



# It's not **Over** 'til it's **Over**

TPG case on technology services contract explores every legal avenue open to the supplier

**O**N MARCH 23, 2007, TPG Technology Consulting Ltd. (TPG) filed a complaint with the Canadian International Trade Tribunal (CITT) regarding the award of a large technology services contract (valued at \$400 million) by the Department of Public Works and Government Services (PWGSC). That initial complaint was rejected by the CITT as being filed outside the prescribed time limits (that decision was later overturned by the Federal Court of Appeal), but nonetheless sparked off a series of proceedings that included four other complaints to the CITT, two applications for judicial review and two motions for injunctions over an eight month period. Ultimately, these various proceedings culminated in an action for damages which is still outstanding before the Federal Court of Canada.

What follows are some of the key determinations that were made during the course of this litigation.

## Key determination 1

### WHEN INFORMATION IS NOT EVIDENCE

As noted above, the initial complaint filed by TPG with the CITT was rejected as being outside the limitation period. The CITT reviewed the complaint before it and found that TPG knew of the information that formed the basis of its complaint more than 10 business days before filing its complaint (which is the very short limitation period provided in the *CITT Act* and associated regulations). The information that TPG relied upon in its complaint consisted of information that was provided verbally from identified and, in some cases, unidentified sources on an informal and unofficial basis, which was later characterized by the Crown as being nothing more than “water-cooler gossip.” The CITT held that TPG knew of this information well before the filing of its complaint.

On judicial review, the Federal Court of Appeal took an entirely different view of the matter. The Court recognized that procurement matters must be dealt with in an expeditious manner. However, out of a concern for the openness of the solicitation process, the Court held that “the starting point of a time-barring period, which is the demarcation of a period which allows for the exercise, or the loss of a right, cannot revolve exclusively around unauthorized communications in the nature of ‘water-cooler gossip.’” Ultimately, the Court held that in light of the nature of the allegations and the lack of any authorized communication by PWGSC on which TPG could base its complaint, all the CITT could do was decline to hear the complaint on the basis that it was premature.

This decision represents a marked departure from what was considered normal practice in procurement complaints to the CITT, namely that a complaint goes to the CITT with the best information available in a timely manner. Given the time limits on filing complaints and the need to act swiftly in order to keep all remedies as viable alternatives, complainants were well advised (and, in my view, still are) to proceed with complaints in an expeditious manner and not wait for some authorized communications from government officials which will support claims of wrong doing.

Furthermore, it is not clear whether this ruling will in fact result in more open procurements. While this ruling opened the door for TPG to live to fight again, it is not clear how it will, in fact, be of assistance to potential complainants in cases involving allegations of subterfuge, bad faith or bias on the part of government officials, as it is rare that one will obtain any authorized communications which support such claims.

Despite the fact that the Federal Court of Appeal seems to have opened the door to obtaining evidence of a higher quality than that which may be immediately available, a complainant should be reluctant to sit on information that discloses a breach of applicable trade agreement. At the very least, in order to protect its position, a potential complainant is well advised to file an objection letter with the procuring agency, setting out the basis of the complaint and requesting a response, thereby stopping the clock from running for at least a period of time.

## Key determination 2

### IF YOU ALLEGE BIAS AND BAD FAITH, BE PREPARED TO BACK IT UP

One possible exception to the above noted general guidance is the case of an allegation of wrongdoing in the nature of bias, bad faith or conflict of interest. This is not to say that one should sit on information which supports a claim of bias, bad faith or conflict of interest. Rather, it is to say that if a complaint were to go forward with a complaint on such grounds, the CITT will expect the complainant to back up its claims with some evidence as opposed to simply allegations.

This was made clear by the CITT in PR-2007-033 in which TPG alleged that there was a reasonable apprehension of bias and/or an appearance of conflict of interest in the evaluation of bids. The CITT refused to even commence an inquiry into this complaint as TPG failed to provide any evidence supporting its allegations.

The CITT held that accusations of bias and conflict of interest, if unsubstantiated, “may unfairly impugn the integrity of the competitive procurement system and the officials responsible for its conduct.” The CITT noted that “such allegations are eas-

**Be extremely cautious and deliberate in your choice of language.**

ily made but impossible to refute except by general denial” and “doubts surrounding integrity can linger even when a complaint is rejected by the Tribunal.” The CITT held that complainants making such allegation must provide sufficient supporting evidence and that it “gives no weight to anonymous and unverifiable sources of alleged serious wrongdoings.”

### Key determination 3 QUESTIONS AND ANSWERS MATTER, SO BE CLEAR

In PR-2007-060, TPG alleged that PWGSC failed to contact references as it committed to doing in response to a bidder’s question. The question was asked and answered as part of the formal “Q & A” process and was published as a formal amendment to the solicitation, as is PWGSC’s convention.

A bidder asked “How will PWGSC determine if a reference project is a fully outsourced project?” PWGSC responded that “Verification of the nature of the project will be determined by the reference check.” A “reference check” was indeed provided for in the solicitation documents. However, it was abundantly clear that

PWGSC intended the reference check to be done at its discretion and that it was not a mandatory part of the evaluation. The solicitation documents used language such as “Canada reserves the right to [check references]” or “Canada may, but will have no obligation to, [check references].”

The CITT accepted TPG’s argument and held that PWGSC’s response to the bidder’s question amended the verification/evaluation provisions of the RFP, making reference checking mandatory. The lesson being that purchasing agencies must be extremely cautious and deliberate in their choice of language during a Q & A process as the answers provided may have very important, but unintended, consequences.

### Key determination 4 PURCHASER CAN CORRECT MISTAKES

While the CITT accepted TPG arguments in PR-2007-060, the CITT ultimately ruled in favour of PWGSC. When TPG commenced that complaint, PWGSC had not yet awarded the contract and the solicitation process was still underway. It would seem that PWGSC hedged its bets and carried out the reference check that TPG was complaining should have been done.

TPG objected to PWGSC’s late attempt to check references on the grounds that a) it should have been done earlier, b) it should be done by a new evaluation team, c) the questions asked of references were inappropriate, and d) insufficient time had been given to the references to adequately respond.

Over these objections, the CITT simply held that the RFP did not indicate in any detail how the reference check was to be performed. Therefore, PWGSC was free to check references in the manner in which it did and that the manner chosen by PWGSC to do so was not unreason-

able. PWGSC was therefore allowed to correct what was ultimately determined by the CITT to be an error in the evaluation process.

### Key determination 5 HARM IS THE KEY

In its decision in PR-2007-025, the CITT accepted TPG’s arguments that the PWGSC departed from the requirements of the solicitation documents. However, the CITT refused to recommend any remedy pursuant to subsection 30.15(2) of the *CITT Act*. When considering what remedy to recommend, subsection 30.15(3) of the *CITT Act* requires the CITT to consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including: a) the seriousness of any deficiency in the procurement process found by the Tribunal; b) the degree to which the complainant and all other interested parties were prejudiced; c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced; d) whether the parties acted in good faith; and e) the extent to which the contract was performed.

In PR-2007-025, the CITT was of the view that, while there was a “serious deficiency in the procurement process,” the evidence nonetheless demonstrated that the deficiencies would not have changed the results of the evaluation. The CITT held that “the prejudice to the integrity and efficiency of the competitive procurement process in this case was minimal” and that “the evidence does not indicate that PWGSC was acting in bad faith.” As a result, the Tribunal determined that it could not assess any meaningful remedy and, ultimately, decided not to disturb the original result of the evaluation.

What can be taken from this determination is that the CITT will be very reluctant to make recommendations with respect to complaints that do not have a practical effect on the outcome of the competition, particularly where there is no evidence of bad faith on the part of PWGSC. ❧

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