



CITT new cost guidelines

New cost guidelines were adopted by the CITT under which the successful party (either the complainant or government) is awarded the costs of the complaint. The guidelines were effective January 31, 2004 and arbitrarily fix costs at three levels of complexity: Level 1 – \$1,000, Level 2 – \$2,100 and Level 3 – \$4,100.

TRADITIONALLY, THE TRIBUNAL virtually never awarded costs to the government, even when the government won. Despite laudable policy rationales for this approach, this was inconsistent with standard procedure in the courts and the judges of the Federal Court found the practice objectionable. This led the tribunal to adopt new cost guidelines.

In the old system, costs were awarded based on a relatively complex set of rules about the time, fees and disbursements incurred. Now, the tribunal simply awards costs based on the guidelines – simplifying disputes about costs, which, in the past, could be fairly drawn out affairs.

Interestingly, the new guidelines seem to be resulting in fewer complaints. While a direct causal link is difficult to prove and other factors may also be contributing, the number of cases filed is down, coinciding with the new cost guidelines. There is reason to believe the new guidelines have a disproportionate deterrent effect on complaints from small- and medium-sized suppliers (SMEs). However, if a large company is prepared to commit the resources required to file a big case, the risk of a modest cost award is immaterial. Thus the net effect of the new guidelines seems to be that the tribunal is less accessible to SMEs – an unfortunate result, as procurement justice should not be reserved only for those with deep pockets.*PL*

ONE WONDERS WHAT the CITT seeks to achieve by the new cost guidelines.

If the CITT's goal was:

- a) to balance the playing field regarding costs to successful parties, that could have been achieved by allowing "costs to follow the event," based upon the existing guidelines (i.e., the successful party receives their costs),
- b) to deter government wrongdoing, it is unlikely that reducing what the government will pay to a successful complainant will achieve that goal, or
- c) to dissuade frivolous complaints by bidders, it would have been better to disallow these types of complaints by defining what constitutes an acceptable complaint.

If it is none of these, perhaps the CITT was seeking to correct an overly generous past practice without acknowledging its former largesse, or to remove the administrative burden on itself that its past practices have created.

Either way, this new system reduces the value of potential success for either bidders or government – at least compared to the tribunal's past practice of granting more generous awards to complainants, if rarely to government. It also adds to the barriers to file a complaint at the CITT. It may limit smaller value complaints but it is unlikely to deter larger value ones.

This new system is confounding. Neither party can hope to recoup its costs, whether complaining or defending. No one really wins – save the CITT itself by reducing its workload. Perhaps that is the real intent. *RW*