



## Conflict of views on conflict of interest

by Paul M. Lalonde

Dealing with conflicts of interest in procurement is tricky at the best of times— the orthodox approach being to disqualify bidders in that position. In the recent case of Dollco Printing and the Department of Canadian Heritage (Heritage), the Canadian International Trade Tribunal found that this strict approach is not necessarily acceptable.

In your garden-variety conflict of interest scenario, bidders cry foul when another bidder has been involved in developing a purchasing strategy or in drafting the solicitation documents. This kind of pre-solicitation work is thought to give an unfair advantage in that a bidder has access to knowledge about the requirement that may not be available to other bidders thus creating a built-in conflict of interest. However, Dollco recently cried foul when its bid was rejected because of just such a perceived conflict of interest.

The solicitation in this case involved a Request for Supply Arrangements (RFSAs) for printing services by Heritage. In April 2002, several months before the solicitation was published, Heritage hired an outside company, PrintSpex, to help prepare the scope of work and the evaluation criteria. In October 2002, Heritage published the RFSAs, with a closing date of December 10, 2002. Sixteen bidders responded and Heritage awarded 10 supply arrangements for printing services.

In the interim, in June 2002, Dollco hired the sole proprietor of PrintSpex and included this individual as a resource in its bid. In March 2003 Heritage informed Dollco that its bid had been disqualified because of the PrintSpex involvement in developing the RFSAs. According to Heritage, Dollco had to be disqualified to be fair to the other bidders.

In May 2003, Dollco complained to the CITT that, among other things, it was unfair to hold the PrintSpex situation against it since Heritage had complete control over the final statement of work, and PrintSpex's proprietor was employed by another firm when the work for Heritage was carried out.

At the tribunal, Heritage argued that disqualifying Dollco was justified in order to protect the integrity of the solicitation process. Heritage pointed out a number of past tribunal and court decisions on the duty of fairness to support its argument that work by a bidder on the pre-solicitation stage created a conflict of interest. Heritage also pointed out that the mere apprehension of bias constituted a breach of the duty of fairness. Heritage claimed that disqualifying Dollco was the only way to resolve the conflict of interest in a manner that was consistent with the *Agreement on Internal Trade (AIT)*.

The tribunal was not moved by the arguments as to the virtuous nature of Heritage's actions. Instead, it pointed out that nothing in the RFSAs referred to resolving conflicts of interest. Likewise, clauses from the Sample Acquisition Clauses and Conditions (SACC) Manual specifically dealing with conflict of interest had not been incorporated by

reference into the RFSAs, although several other SACC Manual clauses had been incorporated. The RFSAs provided neither Heritage's definition of a conflict of interest nor its consequences.

The tribunal concluded that the decision to disqualify Dollco was not based on the wording of the RFSAs or on any specific provision of the *AIT*. Rather, the disqualification was based on a criterion that was not clearly identified in the RFSAs and, therefore, in violation of the *AIT*. The tribunal cautioned that it "is of the view that any consequence of a possible conflict of interest and definition of what constitutes a conflict of interest had to be included in the RFSAs for [Heritage] to legitimately disqualify Dollco's bid."

The tribunal found the complaint valid and recommended the reinstatement and continued evaluation of the Dollco proposal. In the alternative, it recommended that the supply arrangement be cancelled and that a new RFSAs be issued containing appropriate instructions and clauses relating to conflict of interest.

This case illustrates the need to define rules on conflict of interest. There are a variety of ways to deal with the issue of pre-solicitation work by bidders. For example, they can be explicitly disqualified from bidding on the eventual contract. Alternatively, the solicitation documents may provide a fair warning to other bidders that one or more of them may have been involved in defining the solicitation documents. In some such cases, it may be prudent to go so far as to provide all bidders with equal access to any reports or other documents prepared in the pre-solicitation stage.

It often makes sense to allow contractors involved in pre-solicitation stages to bid on the contract. The pool of relevant expertise is not always very vast and disqualifying bidders involved in the pre-solicitation stage may limit competition or otherwise be impractical. It may also be difficult to find contractors willing to provide pre-solicitation assistance if they know it will disqualify them from the ultimate contract. While this creates complicated relationships between purchasers and the bidding community, most difficulties are surmountable through candid disclosure and clear conflict rules.

Whatever approach is adopted, the tribunal has signalled that conflicts of interest must be carefully considered, and that solicitation documents must provide the rules to be followed to resolve them. In other words, it's time, again, to revise those RFP checklists. *mm*

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