



## Complainant beware

by Paul M. Lalonde

Just when you thought the Canadian International Trade Tribunal (CITT) couldn't surprise you anymore, it pulls a new rabbit out of its hat. This time it's an award of costs against an unsuccessful bidder who not only had its complaint rejected, but had to pay the government legal costs for the privilege.

In September 2002, Public Works and Government Services Canada (PWGSC) issued a Request for Standing Offer. The RFSO was to initiate a competitive process leading to the selection of firms to enter into standing offers to provide exposition project management. The solicitation indicated that up to three standing offers would be awarded for the National Capital Region and two for each of the other regions. Following the evaluation of the bids, three proposals were found to be compliant, including one from Antian Professional Services Inc. In December, PWGSC informed Antian that the other two compliant bidders were rated one and two for the other regions and that Antian ranked third in the National Capital Region.

Following the disappointing news, Antian complained to the tribunal. According to Antian, the successful bidders failed to meet mandatory requirements as specified in the RFSO and therefore awarding them the standing offers was contrary to the Agreement on Internal Trade. In particular, the RFSO required that bidders have a minimum number of past experiences carrying out exposition management contracts as prime contractor (sub-contracting jobs were excluded). Antian alleged that neither of the winning contractors met the required minimum.

In response, PWGSC demonstrated that the bids filed by the winning bidders did indicate the required minimum experience. Not surprisingly, both winning bidders intervened in the case arguing that they had the required experience.

Replying to the government's case, Antian conceded that one of the bidders did have the required experience. With respect to the other bidder, Antian maintained that one of the contracts listed as evidence of experience as a prime contractor was not credible. Namely, one of the contractors had referred to a contract with the Ottawa Business Show. Antian urged the tribunal to inquire further about the contract with the show organizers to verify the bidder's allegation regarding its experience. The tribunal rejected this suggestion saying that the onus is on the complainant to substantiate its allegations.

Since Antian did not provide any documentary or other type of evidence in support of its allegations, the CITT found that Antian did not make its case and found the complaint not valid. Then the tribunal went further doing something it had never done before: it ordered Antian to pay the government's costs in responding to the complaint.

Although always a theoretical possibility, the tribunal had never before awarded costs against an unsuccessful complainant. At least, I could find no such decision, and counsel for the tribunal on this case told me she also believed that this was a first.

There are good reasons why the CITT has been reluctant to award costs against complainants. Complainants must act very quickly in bringing complaints, without the benefit of all the information available to the government. As well, at the beginning of the process, the tribunal makes an initial determination as to whether the case presents a reasonable indication that a breach of the trade agreements has occurred. Imposing costs on the unsuccessful complainant, after determining that the case warranted investigation, seems unduly harsh and inconsistent with the tribunal providing a quick, cheap and accessible review of federal procurement. Finally, it is legitimate to expect that the cost of dealing with these cases should fall under the general responsibility of the federal government to maintain a fair, open and transparent procurement system.

However, this case highlights the limits to this principle. The government should not be expected to spend our hard earned tax dollars defending unsubstantiated claims. Likewise, the CITT is not a procurement police. Complainants should not expect the tribunal to "go fishing" and track down evidence for them.

At this point, it is too early to tell whether this case signals a new approach to costs by the CITT. As well, the tribunal's reasons are a bit vague as to why in this particular case costs were awarded to the government. The tribunal considered the particular circumstances of the case and pointed out that the complainant presented no evidence that convinced the tribunal, and it referred to the significant work that PWGSC had to do to refute unsubstantiated allegations. But those comments could no doubt apply to any number of past decisions where costs were *not* imposed. In fact, in many previous cases, the complaint was arguably even flimsier than it was here, so why the new approach?

One thing is certain, after the Antian decision counsel advising potential complainants will no longer be able to tell their clients that the CITT has never awarded costs against an unsuccessful complainant. Things just got a bit more complicated. ☹

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