



by David Attwater

# Let evaluators evaluate

CANADA'S FEDERAL COURT does not require that all evaluation sub-criteria be identified in solicitation documents, provided that "the unidentified aspects are reasonably related to, or encompassed by, the express criterion" [*Siemens*, 2001 FCA 241]. Yet, the CITT has morphed the Court's objective test into the subjective question of whether the unpublished criterion "can reasonably be inferred from the RFP" [see, for example, *Canadian North*, PR-2006-026, para. 69]. From complaints upheld, it appears that the CITT views suppliers as wholly lacking insight.

Alleging undisclosed evaluation criteria has long been successful before the CITT. Many cases challenged the evaluators' use of evaluation plans. The plans, typically unavailable to bidders, are intended to help evaluators apply the evaluation criteria. They provide guidance, reduce subjectivity and promote consistency between evaluators. Applying the *Siemens* case, it was understood that as long as the further evaluation details are reasonably related to, and encompassed by, the published evaluation criteria, their use was consistent with the trade agreements. Despite that, the CITT requires guidelines "fully consistent with the published evaluation criteria" [*Med-Emerg*, PR-2004-050].

Lately an insidious strain of undisclosed evaluation criteria has emerged from the CITT's case law: comments by evaluators. The CITT has assigned particular importance to such comments, reasoning that: "... it is fairly natural for someone responsible for evaluating a proposal to note on the evaluation grids comments of significance to the evaluation exercise, and it seems just as natural for the note to influence the results accordingly" [*Access Information*, PR-2006-031].

Thus, the CITT assumes that a comment has necessarily affected the scoring of a rated requirement. Where a score is less than perfect, or less than expected [*Impact*, PR-2005-050; *Antian*, PR-2006-024], and the thought implied by an evaluator's comment is not a published evaluation criterion or "could not be inferred," the CITT will conclude that the evaluator applied an undisclosed evaluation criterion. In *Impact*, the National Research Council filed uncontroverted evidence that the evaluators' comment did not pertain to any particular evaluation criterion, and had no effect on scoring, and was intended solely

to assist the bidder in future solicitations. As some scores were less than what the CITT expected given the comment, the CITT concluded that the evaluators must have used undisclosed evaluation criteria.

Both the CITT and Federal Court recognize that evaluating proposals requires professional judgement by evaluators possessing experience and expertise in the subject matter. By now attacking an evaluator's thoughts on a proposal, the CITT has gone beyond

reviewing for consistency with the trade agreements and into the realm of discretion necessarily being exercised by contracting authorities. While the CITT may now uphold more complaints, the supplier community is the ultimate loser. ❧

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