



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

Q: CITT 'chill' – fact or fiction?

THERE HAS BEEN MUCH talk about the CITT's chilling effect on federal procurement. Fear of a CITT review is said to delay purchasing decisions and cause other unfortunate results, such as the forced selection of inept bidders.

That being said, blaming the tribunal is likely misguided. With respect to delays, the main problem appears to be the difficulty in obtaining prompt legal advice on compliance with the trade agreements. While I sympathize with the position in which this places purchasing officers, the federal government has made solemn commitments about procurement in the trade agreements, and it is responsible for providing the tools needed to ensure effective compliance by departments. If legal advice is not available in-house in a timely fashion, then departments should be authorized to get the needed advice from outside counsel. And if this problem is widespread, it points to issues in the allocation of legal resources within the government, not with the tribunal process itself.

My suspicion is that with better training about the trade agreements and improved access to prompt legal support, the so-called CITT chill would eventually dissipate. Rather than considering draconian measures, such as limiting the CITT's review function, purchasers should be provided with the support and training they need. If that fails to deliver improvements, then a study of the systemic impacts of the tribunal's review function on federal purchasing should be carried out and appropriate corrective measures identified. *PL*

RELATIVELY FEW SUPPLIERS complain to the CITT, but fear of a CITT challenge occurs every day and it causes federal procurement to become positively risk-adverse in decision making. It takes enormous time (partly due to the differently-worded trade obligations in the three major trade agreements and partly due to the uncertain nature of CITT decision-making) and costs significant dollars to ensure every word in the tender or proposal package does not offend some obscure phrase in the trade agreements. With the federal government being bound to award to the lowest responsive and responsible bidder unless no contract award is made at all, and with the bidders determining what the requirements are for being responsive through CITT complaints, small wonder federal procurement people think the playing field is tilted against them.

A complaint flash-freezes the procurement and requires you to defend your choices of phrasing against an artificial standard. A CITT complaint is free to the complainant but costs procurement officers weeks of work to assemble a reply. And, win or lose, the department has wasted effort and resources better spent elsewhere. Then add in the havoc that an award of damages does to your budget. Government procurement people must ask themselves – would this pass CITT review? With a potential CITT complaint hovering over each federal procurement, can any procurement officer take the risk of being resourceful, innovative or creative – regardless of the cost savings that might be derived? The answer is a resounding “No, not if it could result in a CITT complaint.” *RW*