

## CITTING IN

### Big Blue bellyaches too

by Paul M. Lalonde

You can now add Big Blue, IBM, to the growing list of companies in the computer and information technology sector that have successfully challenged the federal government's procurement practices.

If nothing else, the case (PR-99-020) should convince disgruntled suppliers that they are in very good corporate company if they decide to use the CITT's bid challenge procedure. Some of the other computer and IT notables that have used the system include Corel (recently winning the biggest ever compensation award from the CITT), SHL Systemhouse, Lotus, Novell, Netscape, Amdahl, Hewlett Packard, EDS Canada, Digital Equipment, DMR, PeopleSoft and Wang – an impressive cross-section of the informatics sector. To be fair, not all the challenges launched by these companies were successful, but the proportion of computer and IT-related cases before the CITT is high when compared to other sectors, no great surprise when you consider the following.

All government departments make significant software and hardware acquisitions. In fact when compared to the amount of procurement in this sector, the number of complaints is relatively quite small. Last year, Public Works and Government Services Canada (PWGSC) let a total of 7,148 documents (contracts and amendments) representing roughly \$1.56 billion on informatics purchases, not including independent purchases in this sector by other departments. Out of these, there were a scant 10 complaints to the CITT and in only two of these cases, Corel Corp and Novell Canada Ltd., the CITT's determination was in favour of the complainants (with one case still pending).

This industry is in constant and rapid evolution – product life cycles are very short, presenting difficult challenges to purchasers. By the time the procurement process is completed and the goods or services delivered and implemented, they may already be outmoded.

Often, purchased components subsequently become integrated into larger systems creating technical compatibility problems. This may make purchasing very tricky, particularly since tendering documents are not supposed to require brand name or trademarked products, but should strive to set out requirements in a generic manner.

Ron Lunau, counsel for Corel and other companies before the CITT, notes that “another factor at play here has been the need for departments to address the Y2K problem – a factor in the last Corel case and in the Novell case.” Combine the pressure of the Y2K issue, the highly technical and competitive nature of this sector and the fact that the experts do not always agree on optimal solutions and you have a very fertile environment for disputes. With those conditions, it is not surprising to Lunau that procurement problems occur.

The recent IBM case illustrates these dynamics. The procurement in question was for the supply of two “IBM plug compatible mainframe computers.” The winning bidder was Amdahl Canada Limited, a subsidiary of Amdahl Corporation and part of the Fujitsu Limited family of companies – two huge, ferociously competitive multinational corporations.

The case hinged on a fairly technical matter. IBM alleged that, contrary to the provisions of the Agreement on Internal Trade, PWGSC improperly applied mandatory evaluation criteria that required bidders to submit a firm price per MSU (millions of service units) delivered. On this basis, PWGSC erroneously concluded that IBM’s proposal was non-compliant to the essential requirements of the RFP. According to the department, the RFP also required a firm price for each 16-channel increment and for each additional gigabyte of memory, all of which IBM failed to supply.

The issue for the tribunal was whether IBM had provided the requisite firm prices. PWGSC’s argument was based on the fact that IBM’s bid failed to include a separate tabulation or summary of the unit prices and, therefore, was non-compliant. IBM countered that the prices were provided in the Pricing Format Sheet included in its proposal and that the department could easily determine them through a simple and straightforward mathematical operation. In the opinion of the tribunal, given that the RFP did not require a separate tabulation of unit prices or any such specific format for expressing unit prices, IBM had met the mandatory requirements of the RFP. The CITT recommended that the proposals be re-evaluated or that IBM be compensated for lost profits. The department decided to re-evaluate the IBM proposal.

While not breaking any new legal ground, the case illustrates the technical complexities inherent in this sector and the willingness of informatics companies to vigorously dispute these procurements.

Robert Crowe, vice president of policy at the Information Technology Association of Canada (ITAC), agrees that many unique challenges exist in the informatics procurement area. He points out that the length of the procurement process may create barriers to implementing and developing new technologies and hopes that industry and government will find new ways to speed up the process. Crowe is encouraged by the work being done by ITAC and the government to improve methods of doing business and by the government’s IT procurement reform initiatives. As Crowe says, “there is strong mutual interest to find ways of better delivering the goods to the benefit of the public and the industry.”

Let's hope that Crowe's optimism is justified and that government and the informatics industry will continue to perfect their business relationship. In the meantime, the IBM's recent case reminds us that procurement problems in this sector still exist and that informatics suppliers will likely keep the CITT busy for the foreseeable future.

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