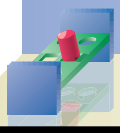

CITT corner

The Canadian International Trade Tribunal can be friend or foe and plenty have opinions about the way it works and the decisions it makes. Paul M. Lalonde from Heenan Blaikie LLP and Robert C. Worthington from Worthington and Associates Ltd. debate the issues.

Paul M. Lalonde & Robert C. Worthington

Are there alternatives to the CITT?

OF COURSE, ALTERNATIVES can be imagined, but nothing currently existing measures up to what the tribunal is able to offer. Certainly, neither the courts nor government departments carrying out reviews themselves are contenders as realistic alternatives.

The tribunal does a remarkable job of balancing Canada's trade agreement commitments with fairness considerations and regard for the operational imperatives of the government and it is no simple matter to construct an alternative that achieves this balance. In fact, given the trade agreements, any proposed alternative must necessarily resemble the tribunal in fundamental ways: it must be independent from the government, offer prompt review, be charged with verifying compliance with the trade agreements and be able to make effective recommendations.

That said, improvement is possible. Clearer statements of reason and more predictability in outcomes are legitimate goals. At the same time, suppliers are often frustrated by the limitations of the tribunal's investigative powers. But any such changes would be tinkering; the basics are sound.

Entrusting procurement review to a body charged only with that task is also not a likely alternative. Realistically, this would change little if, in accordance with the trade agreements, the fundamental characteristics of the process remain intact. Simply duplicating the tribunal's infrastructure is not an attractive proposition.

In dealing with procurement disputes, the tribunal sets the standard; no existing alternative currently offers such transparent, effective and rapid resolution of procurement disputes. In this sense, the tribunal is unique, without peer and infinitely better than the "good ol' days" before effective procurement review. *PL*

THERE ARE ALTERNATIVES to the CITT and alternative ways the CITT could operate.

The US uses the Government Accountability Office (GAO) as its bid challenge authority. Unlike our CITT, the GAO's mandate requires it to make reasonable decisions (our CITT can be wrong and unreasonable), and be impartial (our CITT stated it has an obligation to assist complainants). The GAO considers the costs of government compliance – our CITT disregards such submissions.

In the UK the High Court is the bid challenge entity. Unlike Canada, the UK has legally trained and unbiased adjudicators, rules of evidence, requirements of proof of loss, public hearings, etc. – all without undue hardship to complainants or objection from any other WTO member state.

The Government of Canada (GoC) has more legally enforceable procurement obligations than any other trading nation. Bidders on GoC procurements already have greater legal rights than bidders to any other G8 government due to Canada's unique competitive bidding laws. Rules regarding full disclosure, transparency, equal treatment and procedural fairness are already well developed under Canada's laws.

The GoC created the CITT with powers well beyond the words of any trade agreement Canada signed. It chose to insulate the CITT from appeal – unless a CITT decision is "patently unreasonable." Today's system is overly onerous, stifling creative solutions and creating risk-aversion, which in turn causes serious time delays, inefficiency, ineffectiveness and increased costs to the government and taxpayer. The result after 10 years is a "CITT chill;" millions in compensation to complainants (whether or not they bid); and GoC procurement mired in red tape. To continue such a regime makes neither economical nor practical sense. *RW*