

CITTING IN

The war over warship maintenance

by Paul M. Lalonde

Now and then a case comes along that has it all: interesting substantive issues, tricky procedural maneuvers, compelling human interest and parties with enough guts and money to litigate. The recent dispute over the in-service support contract for the Iroquois and Halifax class warships is just such a case.

For many years, MIL Systems, a division of Davie Industries Inc. (a subsidiary of Dominion Bridge of Montreal), and Fleetway Inc. were the contractors responsible for the custody of all master or reproducible copy, drawings, publications, data lists and other technical data that constitute the intimate design details and information on the warships. In July 1998, Public Works and Government Services Canada (PWGSC) released a Notice of Call for Tenders with respect to the contract held by MIL/Fleetway. The Notice was released as a "Letter of Interest" which had an August 10, 1998 closing date for receipt of submissions. Only those bidders considered compliant with the Letter were entitled to receive a Request for Proposal and to submit a bid.

The RFP provided that the successful bidder would be awarded a contract consisting of a six-month transition period during which the bidder would be expected to prepare itself to undertake specific work to be "called-up," or requisitioned, by the Department of National Defence as and when needed. The winning bidder would be paid a lump sum for successfully completing the transition as well as a monthly project management and administrative fee. However, the bulk of the work (and the payments) would be carried out by a task requisitioning process, or call-up.

On November 4, 1998, PWGSC released the RFP, with a closing date of February 26, 1999. On October 8, 1999, PWGSC, after taking seven-and-a-half months to decide, identified Siemens Westinghouse Inc. as the successful bidder.

On October 21, 1999, MIL/Fleetway complained to the CITT, alleging that the procurement process was carried out in breach of the federal government's obligations under the Agreement on Internal Trade.

MIL Systems and Fleetway alleged that Siemens was non-compliant with the requirements of both the Letter of Interest and the RFP and, therefore, should not have received the RFP in the

first place, much less have succeeded on the bid. MIL/Fleetway requested that the CITT stay or postpone the proposed contract award under the Canadian International Trade Tribunal Act.

On October 29, the tribunal accepted the complaint for inquiry but refused to issue a postponement order on the basis that the contract had already been awarded. Under the CITT Act, the tribunal may order the government to postpone the award of a “proposed contract.” The Act does not allow the tribunal to postpone contracts that have *already* been awarded.

Responding to the tribunal’s refusal, MIL/Fleetway wrote to the tribunal asking it to reconsider its decision. They argued that the tribunal has the power to order the requested postponement because the contract was in the nature of a “standing offer” and that each “call-up” represented a separate “proposed contract”.

The issue was of crucial importance to MIL/Fleetway. For Fleetway, the contract represented about half of its business and since Siemens now had the contract, many highly skilled and experienced employees had been hired away by a Siemens subcontractor. In addition, MIL and Fleetway complained that the loss of the business and of key personnel harmed their reputation in Canada and abroad as experts in this line of business.

MIL/Fleetway quickly filed an application for judicial review with the Federal Court to try to overturn the tribunal’s refusal to issue a postponement order. They also sought an injunction from the court to stop any further call-ups on the contract pending the outcome of the judicial review application.

On December 17, 1999, the court, while recognizing the difficulty of the case, refused to order the injunction. The court was sympathetic to Fleetway and MIL’s predicament of losing key staff and having its reputation hurt. On the other hand, if the injunction was granted, Siemens would be harmed as well; staff would have to be temporarily laid off, or paid to do nothing while the courts and the CITT sorted out the validity of the complaint. Mr. Justice Strayer of the Federal Court of Appeal felt that it was best to preserve the *status quo*. If MIL and Fleetway were correct in their complaint, it would be possible through the CITT process, or through an action for breach of contract against the government, to obtain monetary compensation for the harm suffered. However, given the urgency of the situation, Mr. Justice Strayer ordered that the application for review be heard on January 18, 2000.

So it was steady as she goes through Christmas on Canada’s warships. In January, the parties reconvened before the Federal Court in Ottawa to argue whether the contract really was a contract, or whether it was just some sort of arrangement whereby subsequent contracts could be concluded. If it was the latter, MIL and Fleetway argued the tribunal could and should issue the postponement order.

The courts are very reluctant to grant review of decisions that are interlocutory in nature (i.e. that arise in the course of a proceeding but do not decide the merits of the case). So, the court rejected

their pleas for relief and decided that the tribunal's decision on postponement should be left alone.

Unfortunately for those interested in the underlying legal question – when is a contract really a contract – the court made no pronouncement on this issue. We are left with the tribunal's approach: the award of the right to be called upon by task requisition, or call-up, is itself the award of a contract. Once this occurs, it is too late for the tribunal to order a postponement under subsection 30(13) of the CITT Act.

Meanwhile, the tribunal's process on the MIL/Fleetway complaint continued. On March 6, 2000, the tribunal handed MIL and Fleetway a major victory. It held that the complaint was valid, recommending that the contract with Siemens be cancelled and that PWGSC re-evaluate the MIL/Fleetway proposals in accordance with the evaluation methodology set out in the RFP. In addition, MIL/Fleetway were awarded their reasonable costs incurred in filing and proceeding with the complaint.

This decision is undoubtedly a great victory for MIL and Fleetway. Given the stakes, I would not be surprised to see Siemens or PWGSC take this case back to the Federal Court. In the meantime, with the uncertainty around the final outcome of the solicitation, the key employees who migrated to Siemens must be wondering for whom they will be working in the weeks and months to come.

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