SUMMIT
THE BUSINESS OF PUBLIC SECTOR PROCUREMENT

CITTING IN

Trucking complaint hits the ditch

by Paul M. Lalonde

There is never a shortage of interesting cases before the Canadian International Trade Tribunal. A very recent standout tackled the obligations of Public Works and Government Services Canada (PWGSC) in dealing with suppliers lobbying to amend an existing procurement process. And, PWGSC came out on top.

Western Star Trucks, the complainant, (case PR-2000-011), was unhappy with the way PWGSC changed the structure of a Request for Standing Offer (RFSO) posted on the MERX website in December 1999 relating to the provision and servicing of heavy trucks. Estimated value of the requirement was between $20 million and $50 million. The original RFSO provided that a single, National Master Standing Offer would be issued and that it was mandatory for bidders to bid on the supply and servicing of all required vehicle configurations.

According to PWGSC, as a result of a bidders conference (attended by Western Star) and subsequent communications from potential suppliers, the department concluded that the requirement to bid on all vehicles was unreasonable and would restrict the number of potential suppliers. In April 2000, PWGSC amended the RFSO, dividing the eight required vehicle configurations into two blocks, which could be bid on separately. PWGSC added a wrinkle to block bidding that did not sit well with Western Star. If the combination of the lowest separate bids on the two bidding blocks was in excess of $10,000 less than the lowest combined (single company) bid for both blocks, then two standing offers would be awarded, one for each block. Otherwise, the standing offer would be awarded to the single company with the lowest combined bid for both blocks. The $10,000 threshold was said to represent PWGSC's estimate of the cost to the government of issuing and maintaining two separate standing offers and of supporting different makes of trucks.

The thrust of Western Star's complaint was that PWGSC failed to provide all suppliers with equal access to information in deciding to modify the RFSO. And, that the department acted in breach of the applicable trade agreements in introducing block-bidding and the $10,000 threshold.

Western Star complained that the changes were motivated by pressure from two unnamed bidders who were not in a position to bid on the whole requirement. According to Western Star, PWGSC inappropriately considered the input provided by these bidders without equally

©2000 Summit: The Business of Public Sector Procurement Inc.

consulting all other prospective bidders and giving them a chance to comment on the proposed changes. Western Star felt it was not given fair access to information about the process as required by NAFTA and that PWGSC's actions were intended to favour two prospective bidders to the detriment of the other suppliers.

The department countered that there was nothing unusual about the way it carried out the process, and that the change provided for greater competition, greater access to a broader range of suppliers and was, therefore, entirely justified. As David Attwater, counsel for PWGSC, put it: "The department must be given a considerable amount of discretion for the system to function. The tribunal in this case recognized the practicalities of the system. The department has to be able to make decisions about the structure of its requests."

The tribunal rejected the allegations as to the inappropriate intent of the amendments and consultations. It concluded that once an RFSO process is launched the department is not required to share with all suppliers every last bit of information it receives from interested parties. It said, "There is no obligation on [PWGSC] to consult with potential bidders in considering suggestions for improvement made by bidders and, as a result, to make changes to the solicitation documents." This seems to me to be in line with the language of the trade agreements (see NAFTA, Article 1010(7)). I wonder, however, whether the tribunal would have been as agreeable if PWGSC had actively consulted with certain bidders, instead of merely receiving submissions.

Western Star also pointed to the $10,000 threshold as evidence that the amendments were made to discriminate in favour of unnamed potential suppliers. Western Star argued that the actual cost of awarding the RFSO to two block bidders, as compared to awarding one combined contract, was much more than the estimated $10,000 – meaning that the government was absorbing additional costs in order to favour those filing separate block bids. Western Star also suggested that, to truly favour more competition, the government should have allowed item by item bidding. The tribunal was unmoved by theses allegations.

It stated that Western Star had not produced any evidence that PWGSC unreasonably estimated the cost of issuing separate standing offers for the two blocks (although my understanding is that *some* evidence in this regard was presented). The tribunal was persuaded that the changes made by the department enhanced rather than restricted competition and that they did not discriminate against anyone in particular, saying, "The tribunal is not cognizant of any rules in the trade agreements that guard against greater or excessive competition."

The Western Star case demonstrates that a complainant must bring very compelling evidence to the tribunal if it wishes to question the intent or motives of PWGSC. However, motives, intentions, good and bad faith are difficult to prove. In such instances, justice might best be served by submitting the evidence to the acid test of cross-examination. I, for one, hope the tribunal will allow public hearings more often in such cases.

Paul M. Lalonde practices international trade and procurement law with the firm Heenan Blaikie in Ottawa and Toronto.