FOCUS *Procurement Law*

# Using brand names in the bidding process

JOSEPH GRIFFITHS

The Canadian International Trade Tribunal released its reasons in *Enterasys Networks of Canada Ltd and the Department of Public Works*, [2010] C.I.T.T. No. 104 in July. The split decision, presently under appeal, followed several days of hearings and centred predominantly on the allegation that the Department of Public Works and Government Services Canada (PWGSC) had adopted a practice of using "brand names" to describe its purchasing requirements for networking equipment rather than employing "generic" specifications.

By way of background, in 2006 PWGSC issued certain bidders of networking equipment a Departmental Individual Standing Offer (DISO), which essentially streamlined the procurement process for networking equipment, as each DISO holder was effectively "prescreened" as a suitable provider for such equipment to the government. The DISO was subsequently converted to a National Master Standing Offer (NSMO) in 2009.

As noted by the tribunal, under the terms of the NSMO, PWGSC could issue call-ups directly to a company for the supply of equipment, or open the requirements to competition by sending requests for quotations, in the form of a Request for Volume Discounts (RVDs) to the applicable NSMO holders. Enterasys was one such holder.

An earlier complaint had been filed with the tribunal, alleging that certain provisions of the DISO/NSMO violated provisions of the international trade agreements in that the DISO/NSMO appeared to confer on PWGSC the power to describe its technical requirements by specifying brand names for the required equipment, rather than insisting on the use of generic specifications.

The problem, of course, with the use of brand name descriptions is that it places the onus on the non-incumbent supplier to demonstrate "equivalency" with an incumbent supplier's equipment, rather than requiring all suppliers to demonstrate that their equipment meets the actual operational needs of the tendering department.

In dismissing the earlier complaint, the tribunal found that the NSMO did not, on its face, violate the prohibition in the trade agreements against referring to a particular trademark or name, patent, design, or type, specific origin or producer or supplier in its technical specifications. However, the tribunal went on to state that the issuance of the DISO/NSMO did not shield PWGSC from having to conform to the trade agreements for each individual RVD.

Against that backdrop, Enterasys filed multiple complaints in February alleging, among other things, that PWGSC had, in fact, adopted a widespread practice of identifying products by brand names when issuing RVDs. By doing so, Enterasys alleged that PWGSC effectively excluded any other suppliers from submitting competitive bids, and all but guaranteed that the incumbent supplier would win the RVD.

In reply, PWGSC took the position that its practice of using "brand names" to identify products was justified, as there was no other sufficiently precise or intelligible way of describing its client departmental requirements. According to PWGSC, not only did the DISO/NSMO authorize the procurement of equipment by brand name but, where interoperability with an existing network was required, a precise description of the exact technical requirements presented a high level of complexity that could not be reached without the use of a brand name. Moreover, PWGSC argued that there was insufficient time available to develop a generic description, given the operational requirements of the client departments.

The tribunal noted that, while art. 1007(3) of NAFTA does grant PWGSC the authority to describe the technical requirements for equipment by brand name, doing so was not to be considered the "preferred" method. On the contrary, the tribunal concluded that on reading all of the provisions of NAFTA as a whole, the "provisions point towards the use of generic specifications described in terms of performance criteria in order to make a large pool of competitive bidders available to government buyers, thereby ensuring that the government receives the best value for its money."

Applying that principle to the case before it, the tribunal found that the procurement process adopted by PWGSC violated the trade agreements as it appeared that PWGSC's "default position" was one in which, whenever the requested equipment was going to be integrated into an existing network, a brand name RVD was employed. The tribunal concluded that PWGSC had applied the terms of the NSMO in such a manner as to make brand name RVDs the rule rather than the exception.

The practical consequences of this decision, assuming it withstands PWGSC's application for judicial review, is that the government may not simply use the shortness of time or the mere complexity of its operational requirements as a justification for adopting a policy of issuing a bid by reference to brand name equipment. Instead, the tribunal has clarified that, where PWGSC describes its requirements by reference to brand name equipment, it will have the onus of establishing that it asked its client departments to examine whether there could be another sufficiently precise or intelligible way of describing the procurement requirements.

Given the significant advantage enjoyed by incumbent suppliers, the tribunal's decision may curb the unfettered use of "brand name or equivalent" bidding and open up the process to a larger, more competitive process. ■

*Joseph Griffiths is a sole practitioner and litigator in Ottawa. He acted as counsel for Enterasys before the CITT.*

# Provinces haven't asked for public input

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writing, rumours were circulating in procurement circles that a proposal for implementation, including a dispute resolution mechanism, will be submitted to the Ontario cabinet very soon.

Other than Quebec, which arguably is already largely in compliance, the provinces have taken a rather secretive approach to implementing their commitments under the Canada-U.S. agreement. Given the far-reaching impacts of this implementation on billions of dollars in government contracting, this less than transparent approach is disappointing.

The provinces should have shown greater foresight and leadership and, at a minimum, held public consultations on the implementation of the Canada-U.S. agreement. Some measure of co-ordination of provincial implementation would also have been advisable. Without such co-ordination, there will likely be significantly divergent supplier rights from province to province.

The Canada-U.S. agreement was a bold step. It represents the first time the provinces have accepted any form of international commitment for their procurement activities. Regrettably, there does not appear to be anything bold about the implementation of the agreement. Instead, the provinces are quietly developing unknown measures, without public input.

Given the importance of procurement and the plethora of procurement scandals and challenges faced by governments across the country, Canadians are entitled to an open, transparent and comprehensive debate about the implementation of this historic agreement. Sadly, they are not going to get it.

The implementation of the Canada-U.S. agreement represents a unique opportunity for the provinces to adopt modern, comprehensive procurement codes. Quebec has already adopted such a legislative framework, as have most sophisticated jurisdictions in the developed world. Most provinces and the federal government, meanwhile, continue to operate under antiquated and ambiguous framework laws, supplemented by unenforceable policies and guidelines.

Multiple lawsuits, scandals, commissions of inquiry and auditor general's reports demonstrate that the old model is broken. Wise implementation of the Canada-U.S. agreement offers a real chance at much-needed modernization of Canadian procurement laws. Perhaps the provinces will yet surprise us and adopt profound and meaningful changes, but their secretive approach to date is not an encouraging sign. ■

*Paul Lalonde is a partner in the Business Law group at Heenan Blaikie LLP and a specialist in public contracting and international trade law. He thanks Laura Fernandez, a student-at-law at the same firm, for her assistance with this article.*