

## CITTING IN

### DND gets its knuckles rapped

#### *CITT suggests bad faith in procurement matter*

by Paul Lalonde

Things keep getting more and more interesting on the procurement front at the Canadian International Trade Tribunal.

Federal Court of Canada rulings are making it very difficult and awkward for the government not to implement tribunal recommendations. In a recent case, involving Wescam Inc., the tribunal vigorously uses these powers with respect to the Department of National Defence (DND) and, for the first time in a procurement matter, explicitly called into question the good faith of a government department. In her conclusions, Presiding Member Anita Szlczak wrote that in its handling of this case “[t]here are grave doubts as to whether DND acted in good faith...”

The events leading to Wescam’s complaint happened very quickly. In early December 1998, DND was notified by FLIR Systems Inc. that it had six refurbished forward looking infrared (FLIR) systems available for purchase on a first-come, first-serve basis through its exclusive Canadian distributor, GasTOPS Ltd. Apparently, DND must have thought the offer too good to refuse and, on January 6, 1999, DND posted on MERX an Advanced Contract Award Notice (ACAN). The closing date was less than two weeks later. These FLIR systems were intended by DND to be used on the Canadian Forces Sea King helicopter fleet.

Wescam is a producer of a new FLIR system, which, it claims, is a suitable alternative to the GasTOPS product. On the same day Wescam received the ACAN, its representatives sent DND a letter offering the alternate system and asking that the procurement be competitive. Over the course of the following few days a series of communications ensued between Wescam, DND and Public Works and Government Services Canada. Wescam argued that its system could do the job at a better price, while DND argued that, for various reasons, it would only purchase the “refurbished” FLIR systems, not new ones such as offered by Wescam.

Examining the evidence on the record, it seemed as if, every time Wescam addressed the objections raised by DND, new reasons were found to direct the contract to GasTOPS. At the end of the day, DND’s objections seemed to boil down to the fact that the Sea King community did not want to introduce a different FLIR system to its inventory. The Sea Kings are deployed all over the world and introducing a new system would, according to DND, create significant

logistical problems. So, DND rejected Wescam's request for a competitive process and proceeded as indicated in the ACAN.

On January 19, Wescam complained to the tribunal that the reasons alleged by DND for not proceeding with a competitive process were invalid in light of the federal government's obligations under the *Agreement on Internal Trade*. Wescam requested that the tribunal stop the award of the contract to GasTOPS, that the planned sole-source contract be cancelled and that an open and fair competition for the procurement be held. As an alternative, Wescam requested compensation for loss of profit and other damages.

On January 22, 1999, the tribunal informed the parties that the complaint had been accepted for inquiry and ordered that the award of the contract be postponed until the tribunal had a chance to decide on the merits of the case. However, the government informed the tribunal that a contract in the amount of over \$960,000 had already been awarded, on January 20, to GasTOPS. The tribunal then rescinded its postponement order and inquired into the matter. On April 19, 1999, the tribunal held the complaint to be valid and recommended that any future purchase of FLIR systems be competitive and that Wescam be paid \$15,000 for lost profits, along with its costs for filing and proceeding with the complaint.

With respect to the objections raised by DND to Wescam's alternative system, the tribunal was of the view that they were simply unconvincing or were not properly investigated by DND. DND seemed to forget that, where it wishes to employ a non-competitive procurement process, it bears the burden to prove to the tribunal the circumstances it invokes to derogate from normal tendering procedures. This lapse earned DND a severe reprimand from the tribunal and cost the government \$15,000, plus Wescam's costs.

Additionally, the speed at which this procurement was done and the government's inability to demonstrate the need for the urgency had considerable bearing on the tribunal's finding as to the good faith of DND, believes Paul Conlin, one of the lawyers for Wescam.

The Wescam case makes it clear that the competitive process should be the norm. If not used, the government must be ready to prove why it concluded – after a thorough investigation – that a non-competitive process was legitimate. The government must be ready to back up its positions with positive and compelling evidence, or risk having its good faith called into question.

As interested observers of the procurement process, we all have reason to worry about anyone doubting the good faith of government departments in dealing with potential contractors. Let's hope the Wescam case is an isolated incident and that the federal government will heed its warnings.

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