BID CHALLENGE IN CANADA AND THE IMPACT ON PUBLIC PROCUREMENT: OBSERVATIONS OF CHANGE FROM INSIDE THE REVIEWING AGENCY

Randolph W. Heggart*

INTRODUCTION

When negotiators working on the Canada-US Free Trade Agreement in the mid to late eighties proposed a bid challenge system for Canada, there was a fear among procurement professionals that US suppliers would flood the system with complaints grinding procurement processes to a halt and making the job of the procurement officer a living nightmare. That did not happen. Few complaints have ever been filed by non-Canadian suppliers. Instead, procurement review at the Canadian International Trade Tribunal, and the Procurement Review Board before it, has been a vehicle for Canadian suppliers to obtain greater fairness, openness and transparency in the way that federal government procurement is conducted in Canada.[1] Some changes were sudden and dramatic while others occurred more slowly, evolving gradually as each additional bid challenge case further defined and influenced the change.

The Canadian International Trade Tribunal (the Tribunal) is an independent administrative tribunal operating within Canada's trade remedies system. It is a quasi-judicial body[2] that receives, inquires into and resolves complaints regarding the federal government procurement process. It does not handle complaints related to contract administration and it does not perform a process review function. The inquiry function is complaint driven. In other words, the Tribunal is only authorized by

---

* *Randolph W. Heggart, P.Eng., MBA, is a Research Director with the Canadian International Trade Tribunal, Government of Canada. He has been working in the field of procurement review for nineteen years.*

legislation to respond to complaints filed by suppliers. Currently, those complaints must relate to a contract or procurement that is covered by one of three trade agreements: the *North American Free Trade Agreement*, the *Agreement on Internal Trade*, and the World Trade Organization *Agreement on Government Procurement*. The Tribunal determines whether the government institution responsible for the procurement under review has met the requirements of international and national trade agreements and Canadian legislation. This paper will discuss the impact that bid challenge has had on public procurement in Canada.

SOLE-SOURCE OR LIMITED TENDERING

Many procuring entities use limited tendering (sole-source procurement) as a common method of purchasing. In fact, the previously mentioned trade agreements, including the *Agreement on Government Procurement*, permit such purchase methods for a variety of reasons.

The Canadian central procuring department[3] was, at one time, only required to publish a notice within 60 days after awarding a sole-source contract. The notification practice changed because of a complaint filed with the Procurement Review Board (the Board) in 1989, *LansPlus Inc D89PRF6608-021-0006*.[4] The complaint arose because a contract had been awarded for desktop computer systems without competition. A supplier of such systems read the contract award notice published some 139 days after the fact and filed a complaint. In responding to the complaint, the procuring entity relied on an exception to the competitive procurement rules that allowed an original supplier (where that supplier was the only one capable of supplying the goods) to be contracted to supply extensions or additions to the original contract. The Board determined not only that other suppliers were capable of supplying the requirement but also that the contractor was not the supplier in the original contract.

The case highlighted a significant lack of transparency in the way such procurements were conducted. Thus, the Board recommended that the government publish a notice before awarding a contract on a non-competitive basis so that other potential suppliers, who thought that they might have the capability, could challenge the choice of procurement method.

In May of 1992, the first Advanced Contract Award Notice or ACAN was published on the Canadian government's electronic tendering system. Since that time, there have been a number of complaints related to the rejection of challenges to ACANs and, in almost all cases, the Tribunal has found the complaint to be valid. In particular, the Tribunal has stated that limited tendering should always be considered the exception and that competition should be the norm. "Unless valid justification exists to use limited tendering procedures as specified in the trade agreements, the competitive forces of the market must be left to decide the economic issues."[5]

In 1991, the Report of the Auditor General on the Extent of Competition in Procurement[6] stated that more than $3 billion worth of goods and services (40% of all procurements) were procured annually on a non-competitive basis. At that time, none of the non-competitive transactions were advertised prior to the contract being signed. One indication that demonstrates the changes that have occurred is found in the 2006 Purchasing Activity Report.[7] This report indicates that non-competitive procurements represented only 16.3% of the total value of contracts over $25,000.

STANDING OFFERS

Often goods and services are required on a recurring basis by a number of departments. When the demand is not known in advance and the delivery is required as needed, the procurement is commonly fulfilled by the use of a non-binding standing offer. Suppliers offer to provide the needed goods or services at a firm price on an as and when required basis.

In 1998, a case, called *Polaris Inflatable Boats (Canada) Ltd. (PR-98-032)*[8] resulted in the modification of the way suppliers are selected from standing offers. After this complaint was filed, it became apparent that there existed a problem related to transparency and fairness when standing offers were issued to more than one qualifying supplier. Departments could effectively procure, from the supplier of their choice, any good or service covered by a standing offer without having to justify or explain their rationale. This method of selection lacked transparency and was often unfair to some suppliers.

In the Polaris case, a manufacturer of small watercraft (Rigid Hull Inflatable Boats) complained that despite being issued one of the standing offers, they had not received a single order even though many such craft had been purchased from their competitor. While they recognized that there was no guarantee of work through the standing offer, they suspected that hidden criteria were being applied to choose the company that would get to supply the goods. After its inquiry, the Tribunal found that, indeed, unannounced criteria were being used. While the product chosen may well have reflected the government's legitimate needs, the Tribunal determined that the standing offer did not properly set out the criteria governing the selection of the suppliers and, consequently, the award of the resulting contracts. Pursuant to this decision, the selection of suppliers from standing offers has become considerably more transparent. This is achieved by including the parameters for selecting a supplier from a standing offer. One method currently employed involves ranking the suppliers and requiring that departments follow the order of the ranking when making purchases using the standing offer.

DEFINING CLARIFICATIONS AND MODIFICATIONS

Perhaps one of the most interesting evolutions or 'in-progress' changes in Canadian government procurement since bid challenge began, has been the definition of what constitutes a 'clarification' versus a 'modification' while a procurement action is in progress.

In 1995, the Tribunal received a complaint from a company involved in a very complicated procurement to buy uninterruptible power supplies for in-flight air traffic control centers, a very important need for the safety of air travelers. The case, *Mecron Energy Ltd. (PR-1995-001)*, revolved around just how far procuring officials could go when attempting to understand or clarify what they perceived to be the winning bid.[9] In this case, the Tribunal found that by seeking information from a supplier that ultimately was used to modify or supplement the supplier's proposal; the procuring department overlooked, varied or put aside the evaluation rules. Thus, the procuring entity improperly declared compliant a proposal which, at the time of bid opening, failed to meet the minimum requirement.

The Tribunal agreed that a procuring department could, after bid opening, seek, receive and take into consideration clarifications from bidders in finalizing its evaluation of the proposals. However, the Tribunal emphasized that it is important to have a clear understanding as to what constitutes a clarification. The Tribunal defined a clarification as "an explanation of some existing aspect of a proposal that does not amount to a substantive revision or modification of the proposal."[10]

After the above decision, the government conducted a significant review of its policies and procedures. It also ensured its procuring officials were fully trained and understood the implication of this decision. Evidence can be found in a case that came before the Tribunal in 2004, *Bell Mobility PR-2004-004*. In the Bell Mobility case, the procuring department declared a bid non-compliant to the requirements after it had sought clarification of the supplier's proposal. The department determined that the information it received in response to its questions of clarification would have substantially modified the supplier's proposal. The Tribunal agreed with the government and found that the supplier had attempted to make a revision to its proposal in response to the request for clarification. The case was determined in favour of the government.

TECHNICAL SPECIFICATIONS

The way a technical specification is written can be vital to the openness and fairness of a public procurement. In 1990 a complaint filed with the Procurement Review Board (*H.J. Reis International, Ltd. D90PRF6601-021-0001*) began an evolution of improvement to the specification writing process in Canada. A supplier of farm tractors was attempting to compete for the right to lease a tractor to Agriculture Canada for three years. The technical specification named a specific brand of tractor and included the words "no substitute." The supplier that complained sold tractors but of a different brand. A brand it argued was equivalent to the brand specified. While the Board did not pronounce on the equivalency of the tractors (a determination better left in the hands of the technical experts), the Board did decide that the specifications were not in conformity with the rules of the applicable trade agreements because a particular trade name was indicated and the words "or equivalent" were not included.

This evolution had its benefits for the procuring entities as well. Often purchasing officers were able to find cheaper alternatives by including the words "or equivalent" along with the brand name. A 1997 complaint[11] was found in favour of the procuring entity because the specification had included the words "or equivalent" and the winning bidder had proposed an equivalent and cheaper alternative. Even if the words "or equivalent" are left out but the procuring entity awards a contract to a bidder offering an equivalent product, the Tribunal has decided[12] that such actions are permissible because allowing equivalents is consistent with the trade agreements.

Further cautioning on the use of brand names was provided after a complaint was filed in 1999 by a supplier of cabling.[13] In the Alcatel case the Tribunal reiterated that the use of a "no substitute" specification is not permitted by the trade agreements. It went on to say that because recognized standards existed to describe the cabling requirement in a generic manner, there existed a precise and intelligible way of describing the requirement without using a brand name. As such, the technical specification did not conform to the trade agreements nor would it have even if the words "or equivalent" had been added.

Another identified problem with technical specifications is when they are drafted using design criteria rather than performance criteria. Although not prohibited, design criteria will reduce the openness of a procurement and the number of potential suppliers that could compete. In the case *Danbar Enterprises PR-2004-036*,[14] the Tribunal indicated that, although not the preferred means of creating specifications, if design specifications are used and they are not biased in favour of a particular brand of product and there is sufficient competition, a violation of the trade agreements has not occurred.

What happens when specifications are changed after bid closing, perhaps even after the contract is awarded? Is this a matter of contract administration or something more? A Tribunal case called *Canyon Contracting (PR-2006-016)*[15] is a significant example of this situation. That procurement was for the installation of signs in one of Canada's national parks. After the contract was awarded, discussions with the contractor led to substantive changes to the original specification. A bidder in the original competition filed a complaint and the Tribunal decided that the changes effectively created a new procurement that was not competed in conformity with the applicable trade agreements.

Although it is perhaps too soon to tell, this decision could have important implications on what constitutes contract administration.

Finally, there is a method of specification development that procurement professionals in Canada and elsewhere may wish to consider adopting for complex procurements. This method of procurement, used rarely in Canada but one that is relied on heavily in the United States, is the BAFO or best and final offer method. This involves a two stage procurement whereby initial proposals are received based on a broad specification. The specification is then refined and re-issued so that suppliers can refine and resubmit their proposals. The use of this method could lead to a better definition of goods and services when the precise specification of the procurement is not completely known in advance. It is also consistent with the rules in the trade agreements.

CONCLUSION

Although the majority of cases cited above were decided in favour of the complainants, it is important to provide a few statistics to demonstrate the quality of work produced by the public procurement officers that work for the federal government in Canada. The Tribunal receives, on average, 75 procurement complaints per year. This represents considerably less than one percent of the more than 20,000 transactions per year that are covered by one or more of the trade agreements. Of the complaints received, only about half are accepted for inquiry[16] and, of those accepted for inquiry, between 10 and 15 are decided in favour of the complainant.

It would be naïve to attribute all of the changes above simply to the work of the Procurement Review Board and the Canadian International Trade Tribunal. The changes have come about through a combination of the disciplines imposed by the various trade agreements; the interpretation by the Board, the Tribunal and the Federal Court of Appeal of those trade agreements; and by the ability of the Canada's professional public procurement community to adapt to the new rules and rulings through practice modifications, training and best practice reviews.

Canada has recently signed a free trade agreement that contains a procurement chapter with Peru.[17] I am looking forward to the new and

interesting challenges and changes that may result from this and future agreements.

NOTES

1. On January 1, 1989, with the implementation of the Canada-US Free Trade Agreement the Procurement Review Board of Canada began independent third party procurement review in Canada. The Canadian International Trade Tribunal assumed the mandate of the Procurement Review Board with the implementation of the North American Free Trade Agreement on January 1, 1994.

2. The Tribunal forms part of Canada's legal system and has all the powers of a superior court of record.

3. The Department of Supply and Services (DSS) became the Department of Public Works and Government Services in 1994.

4. Procurement Review Board of Canada (1989), *LANSPLUS INC. (D89PRF6608-021-0006)* [on-line] Available at www.citt-tcce.gc.ca. [Retrieved June 30, 2008].

5. Canadian International Trade Tribunal (1998), *Novell Canada, Ltd. (PR-98-047)* [on-line] Available at www.citt-tcce.gc.ca. [Retrieved June 30, 2008].

6. Office of the Auditor General of Canada (1991), *1991 Report of the Auditor General of Canada*, Chapter 18 – Department of Supply and Services – Management of the Government Procurement Service [on-line] Available at www.oag-bvg.gc.ca. [Retrieved June 30, 2008]

7. Treasury Board of Canada Secretariat (2006), *Purchasing Activity Report 2006*, [on-line] Available at publiservice.tbs-sct.gc.ca. [Retrieved June 30, 2008].

8. Canadian International Trade Tribunal (1998), *Polaris Inflatable Boats (Canada) Ltd. (PR-98-032)* [on-line] Available at www.citt-tcce.gc.ca. [Retrieved June 30, 2008].

9. One significant aspect of this case not decided but worth noting is the importance of keeping the technical evaluation of proposals uncontaminated by the knowledge on the part of the evaluators of the prices of the bids. This was not done and may have been a root cause of the problems.

10. Canadian International Trade Tribunal (1995), *Mechron Energy Ltd. (PR-95-001)* [on-line] Available at www.citt-tcce.gc.ca. [Retrieved June 30, 2008].

11. Canadian International Trade Tribunal (1997), *Flolite Industries (PR-97-045)* [on-line] Available at www.citt-tcce.gc.ca. [Retrieved June 30, 2008].

12. Canadian International Trade Tribunal (2002), *Panavidéo inc. (PR-2002-059)* [on-line] Available at www.citt-tcce.gc.ca. [Retrieved June 30, 2008].

13. Canadian International Trade Tribunal (1999), *Alcatel Canada Wire, a Division of Alcatel Canada Inc. (PR-99-025)* [on-line] Available at www.citt-tcce.gc.ca. [Retrieved June 30, 2008].

14. Canadian International Trade Tribunal (2004), *Danbar Enterprises (PR-2004-036)* [on-line] Available at www.citt-tcce.gc.ca. [Retrieved June 30, 2008].

15. Canadian International Trade Tribunal (2006), *Canyon Contracting (PR-2006-016)* [on-line] Available at www.citt-tcce.gc.ca. [Retrieved June 30, 2008].

16. Complaints are not accepted for inquiry for a variety of reasons including late filing, no jurisdiction and no reasonable indication of a violation of the trade agreements.

17. Foreign Affairs and International Trade Canada (2008), *Canada-Peru Free Trade Agreement, Chapter 14 Government Procurement* [On-line] Available at www.international.gc.ca. [Retrieved on June 30, 2008].