



by David Attwater

CITT broadens access to the AIT

IN A RECENT COMPLAINT by Northrop Grumman (PR-2007-008), the CITT found that there was no requirement to be a “Canadian supplier” to file a complaint under the *Agreement on Internal Trade (AIT)*. Northrop Grumman is a US supplier that bid on a defence contract. It filed a complaint alleging breaches of the *AIT* after its bid was not accepted. In accepting jurisdiction to conduct an inquiry into the complaint, the CITT found that foreign and Canadian suppliers alike may allege breaches of the *AIT*. In an effort to assuage the stunned disbelief of practitioners, the CITT noted that it “is mindful that its decision ... appears to be inconsistent with its previous decisions on the same issue.” The decision is also inconsistent with the Federal Court in *Agustawestland* (2004 FC 1545).

The *AIT* – an agreement between the federal, provincial and territorial governments of Canada – addresses internal trade issues involving non-tariff barriers, capital, services and labour. It is intended to facilitate trade and mobility within Canada. The objects and purpose of the *AIT* are expressed in the *AIT Implementation Act* (S.C. 1996, c. 17), the preambles to the agreement and within the procurement chapter: “the purpose of this Chapter is to establish a framework that will ensure equal access to procurement for all Canadian suppliers.” While acknowledging that these provisions express “what the parties to the *AIT* wanted to achieve,” the CITT devalued their clear intention stating that “they do not constitute substantive provisions.”

The CITT’s decision extends the benefits of the *AIT* beyond Canada’s borders, giving access to bidding and bid challenge to

non-Canadian suppliers on procurements not otherwise subject to Canada’s procurement obligations. It effectively eliminates the exclusions contained in the *NAFTA* and *WTO Agreement on Government Procurement (WTO-AGP)* with respect to procurements by DND and the RCMP. While these agreements limit coverage of goods and services procured by or on behalf of DND and the RCMP, no such limit exists in the *AIT*. The *AIT* expands coverage over these procurements but was understood to limit bid complaint rights to Canadian supplies. Now, foreign suppliers need simply invoke the *AIT* to circumvent the exclusions paid for by Canada in negotiations with its foreign trading partners. The decision also creates a disincentive for Canada’s trading partners to enter into procurement agreements providing opportunities for Canadian business – why bother when the CITT gives away free access!

The federal government has not responded idly. The CITT’s decisions on coverage of the *AIT* and the merits of Northrop Grumman’s complaint have spawned four judicial review applications and three motions to the court. If the CITT’s decision is allowed to stand (court file no. A-310-07), Canada will no doubt seek to amend the *AIT*. So, is the three-member panel of the CITT uniquely on to something or is this just another one of those “disruptive decisions” noted by the Hon. Lastewka PC, MP, in his *Final Report on Government-Wide Review of Procurement* (January, 2005)?

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