

CITTING IN

The CITT: fair arbiter or complainant coddler?

by Paul M. Lalonde

On May 3, 2000, the Canadian International Trade Tribunal (CITT) decision in Educom Training Systems Inc. (PR-99-037) raised questions about the appropriate role of the tribunal in dealing with procurement complainants. This case related to a contract for engineering support of office systems by information technology professionals where discrimination was alleged in favour of the incumbent contractors.

In Educom, the procedural issues included a motion by the federal government to have the complaint dismissed because it was filed late. However, the complainant had filed its initial complaint within the 10-day period, but with some deficiencies. Five days later, the complainant was informed of the deficiencies and asked to rectify the complaint within nine days. This was done, but the government beefed that the rectified complaint contained grounds not raised until December 30, 1999, but dealt with events known to the complainant December 9, 1999, outside the set time limits.

The tribunal dismissed the motion, stating the CITT Act “imposes on the tribunal a substantive obligation to assist the complainant in complying with the requirements of” the Act regarding the filing of complaints.

Is the tribunal’s statement indicative of an imbalance in the way the tribunal deals with complainants? Ottawa lawyer David Attwater, a private sector practitioner hired by the department of Public Works and Government Services Canada (PWGSC) for the Educom case, feels it exemplifies an overly friendly approach to complainants. He feels the tribunal is not sufficiently mindful of the balance that must be struck between competing interests – one being the complainant’s right to have an effective remedy in cases where the requirements of the trade agreements have not been met, the other, the government and the public’s interest in being able to effectively and promptly carry out purchases, but also the successful bidder’s commercial interest and contractual relations with the government, which can be severely disrupted by unfounded complaints.

Attwater also has other reasons for his belief. Typically, a portion of the costs associated with legal proceedings are paid by the loser to the winner. The tribunal is empowered to impose such costs where deemed appropriate but, to date, has not done so against a complainant. When the

tribunal rejected Educom's complaint, the federal government asked for costs to be imposed on the complainant but the tribunal refused, pointing out that, although there was no evidence to support the complaint, it was not "frivolous or vexatious."

The tribunal's role is not simply as passive arbiter; its staff takes an active investigative role and the process also involves an initial vetting of complaints to weed out those without merit – not your standard court proceeding. In Educom and other cases, complaints may initially contain a reasonable indication of a breach of one of the trade agreements, but only further investigation can make it clear that the complaint lacks merit.

During the RFP process, Educom requested an extension of time to file bids and was turned down. PWGSC claimed that the shortened bidding process was necessary but a week later a similar request by another bidder was accepted. The deadline was extended beyond January 1, 2000, raising the ire and suspicion of the complainant. As it turns out, there was an adequate explanation, but this could not be known without investigation by the tribunal. Under the circumstances, it seems harsh to penalize Educom with costs in favour of PWGSC.

The tribunal reviewed the costs issue in an addendum to its decision in Flolite Industries (PR-97-045), where the complaint was rejected. PWGSC pressed the tribunal for a cost award against the complainant. Refusing, the tribunal explained, "little purpose is served by awarding costs to the department and thereby adding to the burden that a complainant already bears, except in those cases where the complainant's conduct demands it," i.e. where the complainant intentionally attempts to mislead the tribunal or shows bad faith in bringing the complaint.

To me this is an appropriate balance. In my experience, complainants do not bring cases lightly, often having expended significant sums preparing the unsuccessful bid and the complaint. Suppliers are exceedingly reluctant to complain to the tribunal, fearing this will damage their relationship with government purchasers and reduce the likelihood of future contracts. PWGSC, however, is staffed with procurement experts, and dealing with complaints – as noted in the Flolite Addendum – is "a function which is inherent to the department's role and responsibility."

Attwater also feels that it is too easy to launch a complaint. He is correct that investigations have been launched based on bald allegations, without supporting evidence. But the tribunal's initial vetting of complaints does weed out the obviously baseless cases. Also, given the 10-day deadline for filing complaints, it is often simply impossible to get specific evidence in the allowable time frame. In Educom, the complainant's suspicions were raised when faced with an unusual set of circumstances surrounding a solicitation. To expect complainants to have much more than this when they come to the tribunal would gut the system and thwart its purpose.

Attwater and others also point out a number of other grounds for their belief that the scales favour complainants:

- Complainants are not subject to the rigors of the court process, such as cross-examination. (I would note that neither is the government.)

- The tribunal is not sufficiently respectful of the government's right to use sole sourcing. (In my view, sole sourcing is rarely worthy of respect.)
- The tribunal has started to make compensation awards for aggravated damages, i.e. it is expanding compensation awards to include punitive damages. (If the tribunal has the power under the applicable laws to make these types of awards – and in my view the jury is still out on this – then I see no reason not to exercise this power where warranted.)

Discussion on this subject is still open. In the meantime, while the tribunal tries to make the process user-friendly, taking on the federal government is still not for the faint of heart.

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