Does familiarity erode deference?

In the early years of the CITT's jurisdiction over Canada's bid complaint process the prospect of overturning a decision on judicial review was slim to nil. Due to an apparent unfamiliarity with the trade agreements and bid complaint process, the Federal Court of Appeal (FCA) showed considerable deference to the CITT. Recent court decisions suggest a greater familiarity with procurement law and less reluctance to overturn CITT decisions. A brief survey of recent cases will illustrate the point.

In *Serco* (2008 FCA 208), the CITT found that Defence Construction Canada (DCC) breached the *Agreement on Internal Trade (AIT)* by rejecting Serco's proposal for conflict of interest (COI) in the absence of a clause in the solicitation documents expressly allowing of such rejection. After finding ample evidence that Serco was involved in preparing the solicitation documents, the FCA concluded that it was in the public interest to reject its proposal. The absence of a COI, and the right to reject a bid for COI, are not matters that must be clearly identified in the solicitation documents.

In *Northrop Grumman* (2008 FCA 187), the CITT found that a complainant need not be a "Canadian supplier" to have standing to allege breaches of the *AIT*. In allowing the application, a majority of the FCA recognized that certain conditions must be satisfied before a complainant can avail itself of the benefits of the *AIT*, including that the procurement was "within Canada." The "within Canada" requirement will be met if the complainant meets the *AIT* definition of "Canadian supplier."

In *Zenix* (2008 FCA 109), the CITT found that DCC could not terminate negotiations until after it disclosed its budget limit and allowed Zenix to accept or reject a contract at that price. In dismissing DCC's application, the FCA accepted the results of the CITT's inquiry while rejecting its reasoning. DCC was not required to disclose its budget limit. However, DCC was not entitled to unilaterally terminate negotiations. Rather, DCC was required to clearly communicate that Zenix's last offer was unacceptable, that negotiations had reached an impasse and that Zenix should make its best and final offer. Only if the final offer was not acceptable, could DCC conclude that negotiations had failed.

In *Equinox* (2008 FCA 36), the FCA allowed the application concluding that the CITT could not choose to inquire into one ground of complaint while refusing to inquire into a closely related facet of the same bid process.

In *TPG* (2007 FCA 291), the CITT accepted a complaint on allegations described as "water-cooler gossip." The FCA found that the CITT has a duty to ensure that information filed by a complainant is consistent with an open, fair and impartial bidding system. The complaint should have been declined on the basis that PWGSC had yet to make authorized communications.

In *Trust Business* (2007 FCA 89), the CITT found that specifying particular products on a no-substitute basis was for purposes of avoiding competition and discriminating between suppliers. In allowing the application, the FCA found that the CITT ignored evidence of legitimate operational requirements while inferring the purposes of avoiding competition and discriminating between suppliers.

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