).

K. Bulko, November 23, 2004, p. 151, line 18 – p. 153, line 16