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PROCUREMENT REVIEW: A PRACTITIONER'S GUIDE

Attwater

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Procurement Review: A Practitioner's Guide is a practical guide to the bid challenge process conducted by the Canadian International Trade Tribunal (CITT), and to issues that arise in procurements conducted by the federal government. It is directed at those "in the trenches" who want to understand the process and how the CITT has interpreted relevant trade agreements. The book provides practical advice for complainants and for government institutions defending against complaints. The book pieces together the CITT's decisions for purposes of elucidating policies governing procurement. It also provides commentary on the CITT's case law.

This release features updates to case law and commentary in Chapter 2 (The Bid Complaint Process), Chapter 3 (Other Procurement Issues), Appendix A1 (Agreement on Internal Trade), Appendix A12 (Canada Free Trade Agreement) and Appendix B1 (Canadian International Trade Tribunal Act).

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Highlights

- **The Bid Complaint Process – Other Matters Relevant to an Inquiry – Protecting Confidential Information** – The requirement to protect confidential information also pertains to contract authorities. For example, Article 517.1 of the CFTA prohibits an entity from providing to any supplier information that might prejudice fair competition between suppliers. In *Complaint by Axxys Construction Group*, PWGSC argued that its obligation to protect confidential information ended after contract award and a debriefing has been given to the unsuccessful bidder. While disagreeing with this assertion, the CITT noted that confidential requirements under the trade agreements continue to apply until all matters involving the procurement process have been resolved. In this case, the complaint involved several matters involving the procurement process. As such, PWGSC was required to protect confidential bid information when responding to an ATIP request: *Complaint by Axxys Construction Group* (March 31, 2025), Doc. PR-2024-057 (C.I.T.T.), paras. 123-131.
- **Other Procurement Issues – Post-Bid Negotiations – The Trade Agreements** – In *Complaint by PricewaterhouseCoopers LLP*, the CITT took an in-depth look at the provisions allowing for negotiations under the CFTA. In this case, two bidders were evaluated as tied for first place and remained so after the tie-breaking provisions of the RFP were applied. A third bidder also submitted a compliant bid but achieved a lower score for its financial proposal. The two tied bidders could not agree on a procedure for breaking the tie and PWGSC would not undertake a proposed process without agreement between the bidders. In the circumstances, PWGSC chose to break the tie using the negotiation provisions of the trade agreements. It asked the three compliant bidders to resubmit their financial proposals with a “best and final offer” or to confirm their initial offer. Given a purposive reading, what constitutes a negotiation should be given an expansive meaning. Negotiations under Article 512 may take various forms depending on the facts of each case. Citing paragraph 512.2(a), the CITT found that negotiations encompass requesting revised or new tenders on any aspect of a proposal. In fact, where negotiations are being conducted concurrently with multiple suppliers, the submission of new or revised tenders is required. As all three compliant bidders had perfect technical scores, asking for revised financial offers from all three was the only option available. In evaluating such tenders, the original evaluation criteria set out in the tender documents must be employed: *Complaint by PricewaterhouseCoopers LLP* (April 29, 2024), Doc. PR-2023-046 (C.I.T.T.).