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# **FOREIGN BIDDERS GET GO-AHEAD TO PROTEST UNDER TRADE AGREEMENT**

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## **Foreign bidders get go-ahead to protest under trade agreement**

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### **FOCUS ON PROCUREMENT LAW**

A recent decision of the Canadian International Trade Tribunal (CITT) opens the door for foreign bidders to launch procurement bid protests against the federal government under the Agreement on Internal Trade (AIT), a domestic intergovernmental trade agreement between the federal and provincial governments aimed at fostering inter-provincial trade.

In *Northrop Grumman Overseas Services Corporation v. Department of Public Works and Government Services* (CITT File No. PR-2007-008), Grumman, a U.S.-based company, filed a complaint with the CITT in relation to a procurement for the supply of infrared sensor targeting pods for the Department of National Defence's CF-18 fighter aircraft. Grumman alleged in its complaint that the government's evaluation of Grumman's bid was not performed in accordance with the specified bid evaluation method.

Grumman complained that the government failed to award it certain evaluation points and incorrectly awarded evaluation points to the winning bidder, Lockheed Martin, another foreign bidder. Grumman requested that the contract awarded to Lockheed be terminated, that the government re-evaluate the bids, and that Grumman be selected as the winning bidder.

Before considering the merits of Grumman's complaint, the CITT asked the government to file submissions addressing whether the CITT had jurisdiction to investigate the complaint, given that Grumman was a foreign company and the only applicable trade agreement was the AIT. Typically, complaints received by the CITT from foreign bidders involve procurements subject to the North American Free Trade Agreement (NAFTA), under which standing of foreign bidders is well established. However, NAFTA did not apply to the procurement in this case.

In response to the request for submissions, the government took the position that Grumman did not have standing to make a complaint involving a procurement under the AIT alone and requested the CITT dismiss Grumman's complaint. The government's position was consistent with several previous decisions in which the CITT concluded that to have standing to bring a complaint under

the AIT, a complainant must be a "Canadian supplier" as defined by the AIT.

In its decision released Sept. 12, the CITT brought much needed clarity to the question of standing of foreign bidders, and determined that Grumman was not precluded from bringing a complaint before the CITT merely because of its nationality.

In arriving at its decision, the CITT examined the Canadian International Trade Tribunal Act, its regulations, and the AIT. The CITT regulations set out three specific criteria which must be met before the tribunal can accept a complaint: first, the complainant must be a "potential supplier" ; second, the complaint must be in respect of a contract designated under one of the applicable trade agreements; and third, the complaint must disclose a reasonable indication that the procurement has not been carried out in accordance with the procurement requirements set out in the trade agreement governing the designated contract. In this case, Grumman argued the government did not comply with the bid evaluation requirements under article 506 of the AIT.

The tribunal had no difficulty determining that Grumman was a "potential supplier" as required to satisfy the first criterion. The CITT found there was no nationality requirement in the definition of potential supplier in either the Act or the regulations. Nor did it find any prohibition against foreign suppliers in the provisions of the AIT on which Grumman based its complaint.

The tribunal also found that the contract was designated under the AIT and that Grumman's complaint met the threshold for investigation required by the third criterion.

The CITT rejected the government's argument that the guiding principles set out in articles 101(3) and 501 of the AIT, which speak of removing barriers for "Canadian suppliers" and fostering trade "within Canada" , imply a general exclusion of foreign bidders. The tribunal instead interpreted these provisions as merely expressions of broad objectives rather than substantive provisions mandating how those objectives are to be met.

The tribunal confirmed that if the government procuring entity wants to restrict a procurement governed by the AIT to Canadian suppliers, the procuring entity may do so if the procurement meets certain additional requirements set out in article 504 of the AIT. The CITT viewed the permissive nature of this nationality exclusion as support for its conclusion that foreign suppliers are not intended to be restricted from bidding on all procurements under the AIT and likewise they are not intended to be excluded from accessing the AIT's dispute resolution mechanisms on the basis of nationality.

After deciding Grumman had standing to file its complaint, the tribunal allowed Grumman's complaint in part and recommended that the government re-evaluate all the bids.

The government has declined to comply with the CITT's recommendation pending the outcome of an application for judicial review filed in the Federal Court filed earlier this month.

Lisa Bolton is a member of Blaney McMurtry LLP's Government Procurement and Litigation Group in Toronto. She represents private sector bidders and tendering parties in all aspects of procurement and related disputes.