



Winning isn't everything

by Paul M. Lalonde

There are persistent echoes in Ottawa of dissatisfaction with the Canadian International Trade Tribunal (CITT) at Public Works and Government Services Canada (PWGSC). I hear grumbling on the disruptive nature of the process: that it is time-consuming and takes resources away from the department's core tasks. As well, the CITT is often said to be overly demanding of PWGSC and inconsistent in its decisions, making it difficult to draw clear conclusions about the effect of the trade agreements and to modify or update practices to ensure compliance. In other words, compliance with the trade agreements is a moving target.

In the same vein, at the September 2002, Canadian Forum on Public Procurement, a senior official at PWGSC said in a presentation that, among other things, he believed the tribunal's exacting approach would one day result in a complaint succeeding because of one misplaced comma in an RFP. Well, ask any lawyer, a misplaced comma can make a huge difference, but I *do* understand the official's frustration. Sometimes it must feel like the department can't win.

With that in mind, I fear that the recent decision in the case of Papp Plastics (PR-2001-066) won't help the tribunal make any new friends in the halls of PWGSC. The case dealt with a complaint by a plastics manufacturer based in Windsor, Ontario, against the sole sourcing of a Department of National Defence requirement for gas-mask lenses. The tribunal found that the complaint was not valid (i.e. the department won), but, remarkably, it nonetheless held that the government should pay for the complainant's costs of bringing the complaint.

This is an unusual finding since, normally, costs are only awarded to a party that is successful. In fact, I could not find any other tribunal case where a losing complainant was awarded costs. Also, CITT staff have told me that they do not recall any previous case where this occurred. For PWGSC, this apparent first must be more than unusual; it must be down right galling.

The CITT's decision may appear odd at first glance, but it was not without justification. In awarding Papp its costs, the tribunal considered the government's handling of the matter before the filing of the complaint and during the CITT's inquiry process. The tribunal felt that, before the complaint was filed, if PWGSC had adequately communicated essential information to Papp about why sole sourcing was justified, the complaint could have been avoided all together. Then, during the course of the inquiry, the tribunal felt that the government should have provided certain relevant documents sooner and that the delay needlessly complicated the matter. It concluded that the conduct of PWGSC was not consistent with the disclosure obligations contained in the CITT's rules of procedure and, therefore, awarded costs to the complainant.

Whatever the merits, I suspect expletives were flying when the Papp decision arrived at PWGSC's doorstep. I can understand the frustration; PWGSC must view this as inconsistent with accepted practice and as unduly favourable to the complainant.

On the other hand, *all* tribunals, including the courts, make decisions that are difficult to reconcile. That is an unavoidable feature of any adjudicative process. There are up to nine different members sitting on the tribunal at any one time, however, normally one panelist decides procurement cases. Naturally, there will be material differences in approach on occasion, and panelists cannot be expected to know and to rigidly follow every previous determination of the CITT.

If consistency with past decisions is an acute concern, PWGSC has the responsibility to make sure that the CITT member deciding the case is alerted to the past approaches adopted in similar cases. In my experience, counsel before the tribunal, on both the complainant and government sides, have not made very extensive use of past decisions. I believe there are two main reasons for this. First, few effective tools exist for digesting and researching CITT decisions (other than the tribunal's excellent website and a few other published works). This can make it difficult to locate cases where similar issues were dealt with. Second, the very compressed time frame in which the process unfolds does not allow much time for extensive legal arguments on past decisions. Rigorous thinking and careful consideration of precedents take time – a luxury not often available in procurement cases.

Decisions that seem to stick out from the pack, like the Papp cost award, will occur from time to time. Government frustration about this should be tempered by the fact that sometimes the inconsistency goes in the department's favour. It seems to me that the most constructive thing to do is to make sure that CITT decisions are carefully reviewed within the department, that their lessons, if any, are learned and that they are easily available for future reference in subsequent cases.

Like it or not, the Papp decision is worthy of careful scrutiny, offering some valuable lessons to contracting officers. In short, always be professional, prudent and above all clear when communicating with potential bidders, even when you are certain their objections are groundless. At the CITT, being right on the merits may not always be enough to stay clear of costly trouble. ~~~

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