



VALUABLE LESSONS FOR ALL CANADIAN CONTRACT MANAGERS

CITT by the Numbers

The trade agreements currently in force in Canada generally apply to the provincial, territorial and federal governments. But as we have reported in earlier issues of *The Legal Edge*, the Agreement on Internal Trade (AIT), in particular, is important not only to public-sector organizations that fall within its enforcement jurisdiction, but to all Canadian contract managers (see Issue 60, April - May 2005).

The AIT is an agreement among the federal, provincial and territorial governments of Canada that was designed to reduce and eliminate barriers to the free movement of persons, goods, services, and investments within the country. The AIT is also intended to help establish an open, efficient, and stable domestic market.

The Canadian International Trade Tribunal (CITT), as the bid-challenge authority in Canada, has jurisdiction over disputes under the AIT. And its determinations should be of interest to Canadian contract managers in both the public and the private sectors, for some of the same reasons that make the AIT important.

Why CITT Determinations Matter

First, the CITT follows many of the same practices as our court system, in making its determinations. But the CITT often goes into greater detail about procurements than the courts do, and it applies different remedies.

Second, when organizations appeal CITT determinations, it is to our Federal Court, where senior judges make decisions that form part of the case law that guides our lower courts, where your organization might well find itself if a procurement comes into dispute.

Third, in enforcing the terms of the AIT, the Tribunal shapes its determinations to help eliminate trade barriers and support fair and open procurements. It has detailed guidelines for running procurements and avoiding complaints from suppliers – all good lessons for contract managers.

Fourth, the CITT is a small, independent body, relative to our court system, so it is much more agile and able to respond to complaints more quickly. (For example, it must determine, within five working days of receiving a complaint, whether or not the conditions for conducting an inquiry have been met.) In doing so, it can often help

organizations avoid costly litigation and time-consuming court cases. Here again, these are valuable lessons.

Finally, provincial/territorial, regional and municipal governments are moving toward the trade agreements in terms of shaping their own guidelines on supplier rights, fairness, equal access, non-discrimination, and so on. CITT decisions per se may not directly affect your organization, but they are a bellwether, and they bear watching.

By the Numbers

In a March 2008 presentation in Ottawa, Reagan Walker, the CITT's general counsel, put into perspective the scope of procurement complaints in Canada under the jurisdiction of the CITT, saying that, "In the fiscal year 2006-2007, the Tribunal received 53 complaints. In a normal year, the Government Accountability Office (GAO), the Tribunal's counterpart in the United States, receives 1,600 complaints. The Tribunal held one oral hearing last year ... in a normal year, the GAO holds 40 hearings."

According to Mr. Walker, the CITT made 71 determinations in 2007. That number includes both rejection decisions and determinations pursuant to inquiries. Among these:

- 15 dealt with complainants trying to escape the consequences of their transitory lapses of judgment,
- 11 dealt with allegations of improper evaluation of the complainant's bid, and one of these went to the Federal Court of Appeal,
- seven dealt with the CITT's jurisdiction, and one of these went to the Federal Court of Appeal,
- six dealt with allegations of non-compliance on the part of the successful bidder,
- six cases were dismissed for not being filed in a timely fashion (i.e., within 10 days from the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier), and one of these went to the Federal Court of Appeal,
- four dealt with allegations of a conflict of interest on the part of the successful bidder, resulting in a biased evaluation process,
- four dealt with allegations of improper bid specifications, including the use of sole-source procurement,
- two dealt with information from anonymous sources, and
- two dealt with Public Works and Government Services Canada's failure to accept products equivalent to the one specified in the solicitation document.

Regular readers of *The Legal Edge* will already be familiar with some of the organizations involved in these cases, such as Canadian North Inc., Zenix Engineering Ltd., Ready John Inc., Northrop Grumman Overseas Services Corporation, and Information Builders (Canada) Inc., among others.

More Information

For those not yet familiar with the CITT and its work and decisions, it's just a click away, at www.citt.gc.ca.

Of particular interest, apart from the determinations themselves (for which you can subscribe to updates: www.citt-tcce.gc.ca/lists/index_e.asp), are the various guidelines and guides (www.citt-tcce.gc.ca/publicat/index_e.asp#5). While the specifics apply to the CITT and the trade agreements over which it presides, there is a wealth of information here for contract managers about reviewing procurements and dealing with proponent complaints.

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