

Correct or reasonable



by David Attwater

The CITT chooses its own standard of review

JUST AS THE FEDERAL Court must determine the appropriate standard for reviewing the CITT's decisions, so too does the CITT use a standard for reviewing decisions of contracting authorities. Must a decision be "correct," as understood by the CITT, or is it sufficient that a decision be "reasonable?" Different standards of review can produce very different results.

The standard of review applied by a reviewing body is a reflection of the level of deference being shown to the decision-maker. The analysis identifying the appropriate standard of review determines who is best positioned to make a decision and, thus, who should make the decision. The standard used by the CITT to judge decisions of contracting authorities appears to reflect the view that the CITT should retain the right to make the decisions.

The CITT has traditionally used a correctness standard of review, showing no deference to decisions of contracting authorities. Using this standard, if the CITT would have decided differently, the decision is wrong. In his final report on the [federal] government-wide review of procurement, the Honourable Walt Lastewka, noted this with respect to the correctness standard:

"CITT rulings appear to be based on a standard of correctness within the context of the trade agreements, not reasonableness

in the wider context of procurement. (...) It is noteworthy that in the USA, the former General Service Board of Contract Appeals did not use a standard of reasonableness and lost its authority to hear bid protests after 10 years of what most would consider disruptive decisions."

Commencing in 2002, the CITT started showing some deference to the discretion exercised by evaluators. In a *Complaint by ACMG Management* [PR-2001-056], the CITT said it will substitute its judgement for that of evaluators only in certain circumstances. As seen in later cases, the "intervention test" broadens, taking on greater prominence in the CITT's case law. The list of circumstances justifying intervention grows; the test is applied more generally to decisions of contracting authorities and becomes the test for what the CITT calls a "reasonable" decision.

Yet, the CITT's intervention test incorporates its traditional correctness standard of review and merely labels decisions of contracting authorities as reasonable or unreasonable, which are considered correct or wrong. Thus, the standard of review applied by the CITT, ostensibly one of reasonableness, is in practice one of correctness.

The intervention test shows no real deference to contracting authorities. In effect, the CITT is saying that it will accept a decision in the absence of circumstances amounting to a breach of the trade agreements. Whether those circumstances exist is determined by whether the CITT would have made a different decision. In contrast, a reasonableness test recognizes that there may be more than one right answer and that a decision is not necessarily wrong because the reviewing body would have decided differently. ♪♪

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