Help wanted

NAFTA: Trying to figure out what's in and what's out

by R.J. Kelly

The *North American Free Trade Agreement* (*NAFTA*) has been around for over 10 years, and to the procurement community the most intrusive part of the agreement is "Chapter 10, Government Procurement."

When *NAFTA* came into force, it required the government procurement community to adapt to a new set of rules, based in law, to acquire goods, services and construction valued at over certain dollar thresholds. The agreement imposed a discipline on purchasing officials to ensure the bidding process is fair and transparent – reasonable objectives when one is spending taxpayer money. But there has been some grumbling regarding the agreement, particularly about the length of time a bid solicitation needs to be posted (40 days) and the actions of the Canadian International Trade Tribunal (CITT). The CITT was established under *NAFTA* to hear, among other things, bidder complaints regarding federal procurements.

The threat of a complaint to the CITT appears the biggest cause of concern. This is especially true for senior managers, who may have to defend their decisions and develop and submit a Government Institute Report – and if considered to be at fault, their department may have to pay to the complainant the costs of bidding, and sometimes even lost profit. No one relishes this idea. Some comfort can be taken by the fact that when compared to the vast number of transactions that take place every year, relatively few procurement cases come before the tribunal. And the tribunal has occasionally, dismissed a challenge and required the complainant to pay the Crown's costs in defending its position.

One aspect of *NAFTA* that has not attracted the attention of the CITT is challenges related to excluding a procurement from the agreement. Application of the *NAFTA* is usually based on the value of the procurement crossing certain dollar thresholds. The current thresholds in Canadian dollars, valid until the end of December 2005, are:

- Goods (between Canada and the USA), $38,000
- Goods (between Canada and Mexico), $89,000
- Services between the three parties (Canada, USA and Mexico), $89,000
- Construction between the three parties, $11.5 million

Normally, when a procurement value exceeds any of these thresholds, *NAFTA* must be followed.

However, *NAFTA* also contains a list of exceptions, excluded services, and derogations and the procurement officer must know what these are and when they apply. If an exclusion or exception is used to avoid the *NAFTA* bidding process, this is challengeable to the CITT under the bid dispute provisions.

Experience to date indicates that there have been very few challenges on what is in and what is out of *NAFTA* – a situation that exists perhaps because the supplier community is just not aware of procurements that never make into the Government Electronic Tendering Service.

When a procurement officer applies the "exceptions," found in Article 1018 of the *NAFTA*, that deal with security and defence as well as protecting public morals, life or health, intellectual property, and purchases from handicapped persons, philanthropic institutions or of prison labour, the decision can be justified by the very nature of the buy and the exceptions as described. So too with what are termed the derogations. These include shipbuilding and repair, certain communication and security equipment, set asides for small and minority businesses and agricultural support and human feeding programs.

Despite initial concerns when *NAFTA* came into force, what remains unclear is when the 50-plus exclusions in the services category apply. These are listed in an annex to the procurement chapter. So, if it is decided that a certain service is outside of *NAFTA*, and a supplier thinks otherwise, the supplier can challenge the decision through a complaint to the CITT. This has not happened to any great extent, but in theory, until there is a definitive ruling for every one of the exclusions each decision is challengeable.

An examination of some of the exclusions illustrates the situation. All research and development contracts are out, but natural resource and wildlife studies are in. Forest tree planting services are in, but seedling production including transplanting services are out. In the administrative area, the anomalies are significant. For example, post office services are out, but courier and messenger services are in. The list goes on with many related services either in or out, but with no explanation. Until every one of the exceptions are explained or rationalized, the procurement officer who is deciding what is covered or not is subject to a CITT challenge.

We may never know what was in the mind of the *NAFTA* negotiators when they crafted the exceptions, but procurement officers could do with some clear guidance. Because *NAFTA* is enshrined in law, one might think to turn to the Department of Justice for assistance, but Justice has not established a *NAFTA* interpretation centre. Perhaps Justice and the Department of International Trade (the folks who negotiate the details of the trade agreements) could collaborate and provide a practical (analysis and definition of the exceptions) interpretation of the agreement, or possibly an academic would take on the task. Regardless of who does it, a practical guide to *NAFTA* would be a very useful tool for buyers and suppliers alike.

R.J. (Bob) Kelly is a consultant with RFP Solutions. Prior to joining the firm, Bob was director of procurement policy at the Treasury Board Secretariat for some 20 years. For the past year, he has been a consultant to the Parliamentary Secretary's Task Force on the (federal) Government-Wide Review of Procurement.