

PROCUREMENT COMPLAINTS AGAINST THE GOVERNMENT: MORE THAN JUST BID CHALLENGES

Posted on February 11, 2016

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In the context of government procurement, the term "bid challenge" is often used to describe the ability of potential suppliers to government to challenge a government procurement. "Bid challenge" is even the title of Article 1017 of the North American Free Trade Agreement. That article is one of the most important reasons that private parties in Canada have the right to challenge a government procurement.

The expression "bid challenge" can do a disservice to aggrieved potential suppliers, because potential suppliers can challenge government procurements in more ways than just in the evaluation of their bid. Two recent procurement challenge cases where McMillan was successful counsel ([Knowledge Circle](#)^[1] and [CGI v Canada Post](#)^[2]) demonstrate that bid challenges are not the only, and may not even be the easiest, way to challenge a government procurement.

The bid challenge in CGI v Canada Post

CGI v Canada Post was largely an example of a traditional "bid challenge" to the Canadian International Trade Tribunal (CITT). CGI bid on a Canada Post procurement for data centre services. The contract was estimated to be worth over \$100M. Based on Canada Post's evaluation, another bidder, Wipro, scored higher and was awarded the contract. CGI had a number of complaints, but the core of its substantive case was that Canada Post had improperly evaluated its bid, particularly by deviating from its published evaluation scheme and applying undisclosed evaluation criteria. Bid challenges are often also based on allegations that evaluators unreasonably ignored or misinterpreted information in a bid, that evaluators misapplied particular evaluation criteria, or that the evaluation was otherwise fundamentally unfair.

A bid challenge is usually an uphill battle; strong facts and good counsel are important parts of a winning recipe. In determining whether a bid evaluation has been properly conducted, the CITT will generally give deference to evaluators because of their familiarity with the evaluation and subject matter. Parties who fault the CITT's decision can in turn ask the Federal Court of Appeal to judicially review the CITT's decision. In doing so, the Federal Court of Appeal will generally give deference to the CITT's special expertise in the area of the procurement.

Because of this, a party wishing to launch a bid challenge (a "complainant") generally needs to identify evaluation errors that are more than merely inaccurate in the bidder's opinion. The alleged errors should be of such a nature that they undermine the fairness of the evaluation process in a way that has a material impact on the final result. Experienced counsel can be of great assistance in marshalling evidence and characterizing evaluation errors in a way that emphasizes their severity, rather than them being relegated to the realm of an evaluator's judgment call, which the CITT will not second-guess.

Ability of contract awardees to defend their contract

While the odds are generally against a complainant in a bid challenge, a successful bid challenge can have seriously detrimental effects for the supplier who was awarded a contract pursuant to the evaluation. The CITT recognizes this and generally lets contract awardees participate in a bid challenge proceeding as an intervenor. A contract awardee can play an important role in defending the award of the contract for at least two reasons.

First, given that the contract awardee's hard won contract may be on the line, they may wish to ensure that the government's lawyers (usually Department of Justice lawyers) are presenting the strongest case possible in defense of both the evaluation, and the contract award. The government may not have the same level of engagement in defending a contract award as a private supplier. A contract awardee will need to retain independent counsel to make full arguments based on all the confidential information on the CITT record.

Second, even if a bid challenge is successful, there are a variety of remedies the CITT can recommend^[3], some of which prejudice the contract awardee while others do not. Possible remedies include measures that disrupt the contract, such as awarding the contract to the complainant or starting a whole new solicitation process. Towards the other end of the remedy spectrum, the CITT may only compensate the complainant for their lost profits. Compensation affects the government because it has to pay out, but does not directly affect the contract awardee. One of the factors the CITT considers in recommending a remedy is the "extent to which the contract was performed".^[4] Timing can, therefore, play a crucial role in the end result depending upon how quickly the contract terms are being implemented and how fast the complaint process is moving. The contract awardee can provide important evidence that may not even be available to the government about this factor, which can help protect the awarded contract.

CGI v Canada Post proceedings at both the CITT and the Federal Court of Appeal

In *CGI v Canada Post*, McMillan acted on behalf the contract awardee, and pursued both of the above strategies. Ultimately, between the arguments from Canada Post's lawyers and McMillan, the CITT found that the evaluation was properly conducted, so the issue of remedy was moot. Because submissions regarding the correctness of the evaluation and any appropriate remedy are all made at the same time, a prudent contract awardee should likely make extensive remedy submissions, along with submissions as to the correctness of the

evaluation.

After CGI received the CITT decision upholding the contract award to Wipro, CGI asked the Federal Court of Appeal to reverse the CITT's decision. After a full judicial review proceeding,^[5] in which the contract awardee was able to participate by virtue of being an intervenor in the CITT proceeding, the Federal Court of Appeal upheld the CITT's decision that the evaluation was proper, giving substantial deference to the CITT's findings of fact. McMillan's client, kept the contract it was awarded pursuant to the evaluation and continued to perform it.

As a side note, CGI filed a similar second bid challenge against Canada Post for application development services in which McMillan did not participate.⁵ CGI was successful in that complaint. The CITT recommended that the technical proposals be re-evaluated by a new team to the extent possible, and that if the rankings changed, new contracts be awarded.

A successful procurement challenge that was not a "bid challenge"

Knowledge Circle is an example of how successful procurement challenges can happen well after the bid evaluation or contract award stages.

Pursuant to a competition in 2007, Health Canada awarded Standing Offer Agreements (SOAs) to a number of language training suppliers. Based on the terms of the competition, the SOAs would expire after a maximum of five years.

After these five years, one supplier, Knowledge Circle, heard through informal challenges that many of the other suppliers were still getting work through the SOAs that should have expired. Knowledge Circle retained McMillan to investigate further. Through an Access to Information request and government information published through Proactive Disclosure mechanisms, it was learned that Health Canada had repeatedly extended the SOAs to certain suppliers beyond the initially stipulated five year maximum.

After a complex CITT proceeding, the CITT accepted Knowledge Circle's complaint and found that the government was in breach of its *NAFTA* obligations when it awarded contract extensions to suppliers without engaging the mandatory competitive process.

The CITT has many remedies that it may then consider following a determination of a successful complaint. A successful complainant usually wants some financial results so mild remedies that simply admonish the government for breach of its obligations ring hollow in the minds of aggrieved parties.

Knowledge Circle pushed for an award of financial compensation and was awarded damages for the lost opportunity that it suffered. Expert accounting evidence was proffered and resulted in an award of compensation for the lost profit on work Knowledge Circle ought to have been allowed to compete for.

Knowledge Circle convinced the CITT to award lost profit calculated based on a gross profit margin of 45% of revenue, which was significantly in excess of the range of 10-15 % that the CITT often awarded in prior cases. The expert evidence carried the day in this case. Health Canada also stopped using the contracting vehicles the should have expired.

This all happened long after bids had been evaluated. It only came to light because based on informal sources, Knowledge Circle suspected that certain contracting vehicles were being improperly used. The CITT held the government accountable and compensated Knowledge Circle accordingly, which included an extraordinary cost award as well.

What potential suppliers should keep in mind

The bid evaluation process is an obvious opportunity to challenge government procurement decisions. By no means is it the only time when the government's procurement practices can be scrutinized. The government procurement process is complex and there are many places and ways where the government may misstep, to the detriment of potential suppliers. Suppliers need to be alert to ensure their rights to fairly compete for potentially large, lucrative, government contracts are respected. Suppliers need to act promptly, because they are usually required to act within 10 days of learning of a problem. Where a supplier's rights are not respected, a case before the CITT may offer a remedy to assist an injured supplier.

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[1] *Knowledge Circle Learning Services*, PR-2013-014, reasons on liability dated January 13, 2014; reasons on compensation dated June 24, 2014; and reasons on costs dated September 11, 2014 (McMillan acted for successful complainant).

[2] *CGI Information Systems and Management Consultants Inc.*, PR-2014-015 and PR-2014-020, Reasons issued October 24, 2014, affirmed by *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Wipro Technologies Canada Ltd.*, 2015 FCA 272 (McMillan acted as intervener for Wipro, the successful supplier).

[3] *Canadian International Trade Tribunal Act*, [CITT Act] s. 30.15(2).

[4] *CITT Act*, s. 30.15(3)(e).

[5] *CGI Information Systems and Management Consultants Inc.*, PR-2014-016 and PR-2014-021, Reasons issued October 30, 2014.

A Cautionary Note



The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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