

CITTING IN

Objection sustained

Suppliers have a good day in court

by Paul M. Lalonde

Since the Canadian International Trade Tribunal began hearing complaints from disgruntled suppliers, it has initiated approximately 90 investigations relating to the handling of the procurement process by the federal government. In over 20 of these cases (with about 40 still in progress), the Tribunal has found suppliers' complaints valid and recommended that the government change the manner in which the particular contract was awarded or that the complainant be awarded compensation.

However, some observers have felt that the Tribunal's powers were too limited in that it could only make "recommendations," as opposed to binding decisions; if the government refused to follow the advice of the Tribunal, there was little the complainant could do. In other words, the Tribunal, or so some people thought, had no teeth (or, at best, blunt ones).

This view was not without foundation. Under the Canadian International Trade Tribunal Act, where the Tribunal finds that a complaint from a potential supplier is valid, it may, among other things, "recommend" that the government re-evaluate the bids, start a new solicitation process or award the contract to or compensate the complainant. But, according to some sceptical observers, the Act does not force a department to implement recommendations it dislikes.

Not quite so, says the Federal Court of Canada. In recent cases, the Court has made it quite difficult and awkward for departments to refuse to implement Tribunal recommendations.

On April 21, barring any appeal to the Supreme Court of Canada, the Federal Court of Canada confirmed last October's CITT ruling which handed Corel Corporation a significant victory concerning Revenue Canada's purchases of office software.

This case dealt with two complaints by Corel that Revenue Canada's purchases of office software discriminated against Corel, in favour of Microsoft. Corel complained that the procurement process discriminated against non-Microsoft bidders by combining into one RFP the procurement of software licences and integration and conversion. According to Corel, this gave the incumbent Microsoft an unfair advantage.

The CITT concluded that Corel's complaints were valid and recommended that a new solicitation be issued by Revenue Canada which diminished the impact of the conversion costs or that Corel be awarded compensation.

The federal government sought to have these recommendations overturned by the Court, arguing that, in inquiring into the impact of Microsoft's incumbency, the CITT exceeded its jurisdiction and should be more deferential to the decisions of the department. The Court dismissed the government's application and summarily rejected the argument as to the incumbency of Microsoft. The brevity, if not the result, of the decision is disappointing in that the Court missed an opportunity to clarify the nature of the Tribunal's process. (Is it in the nature of a deferential review of the procurement decision, or a more intrusive inquiry?) The Court simply stated that it was not persuaded that the CITT improperly embarked on an inquiry into the incumbency issue.

In another recent case, *Wang Canada Ltd. v. Canada*, Public Works and Government Services Canada (PWGSC) rejected a bid by Wang for the provision of computer maintenance services as non-compliant. Wang complained to the Tribunal, which held the complaint valid, on the basis that the process was carried out in breach of NAFTA and the Agreement on Internal Trade (AIT), and recommended that the contract be awarded to Wang.

Upon receiving the Tribunal's recommendations, PWGSC replied that the Minister had decided not to award the contract to Wang. Instead, the department would issue a new RFP on which Wang was welcome to bid. The basis for the Minister's decision not to implement the recommendations was that a new solicitation would better serve the public interest. Wang sought to have this decision set aside by the Federal Court.

The Court sided with Wang. It held that NAFTA and the AIT are important trade agreements, which impose significant obligations on our government institutions, and that the legislative scheme implementing them into Canadian law ought to be rigorously respected. The Court further found that non-implementation of the recommendations in this case was inconsistent with the overall purpose and intent of that legislative scheme.

The Court allowed Wang's application, quashed the decision of the Minister, imposed the costs of the Court proceeding on the department and, most importantly, ordered that the contract be awarded to Wang as recommended by the Tribunal.

In another recent case, *Attorney General of Canada v. Symtron Systems Inc.*, the Federal Court reviewed Chapter 10 of NAFTA, which contains the undertakings of Canada, the United States and Mexico regarding government procurement, and noted that under NAFTA "any aspect" of a procurement process is open to challenge.

Since Chapter 10 provides skeletal rules only, Parliament has given it muscle with amendments to the CITT Act which provide a type of "enforcement" mechanism. Under subsection 30.18(1), government institutions "shall" implement the Tribunal's recommendations "to the greatest extent possible." According to the Court, the intent of the legislation is to render non-compliance

an “awkward and unusual occurrence.” As the Court put it, Chapter 10 signals that the Tribunal is “not to be toothless.”

With these cases, the Federal Court’s message to the government is clear: Implement the recommendations of the Tribunal unless you have very compelling reasons for not doing so. Existing disciplines on the procurement process are to be taken very seriously and the Court will not take kindly to any government reluctance in implementing Tribunal recommendations.

Faced with a fairly activist CITT that is well supported by the Federal Court, and faced with a recent series of important defeats, the government may well be feeling a bit like Dr. Frankenstein when his creation discovered a will of its own.

[Paul M. Lalonde](#) practices international trade and procurement law with the firm Heenan Blaikie in Ottawa and Toronto.