

Conflicts of interest



by David Attwater

CITT'S CASE LAW on conflicts of interest appears to be in a constant state of flux, making it difficult for contracting authorities and others to adopt or advocate a position without significant risk of running afoul of the Tribunal.

No express provision in the *Agreement on Internal Trade* prohibits conflicts of interest. The *NAFTA* and *WTO Agreement on Government Procurement* prohibit contracting authorities, in certain circumstances, from seeking or obtaining advice from a person with a commercial interest in the procurement. The trade agreements proscribe seeking or accepting advice for use "in the preparation or adoption of a technical specification" ... "in a manner that would have the effect of precluding competition." In practice, however, the CITT apparently has no regard to the actual provisions governing conflict of interest.

In early cases, the CITT considered conflict of interest as an element of bias, or as a matter of discrimination. In several cases that followed, it considered a bidder's disqualification for conflict of interest having regard to the conditions for bid compliance specified in the solicitation documents. That is, a bidder must be disqualified for a conflict if proscribed by the solicitation documents, but may not be disqualified for even an obvious conflict of interest where not expressly proscribed by the solicitation documents. In a recent case, *Complaint by Calian Ltd* [PR-2006-008], the CITT again accepted that a conflict of interest breaches the non-discrimination provisions of the trade agreements independent of the solicitation documents.

Different conceptual approaches to conflict of interest may invoke different tests and yield different results. Contracting authorities require consistency in the CITT's reasoning to understand and meet their trade agreement obligations. Unfortunately, consistency and predictability have been lacking. So, too, has been an explanation from the CITT of its approaches. The problem has primarily involved those cases where the solicitation documents do not expressly prohibit conflicts of interest.

Thus, contracting authorities can enhance the predictability of their process by expressly prohibiting conflicts of interest in their solicitation documents. Incorporating such a clause would be a good practice in any event. Clause K2210T of PWGSC's *SACC Manual* is one clause that prohibits conflicts of interest. However, as the *Complaint by Averna Technologies* [PR-2005-035] revealed, a broadly worded clause may have an affect well beyond what was intended, or is necessary.

After the *Calian* complaint, it is also important that officers and employees of the contracting and technical authority be aware of guidelines governing conflicts of interest, such as the Treasury Board's guideline titled *Values and Ethics Code for the Public Service* [September 1, 2003] and, for DND employees and CF members, DAOD 7021-1, titled *Conflict of Interest* [July 7, 2000].

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