SUMMIT
THE BUSINESS OF PUBLIC SECTOR PROCUREMENT

CITTING IN

Smoking guns at Health Canada

by Paul M. Lalonde

Do honourable ends justify bad procurement means? Not according to the CITT in its recent compensation award to Dr. John C. Luik (PR-99-035); not even when fighting "big tobacco."

As of December 2000, regulations require tobacco companies to carry larger and more graphic warnings on their cigarette packaging. Prior to these regulations, Health Canada needed to carry out a consumer research study regarding the impact of the proposed warnings on the decision to smoke or not to smoke. Eager to proceed, Health Canada awarded a contract for the study to Dr. John Liefeld (who was, by all accounts, properly qualified) and only later got Public Works and Government Services Canada (PWGSC) to post a notice of the ACAN (Advance Contract Award Notice) on MERX.

Upon seeing the ACAN, Luik complained to the CITT that he too could have carried out this study and that a competitive contracting process should have been launched before Liefeld's study was started. In a stinging rebuke issued last March, the tribunal agreed with Luik that the procurement process in this case was a sham. The Reasons of the Tribunal tell a shocking story. Take the following passage from the Reasons, for example:

> Health Canada awarded the procurement at issue to Dr. Liefeld in June 1999. In July 1999, Health Canada asked the Department [PWGSC] to initiate a procurement process for the same requirement by publishing an ACAN, all the while knowing that the action described in the ACAN was not prospective but past. At the time of publication of the ACAN, both the Department and Health Canada knew that the contract was well under way, as, in the very words of Dr. Liefeld, more than 50 percent had already been completed.

Ouch! But that's not all. The tribunal went on:

> In the Tribunal's opinion, these actions by the Department and Health Canada run counter to both the letter and the spirit of the trade agreements. That the Department and Health Canada continued to misinform the potential suppliers, when the former knew that it was virtually impossible for the latter to participate in this procurement, clearly demonstrates a lack of good faith. In the Tribunal's opinion, it is particularly regrettable that the Department was involved in these

> deceptions, given its responsibility to safeguard the efficiency and integrity of the procurement process.

Misinform? Lack of good faith? Deceptions? Very ouch!

As part of its recommendations, the tribunal urged the parties to work out a joint compensation proposal that reflected the harm done to the integrity of the contracting process. But Health Canada and PWGSC were still not willing to offer Luik an acceptable compensation package, so the parties were back before the tribunal arguing over the amount of compensation to pay.

This past November 28, the tribunal issued its decision on compensation: a total of $78,508.71 for Luik's troubles. It is a very interesting, if somewhat puzzling decision. Some observers see it as disturbing – an undeserved windfall for Luik, they say. On balance, I think it was reasonable, even modest, given the egregious nature of the government's conduct.

Luik claimed $85,000 for lost opportunity (representing 85 percent of the estimated value of the procurement), $25,000 for the prejudice caused to the integrity of the process and $25,000 for the bad faith shown by the government. On lost opportunity, Health Canada and PWGSC countered that lost profits should be 44.25 percent of the amount actually spent by Health Canada, divided by three (the number of potential bidders).

At the end of the day, the tribunal liked neither calculation and simply split the difference and awarded Luik $28,508.71 for lost opportunity. This strikes me as an odd amount for this kind of case. One might question why the tribunal would bother with a number precise down to the penny when, admittedly, the exercise is one of approximation. And, if the tribunal liked neither method of calculation, would it not have made more sense to define what *is* the appropriate method, instead of mechanically splitting the difference between two unacceptable proposals. It seems to me to be sending the wrong message to parties disputing compensation: take extreme positions, because the tribunal might simply split the difference.

As for the $50,000 Luik was claiming for damage to the integrity of the process and bad faith, he got every penny. Good for him, I say. Deception, deliberate misinformation and bad faith are inexcusable, unacceptable and warrant compensation for the victims. If that punishment ends up as a modest windfall for someone, so be it. At a policy level, this case may have some positive effects. If other suppliers are encouraged by Luik's good fortune to come forward with their horror stories, then the federal government might try harder to kick some of its bad procurement habits.

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