The Canadian International Trade Tribunal (CITT) can be friend or foe and plenty have opinions about the way it works and the decisions it makes. Paul M. Lalonde partner and co-head of Heenan Blaikie LLP's International Trade and Competition Law Group and Robert C. Worthington, president of Worthington and Associates Ltd. debate the issues.

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Sole source contracting – kill or keep

THE TRADE AGREEMENTS, and Canadian legislation for that matter, provide that the default rule should always be competition. In an open democracy, there is no serious debate that this is the right basic premise on which to found a modern, effective public contracting system. However, to be effective, in certain circumstances directed contracting without competition needs to be allowed. The current balance struck between these competing values is about right at the federal level.

The trade agreements provide a number of specific instances, set out in extensive detail, where not competing requirements is perfectly legitimate. These include emergencies and situations where it would not be practical to compete a requirement, such as when only one supplier can provide the goods in question (because of patent protection or otherwise). Determining whether a situation calls for competition is usually straightforward.

The trade agreements also provide that procurements below certain value thresholds are not subject to the competition requirement. This opens the door to sole sourcing on smaller contracts, particularly for services, where the value of the contract does not justify a full blown competitive contracting process.

The tribunal has occasionally been criticized for being too strict in its assessment of sole sourcing situations. In the relatively infrequent instances (the overwhelming bulk of sole source situations are never contested) where sole sourcing has been challenged, the tribunal has almost always found that the contract should have been competed.

Finally, when considering the merits of any claims about the tribunal "killing" anything, a bit of perspective is called for. In the fiscal year ending in March 2004, the tribunal found only five complaints to be valid or valid in part. Of these five cases, not one of them dealt with sole source contract awards. Given the number of ACANs typically issued by the federal government in any given year, this is remarkable. These facts lead to only one conclusion, far from being 'killed,' sole-sourcing is alive and well. *PL*

SOLE SOURCE CONTRACTING, called "limited tendering" by NAFTA and WTO-AGP whereby the federal government contracts only with one supplier without competing the contract, is a valid method of professional procurement under certain circumstances as defined in the trade agreements and in any procurement under the threshold dollar values of the trade agreements.

Yet, even within those limited circumstances in its apparent wisdom, the CITT has circumscribed the use of sole source contracting to the point where it is virtually banished from the federal procurement landscape. While competition is and should be the norm in public procurement, the CITT's strict constructionist interpretation leaves little room for any sole source contracting. Thus, an urgent need cannot be sole-sourced because, in hindsight, it should have been foreseeable; compatibility of product purchases, which should be simple, are opened up to competitors of equivalent but not necessarily compatible products (at significant extra training cost); and the CITT becomes embroiled in highly technical debates and analyses over whether something could have been equivalent or not, after the fact.

The CITT strict interpretation of when "limited tendering" could be used (or not) is both an unreasonable interpretation and a significant, unnecessary barrier to innovative and rapid procurement. In an attempt to control maverick spending and potentially biased procurement, the CITT ignores the reality that efficiency and urgency can indeed trump form at times. By insisting on exact compliance, by shifting the onus of justification to government and by not insisting upon supplier proof of ability to supply the product or service based solely upon what was submitted as a bid, the CITT creates artificiality in an already too cumbersome and artificial system. This neither serves the government nor the oft-forgotten beneficiaries of federal procurement, the people of Canada. "At what real cost do we seek compliance?" is a question never posed to nor answered by the CITT ... and this author thinks it should be. *RW*