



The irony of MERX

by Paul M. Lalonde

The controversial two-year extension of the Bank of Montreal's MERX contract with the federal government has been getting a lot of media attention and has been criticized on several fronts. In the latest development, the Canadian International Trade Tribunal (CITT) held that the extension of the exclusive contract to run the government's electronic tendering system violated Canada's obligations under NAFTA and the Agreement on Internal Trade.

The CITT decision is rich with irony. The MERX system was designed to implement trade agreement commitments of openness, transparency and fairness. But in extending the contract for that system, the government failed to live up to those very commitments.

The complaint before the tribunal was filed on April 9, 2002, by a New Brunswick firm, Tendering Publications Limited (known as BIDS). BIDS operates an online system, primarily supplying tendering documentation of the Atlantic Provinces. On April 15, 2002, the CITT issued an order postponing the award of the MERX contract. This order had no effect, however, since the extension had already been awarded on March 22 (and the tribunal's postponement of award powers do not extend to previously awarded contracts).

The original MERX contract began on May 31, 1997 and provided for a three-year term that could be extended for two additional years. These extensions were granted, such that the contract was due to end on May 31, 2002. In spring 2000, the government began to examine options for the replacement of system administered by MERX (known as GETS II). However, delays were encountered and in the spring of 2001 the government realized it would not be able to finalize a replacement strategy before the end of the MERX contract. The government therefore initiated negotiations with the Bank of Montreal to further extend the contract, and in March 2002, the additional two-year extension was announced.

Public Works and Government Services Canada (PWGSC) argued before the CITT that it acted in good faith and that the extension was necessary as a stopgap measure, pending the tendering of a replacement for GETS II. PWGSC expressed sympathy for BIDS' position but argued that, in any event, BIDS was not in a position to do the work carried out by the Bank of Montreal. PWGSC also argued that the MERX contract incorporates by reference general (SACC Manual) clauses, which provide for contract amendment, and that the extension had been carried out in conformity with the formalities required by those clauses. Since an extension is a matter of contract administration, and not a procurement process, it is beyond the tribunal's review powers.

The CITT rejected the idea that the general amendment clauses provided the legal authority to extend the contract. The tribunal held that amendment clauses provide the mechanism for amending the contract during its term, but they do not permit the extension of the term of application of the contract. If this were the case, the tribunal said, such clauses would render many of the trade agreement obligations meaningless.

The CITT concluded that the extension constituted a new procurement to which the trade agreement requirements of publicity, competition and fairness applied. The tribunal noted that it was clear as early as spring 2001 (over a year before the expiry of the MERX contract) that a replacement to GETS II would not be ready in time. But, instead of considering competing the remainder of the GETS II requirement, the government immediately launched into negotiations with the Bank of Montreal.

The tribunal said in its decision that it believed that PWGSC did intend to compete a replacement to GETS II eventually, and it expressed sympathy for PWGSC's insistence that the continued operation of the system was vital to government operations. However, the CITT said, "This fact alone does not permit PWGSC to ignore the other obligations of the trade agreements."

The CITT recommended that within six months of the decision, PWGSC issue an RFP to compete the current requirement, or, in the alternative, issue an RFP for a replacement system. If such a competition results in the selection of a supplier other than the current contractor, then, the tribunal recommended, PWGSC terminate the existing contract and award a new contract to the winning supplier. BIDS' claim for compensation for lost profit, lost opportunity and for punitive damages was rejected.

Aside from the general interest the MERX contract generates in the procurement community, this case is also an important illustration of the distinction between contract amendments and extensions, and should be read carefully by any procurement officer considering extending a contract. Extensions can run afoul of the trade agreements if they are not carried out in strict conformity with the terms of the initial contract, or if they are used merely to avoid having to compete a requirement.

What all this means to the future of the government's electronic tendering system remains unclear but many interested observers, as well as organizations such as the Canadian Federation of Independent Business, have been critical of the MERX extension and wish to see greater competition and greater access to tendering documentation. At the same time, some provinces are relying on the federal government to take the lead in terms of national electronic tendering platforms. I see no reason why Canada cannot equip itself with the best electronic tendering system in the world, including affordable (if not free) access to primary tendering documentation from a variety of competing sources. *mm*

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