

CITTING IN

¿Donde están los otros?

by Paul M. Lalonde

A bid challenge system created largely to secure foreigners fair access to Canadian government procurement has, somewhat ironically, been used almost exclusively by Canadian companies challenging contract awards by their own government. That is a puzzle.

The CITT has been handed its responsibilities over procurement complaints primarily as a result of Canada's undertakings to other countries, most notably in NAFTA and the WTO Agreement on Government Procurement. A driving force behind these agreements is the protection of foreign bidders against discrimination. In exchange Canadian suppliers are supposed to receive reciprocal protection abroad.

The rarity of foreign complaints is quite striking. Out of some 200 procurement decisions handed down by the CITT since the beginning of 1994, only three were as a result of complaints by foreign companies. All three of these complaints were by US companies: two by the same company, Symtron Systems Inc, and one by National Airmotive Corporation.

The structure of the Canadian economy itself provides some explanation for the scarcity of foreign complaints. The Canadian business world is populated by a large number of companies that are subsidiaries of, or affiliated with, foreign companies. If, for example, a US multinational is planning to bid on a Canadian government contract, chances are they will do so through their Canadian affiliate, often a company well established in Canada with significant facilities here. Thus, if they lose the bid and complain to the CITT, their complaints will not register as being filed by a foreign enterprise. Some observers feel this is the primary reason why so few complaints appear to be filed by foreigners.

While the presence of Canadian subsidiaries is surely a very important factor (especially with respect to US companies), I am not completely satisfied by this explanation. Anecdotal evidence culled from clients and contacts leads me to believe that foreign bidders are still somewhat timid in their pursuit of the Canadian procurement market (particularly companies from overseas). Accordingly, since there are relatively few foreign bidders to begin with, there are few foreigners likely to complain to the CITT.

In addition, even when they do bid and are unhappy about the process, foreign suppliers may not be aware of the availability and effectiveness of the CITT's bid challenge procedure. From conversations with foreign clients and contacts, I sense that they know little, if anything, about the CITT's bid challenge procedure. By contrast, the CITT's role has been widely publicized in Canada.

There may also be another factor at play here. When foreigners feel hard done by, they may be more inclined to complain to their own government about unfair treatment, rather than use the remedies created by the government they feel is perpetrating the discrimination. The actions taken by National Airmotive Corporation in a recent case illustrates the types of complaints that a foreign supplier can present to their home government, although in this case, the company *also* filed a complaint with the CITT (*National Airmotive Corporation*, PR-98-051, June 3, 1999).

National Airmotive wanted to bid on a defence contract for the repair and overhaul of certain aircraft equipment that had been issued on a limited tendering basis. The federal government argued that the contract at issue was not a "designated contract" (i.e. it was not subject to the disciplines of the NAFTA or the WTO Agreement on Government Procurement). It was a contract for services with reference to transportation equipment and, therefore, the CITT had no jurisdiction to inquire into the matter. The CITT agreed with the government and declined jurisdiction over the matter.

Unhappy with the process in Canada, National Airmotive at the same time petitioned the Office of the United States Trade Representative (USTR) to cite Canada under Title VII of the *U.S. Trade Act of 1988*. Title VII is a mechanism that allows the US to cite and take actions against countries whose government procurement practices violate international trade agreements. National Airmotive was particularly irked that they could not bid on contracts for servicing Canadian government aircraft while Canadian companies could bid on the mirror contracts in the US (Canada specifically excluded such contracts from the coverage of the procurement agreements, while the US chose to forgo such exclusion).

In the end, the USTR did not cite Canada for any alleged breach of Chapter 10 of NAFTA or of the WTO Agreement on Government Procurement. But, the case illustrates the kinds of recourse that foreign suppliers might attempt to exercise if they believe they have been treated in a discriminatory manner.

It is interesting to note that Canada has no equivalent to Title VII. Canadian suppliers are free to complain to the Canadian government should they be mistreated in their efforts to sell their goods and services to foreign governments, but there is no formal or legislative process for doing so. It is entirely within the discretion of the Department of Foreign Affairs and International Trade whether it chooses to pursue the matter with the foreign government or even to investigate the issue. There is no requirement for a formal consultation process, or even for the department to provide reasons for its decision to pursue or abandon a particular matter.

Some observers have suggested that US businesses, and their European Union counterparts, have an edge over their Canadian competitors. They have a mechanism which compels their governments to more formally investigate alleged breaches of international trade agreements, while Canada is dependent on the discretion (some say the whim) of the Government of Canada.

In the end, there is little hard evidence as to why there are still so few procurement complaints filed by foreign bidders before the CITT. It would be worthwhile, as a means of monitoring the effectiveness of Canada's trade agreements, to study the behaviour of foreign suppliers in Canada and of Canadian suppliers abroad. And, as the CITT gains visibility and credibility among the international procurement community, it will be interesting to see if foreign companies start to use the bid challenge process more frequently.

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