

Federal Court reins in CITT



by Robert C. Worthington, LLB

EVER SINCE THE PASSAGE of the *Canadian International Trade Tribunal Act* and the various international and national trade agreements (*AIT*, *NAFTA*, *WTO-AGP*, etc.), it has been extremely difficult for the Government of Canada (GoC) to use anything less than full public competitive bidding as its solicitation method. Invitational tendering (what *NAFTA* calls 'limited tendering') whereby the public purchaser invites only select vendors or service providers to compete for a contract award (usually for valid supply management reasons such as being manufacturers or suppliers of a particular product for which there is no substitute or equivalent) has been almost banished from the federal purchasing field. Routinely, an excluded vendor would complain to the Canadian International Trade Tribunal (CITT) about being excluded and the CITT would either order the GoC to re-do the competition with the complaining vendor included or recommend the GoC compensate the complaining vendor for the "lost opportunity to compete."

The CITT saw all of these "limited tenders" as hidden barriers to free trade and contrary to the *NAFTA - AIT* requirements of full, open tendering. The result was that the GoC was forced to allow vendors and service providers whom they would not have invited to be part of the competitive bid solicitation to bid and potentially win the contract award. Over the past decade, some vendors didn't even bid but simply complained to the CITT about the invitation or request excluding them and received compensation recommendations from the CITT.

That untenable situation has finally been addressed by the Federal Court of Appeal in the judicial review of a CITT decision in *Attorney General (Canada) v. Trust Business Systems* (2007) Fed. C.A.

In this case, the GoC issued an RFP for specific replacement components to its marine navigation control system which stated "no substitutions." Trust Business Systems, an electronics products supplier who allegedly had an equivalent product, complained to the CITT about being excluded. The CITT determined the GoC breached *AIT* and recommended Trust Business Systems be compensated.

At the Federal Court of Appeal, however, the CITT decision was determined to be "patently unreasonable" and overturned. Why? Well, apparently the Court thought there should be evidence before the CITT could decide a case (a shocking and novel concept!). Quoting the Court, "*it is patently unreasonable for the Tribunal to simply infer a purpose of avoiding competition or discrimination between suppliers on the part of Public Works without any evidence to demonstrate such an intention.*" In other words, the CITT can not ignore the Government's evidence, unthinkingly accept the supplier's claims and presume the GoC is seeking to avoid its trade obligation commitments ... things the CITT has routinely done in numerous other cases in the past.

Specific, brand name products can be required as a "legitimate objective" under *AIT* and "no substitutions" can be a valid term for invitations and requests, even for the federal government. The government must still have valid, justifiable reasons for using such terms but now, for the first time, the onus will shift to the complainant to provide real evidence, not mere allegation or innuendo, that such restrictions were applied for an improper trade purpose. The CITT can no longer simply and automatically decide "no restrictions allowed."

A new day has dawned in federal government procurement and the sun just got a little brighter for federal purchasers. What will the panel members at Canada's CITT do now that the *Magna Carta* (i.e., the requirement of evidence) has rolled into town? We hope they will be just a bit fairer in future. It is, after all, the law. *mw*

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