



# Door #1 or Door #2?

## To resolve competitive bid issues, can a bidder use all means available?

by Robert C. Worthington, LLB

EVER SINCE THE GOVERNMENT of Canada (GoC) signed NAFTA, AIT, and the WTO-AGP and created the Canadian International Trade Tribunal (CITT) as the federal bid challenge entity to oversee federal procurement activities covered by the various trade agreements, many lawyers have wondered what would happen if a dissatisfied bidder chose to complain to the CITT and also to sue under Canada's competitive bidding laws. Would pursuit of one cancel out the other? Could a bidder recover losses twice? Or, would the decision of one be considered final and binding (what lawyers call *res judicata* and what the public knows as "double jeopardy"). We don't yet have a final answer but we do have a preliminary opinion from the court – and it doesn't look especially good for federal procurement!

This issue has arisen only because Canada is unique amongst all the signatories to these trade agreements. No other country has competitive bidding laws that have such wide application and such well-defined rules and remedies. Thus, such a question would not even arise in the US or in Mexico. In those countries, a bidder that felt it had been unfairly treated in a federal government procurement would have only one recourse – to complain under the trade agreements.

In Canada, a bidder to our federal government who is seeking to have a procurement decision reviewed (assuming the procurement is covered by one of the trade agreements, which most government procurements of goods and services are) could complain to the CITT, if they can get their complaint in within the extremely short time period of 10 days after learning of the GoC's denial of relief. Alternatively, the bidder can sue under Canada's competitive bidding laws. The grounds for review are narrower for lawsuits (one has to be a compliant bidder and can only complain for procedural unfairness, unlike the much wider grounds under the trade agreements whereby a potential bidder can complain about any aspect of the procurement process). However, the time limit for suing is much longer for a lawsuit, being two years from the award of the contract.

The Government of Canada has always taken the position that pursuit of a CITT remedy barred a bidder from then suing under the law. As a result of the Ontario Supreme Court decision in *Stenotran Services Inc. v. Canada (Attorney General)* (2007) Ont. S.C., that position may be incorrect.

The facts of the case are quite controversial and largely unproven at this point. Simplifying them, Stenotran filed a complaint with the CITT regarding a procurement they had participated in and lost to another bidder. In part, they succeeded at the CITT and the award decision was cancelled. On the GoC's re-competition of the procurement, Stenotran won the contract. Then, Stenotran alleged that they discovered further information, which Stenotran says is evidence of a conspiracy between the previously successful bidder and the GoC to deny Stenotran the first contract. Since they were out of time to file a complaint at the CITT, Stenotran sued under competitive bidding law.

The GoC went to court to have the lawsuit dismissed prior to a full trial, arguing in essence that the CITT decision was the final word on the case and Stenotran's case on the same facts was seeking a second hearing on what had already been decided – in other words, it should be *res judicata* and consequently dismissed out of hand.

Stenotran argued that while the case might arise out of similar facts, there was new evidence not heard by the CITT and this was a new case and not barred by the CITT's previous decision.

The court (while being careful to note that it was by law required to presume Stenotran's allegations were true and it could only dismiss Stenotran's claim if it was patently obvious it would fail), refused to apply the doctrine of *res judicata* and allowed Stenotran's lawsuit to proceed to a full trial. It did point out that Stenotran would not be entitled to recover twice for the same wrong, but, at the same time, the court did not accede to the GoC's argument that a bidder has only the choice of CITT or court.

In other words, yes, it is legally possible for a bidder to complain to the CITT (win or lose) and then commence a lawsuit for more.

Whether Stenotran or the GoC will succeed at a full trial, we have no idea and we must await the decision of the court, in due course, as lawyers often say. But the door is ajar to letting bidders do both and it will be tricky to close it once it is open, if the trial decision on the full case decides that both remedies are available and they are not mutually exclusive.

Can bidders choose door number one, door number two, or both? We will have to wait and see. ~~~

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