International Procurement

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During 1996 there were a number of significant legal developments regarding the international sale of goods and services to governments and governmental entities. In general, these legal developments showed a positive trend towards the enforcement of international and multilateral commitments designed to provide greater fairness and transparency in international government procurement.

I. Europe

Perhaps the most dramatic development during 1996 was the identification of Germany by the Office of the United States Trade Representative (USTR), pursuant to Title VII of the U.S. 1988 Omnibus Trade and Competitiveness Act, as having a "significant pattern or practice of discrimination" in its heavy electrical equipment procurement sector. USTR postponed the imposition of sanctions on Germany under Title VII due to progress in negotiations between the United States and Germany (and the European Commission on Germany's behalf), and upon the German Government's commitment to make several key reforms. As of the end of 1996, however, the Title VII action remained open pending Germany's enactment of legislation, acceptable to USTR, which implements the agreed-upon reforms. USTR's use of the Omnibus Trade and Competitiveness Act in this case shows a willingness on the part of USTR to address aggressively problems which American companies encounter in foreign public procurements.

The USTR initiated the Title VII action based upon findings that procurement procedures used by a government-owned utility in the City of Cottbus, Germany, in purchasing two steam turbines worth approximately $250 million were unfair to American companies, and that Germany's public procurement remedies system does not meet the requirements of the 1993 U.S.–European Union Memorandum of Understanding on Government Procurement.

The USTR had previously cited the German heavy electrical public procurement market in spring 1995 as "warranting special attention," as an area "of substantial concern," under Title VII. This initial action was based in part upon procurement irregularities General Electric

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encountered on another major procurement for steam turbines, which effectively excluded GE from the procurement.[1]

The USTR's identification of Germany under Title VII, on April 30, 1996, began a sixty-day consultation period, at the end of which time the United States could decide to impose sanctions. On July 1, 1996, USTR extended the consultation period for an additional ninety days to September 30, citing progress in negotiations with the German Government. On October 1, 1996, USTR further delayed the imposition of sanctions indefinitely based upon Germany's agreement both to take steps that will ensure open competition in the German heavy electrical equipment procurement market in the future and to reform its system for addressing alleged procurement irregularities.

As of the end of 1996, USTR had not terminated the Section VII action pending the passage, and USTR's evaluation, of appropriate German legislation. USTR has stated that if it is not satisfied with the details of the German legislation, or if there are unreasonable delays in the submission or passage of the legislation or further difficulties experienced by American companies with German Government procurements, USTR will impose the Section VII sanctions.

In another significant legal development, the European Court of Justice (ECJ), applying the EU Directive on Procurement in the Water, Energy, Transport and Telecommunications Sectors (EU Procurement Directive), the basis upon which GE sought an injunction in the steam turbine procurement, overturned a Belgian regional procurement as unlawful.[2]

The ECJ case arose out of an invitation for bids the Belgian Société Règionale Wallonne du Transport (SRWT) issued in 1993 for 307 standard vehicles, to be purchased in six lots. The SRWT received five bids in response to its invitation for tenders.

Following public opening of the five bids, but prior to contract award, one of the unsuccessful bidders, EMI, sent correspondence to the SRWT in which EMI addressed certain aspects of its bid. The SRWT's technical group refused to consider the correspondence, concluding that the correspondence modified EMI's initial bid. The SRWT source selection authority was less certain about its authority to consider the correspondence, however, and requested a legal opinion from the Walloon Minister of Transport.

The Transport Minister opined that the SRWT could consider the post-opening correspondence, which the SRWT then did when reviewing all bids for an award decision. The SRWT subsequently awarded Lots 2 to 6 of the procurement to EMI and the first lot to another bidder. The original low bidder on Lots 2 to 6, Van Hool, immediately protested to the Belgian Conseil d'État seeking suspension of the award decision. When the Conseil dismissed the protest, Van Hool then complained to the European Commission. Before bringing its action in the ECJ, the Commission first asked the Belgian Government, pursuant to the EU Procurement Directive, to address Van Hool's allegation that Belgium had failed to fulfill its obligations under the Directive. The government responded that Van Hool's complaint was unfounded. The Commission followed up with a "reasoned opinion" to the Belgian Government requesting that the government suspend the contract between the SRWT and EMI. The government replied that the Commission had failed to prove that the Belgian Government did not fulfill any obligation.

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1. A German subsidiary of General Electric sought an injunction in the German court system which would have required reopening of bidding for the steam turbine procurement, based upon the European Union's Directive on the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors. The Berlin Court of Appeals denied the request for an injunction in April 1995.

2. Case 87/94, Commission v. Kingdom of Belgium, 1996 E.C.R. ___, ___ C.M.L.R. ___ (1996).

Before the ECJ, the Commission charged that the SRWT considered amendments to EMI's bid after bid opening, and evaluated EMI's bid even though it was nonresponsive. The ECJ upheld the Commission's position, finding that the Belgian Government failed to adhere to the EU Procurement Directive. Specifically, the ECJ found that SRWT considered information submitted by EMI after bid opening, and that, in two separate instances, the SRWT improperly evaluated EMI's bid on the basis of factors not set forth in the invitation. The Court awarded the Commission its costs.

II. North America

In North America, there were similarly several noteworthy international procurement developments in 1996. In Canada, the Canadian International Trade Tribunal (CITT), the forum which Canada established following ratification of NAFTA to resolve alleged procurement improprieties on Canadian Government procurements covered by NAFTA, issued a number of decisions in 1996 interpreting NAFTA's public procurement requirements. Illustrative of the CITT's NAFTA procurement decisions is a CITT decision which arose out of a procurement by the Canadian Department of Public Works and Government Services (PWGS) for air tanker services for aerial firefighting activities requested by Canada's Department of Indian Affairs and Northern Development.[3] In addition to addressing several procurement issues, the decision also addressed an important aspect of the CITT's jurisdiction with respect to small and minority business set-aside procurements.

In the CITT case, soon after PWGS issued a request for proposals (RFP), in February 1996, a potential offeror, Conair Aviation (Conair), requested and received from PWGS a written clarification of the RFP accepting Conair's use of a particular brand of air tanker, which, though specifically called for in the RFP, did not conform to certain technical requirements specified in the RFP.

Two firms submitted offers in response to the RFP: Conair and Air Spray (1967), Ltd. (Air Spray). PWGS evaluated the proposals, and recommended award to Conair. After announcing its award recommendation, PWGS made available to both Air Spray and Conair the total value of the other's offer.

Prior to contract award, the losing offeror, Air Spray, complained to PWGS that Conair's offer did not comply with the RFP's technical requirements. PWGS, in response, decided that what had originally been regarded as a clarification to the RFP was actually an amendment to the RFP, and that because Air Spray had not been advised of the amendment it had not received equal treatment. PWGS therefore made a determination not to award the contract to Conair, and decided to cancel and reissue the RFP. After Air Spray lowered its price dramatically in response to the reissued RFP, PWGS awarded Air Spray the contract.

Conair protested the contract award to the CITT. Conair argued that: (1) the designation in the RFP of a specific type of aircraft gave the specifications of the designated aircraft precedence over certain technical requirements in the RFP regarding the aircraft; (2) because PWGS initially did not consider Conair's request for clarification to be significant, the clarification could not constitute a material or substantial amendment to the RFP; (3) the requirements at issue in the protest were not essential requirements under NAFTA Article 1015(4); and (4) disclosure of Conair's total bid price was sufficient to calculate the details of its bid price and thus violated

3. *In re* Conair Aviation, PR-95-039, August 8, 1996 (CITT) [unpublished].

NAFTA Article 1014(3) regarding confidentiality of bids. The CITT upheld Conair's protest finding, first, that disclosure of the bid prices had the effect of precluding competition on the re-bid, in violation of NAFTA Article 1008(2)(a). Second, the CITT held that the clarification PWGS provided to Conair did not constitute "significant information" required to be disclosed to all interested bidders under NAFTA Article 1010(7). Finally, the CITT held unavailable the public interest exception to the NAFTA Article 1015(4)(c) requirement that award be made to the contractor determined capable of performing the contract whose bid is either lowest-priced or the most advantageous under the solicitation criteria.[4]

The CITT allowed the contract with Air Spray to stand, but recommended that Conair be compensated for its lost profits and that PWGS not renew its option to extend its contract with Air Spray for an additional year. The CITT also awarded Conair its reasonable costs of pursuing the protest.

In the United States, the U.S. Government took two important steps in 1996 to support U.S. defense exports to foreign governments. The first was establishment of the Defense Export Loan Guarantee Program (DELG Program). In late 1995, Congress authorized the Department of Defense (DOD) to establish a loan guarantee program, and DOD spent much of 1996 working out the details of the Program. After DOD's authority for the Program was renewed in September 1996, DOD announced availability of the Program on November 8, 1996.[5] The DELG Program offers guarantees to lenders against losses of principal or interest, or both, for loans extended to eligible countries for the purchase or long-term lease of U.S. defense articles or services, or design and construction services—all as defined in the Arms Export Control Act—which are eligible to be exported under that Act.[6] Eligible countries include NATO countries, major non-NATO allies, emerging democracies of Central Europe, and noncommunist Asia Pacific Economic Cooperation members. Loan guarantees are available for eligible sales under DOD's Foreign Military Sales (FMS) program.

The DELG Program, which is limited to $15 billion in contingent liability, was designed to function much like the Export-Import Bank; in fact, the Program cannot offer guarantees with terms and conditions more favorable than those offered by the Export-Import Bank. The DELG Program differs from the Export-Import Bank program, however, in two important respects. First, the Program's implementing legislation requires the Program to assess fees to cover expected current and future program costs. Second, each borrower is required to pay

4. The *Conair* decision also addressed the CITT's jurisdiction under NAFTA to hear protests regarding procurements set aside for small and minority businesses. The CITT found that preferential procurements based upon Canadian land claims agreements and other aboriginal treaties could qualify as "set-asides on behalf of small and minority businesses" under NAFTA Annex 1001.2b, which are exempt from NAFTA's procurement requirements. The CITT cautioned, however, that procurement commitments in land claims agreements "do not create a 'set-aside' by their mere existence," nor does a statement in the RFP that it is a "land claims tendering procedure." An RFP, the CITT found, must substantively relate to "objective requirements, such as aboriginal ownership, employment and subcontracting preferences, which are provided for under the [land claims agreement]" in order for it to qualify for the set-aside provisions.

The CITT held that the RFP only partly related to an area covered by a land claims agreement, and it only required the contract awardee "to provide where possible" employment of aboriginal labor and aboriginal firms as subcontractors. No quantity of work nor amounts of supplies or equipment were expressly reserved or set aside in the RFP for aboriginal people or firms. Moreover, the two bidders were not aboriginal firms, and were not required to meet standards regarding labor, managerial, financial, or technical aboriginal contents. The procurement therefore did not qualify as a set-aside and was thus subject to NAFTA's procurement requirements.

5. 61 Fed. Reg. 57,853 (1996).

6. 22 U.S.C. § 2751 (1994)

an exposure fee to cover the risk associated with a potential default, which fee cannot be included in the amount guaranteed.

In addition to reauthorizing the Defense Export Loan Guarantee Program in 1996, Congress provided the president of the United States with broadened authority to waive FMS "recoupment" charges, which the Arms Export Control Act requires DOD to add to foreign government purchases under the FMS program in order to recover nonrecurring research and development costs.[7] DOD has calculated that this fee can add up to twenty-five percent to the costs of FMS purchases as compared to direct commercial sales of military equipment.

Section 4303 of the Fiscal Year 1996 Defense Authorization Act authorized the president to waive recoupment charges if he found that (1) imposing the fee likely would cause the United States to lose the sale, or (2) the elimination of the charges would result in unit cost savings to DOD. The Act, however, conditioned implementation of this authority on enactment of legislation that identified an offset for any lost revenue projected through use of the waiver authority. The FY 1997 Defense Authorization Act, enacted in 1996, provided DOD the authority to sell up to $693 million in items from the National Defense Stockpile as an offset to any lost revenue, thus bringing the new waiver authority into effect.

A final development of note in the United States was a decision by a U.S. administrative forum, the Armed Services Board of Contract Appeals (Board), which further delineates the circumstances under which a waiver of the Buy American Act's requirement that only domestic construction materials be used on U.S. military construction projects is appropriate.[8]

The contractor in this case bid to furnish and install smoke detectors in military base housing. Included in the Invitation for Bids for the contract was the standard U.S. Government contract clause, "Buy American Act—Construction Materials." In preparing its bid, the contractor obtained a price quotation for smoke detectors from BRK Electronics (BRK), a U.S. company. The contractor included the quotation in its bid, was found to be the low bidder, and was awarded a fixed-price contract.

After the contractor began contract performance, the government's construction representative asked the contractor to obtain information from BRK which demonstrated compliance of its smoke detectors with the Buy American Act. When the contractor asked BRK about Buy American Act compliance, BRK informed the contractor that the smoke detectors did not comply with the Act. The contractor then purchased one of three smoke detectors which complied both with the contract specifications and the Buy American Act. The price of the smoke detectors purchased exceeded the price of the BRK smoke detectors by sixty-four percent. The contractor informally asked the government for relief. The government, in response, refused to accept or pay for the BRK detectors, including those that the contractor had already installed, but told the contractor that it could apply for a Buy American waiver.

7. 22 U.S.C. § 2761(e) (1994).

8. Losasso Electric Co., ASBCA No. 49407, 96-2 BCA ¶ 28,392. The Buy American Act, 15 U.S.C. §§ 10a-10d, is implemented in U.S. Government construction contracts through the standard contract clause, "Buy American Act—Construction Materials," Federal Acquisition Regulation (FAR) 52.225-5, 48 C.F.R. § 52.225-5, which clause, in turn, provides that its requirements are administered in accordance with Executive Order No. 10582 and Subpart 25.2 of the FAR, 48 C.F.R. Subpt. 25.2. FAR 25.202 permits an agency head to waive the requirement for the use of domestic construction material where he or she determines that use of particular domestic material would unreasonably increase the cost of the contract. FAR 25.105 sets forth the criteria for making that determination, which section is applicable to construction procurements, before and after award, through FAR 25.202 and 25.203.

The contractor then sought a waiver covering the 327 BRK smoke detectors it had already installed. The government responded to the waiver request with instructions to replace all materials that did not comply with the Buy American Act. The contractor submitted a claim to the government, which the government denied.

On appeal, the Board affirmed the contracting officer's denial of the waiver request. The Board distinguished from the case before it the two lead decisions of the U.S. Court of Appeals for the Federal Circuit upholding Buy American Act waivers in construction contracts.[9] In both appellate decisions, the contractor had based its bid on furnishing certain domestic construction materials, and had encountered problems with unreasonableness of the price of the materials after award due to circumstances which could not have been anticipated at the time of bidding. In the present case, in contrast, the Board found that the contractor encountered a problem due to its own failure to inquire, prior to bidding, regarding compliance of the smoke detectors with the Buy American Act. If the contractor had so inquired, and had brought the issue of noncompliance to the attention of the contracting officer, the Board held, the contracting officer would have been in a position to rule on an application to except the smoke detectors prior to award, and thus keep all bidders on an equal footing. Since the contractor had not given the contracting officer this opportunity, the government could not now waive the Buy American requirements, which would compromise the integrity of the competitive process. The Board thus upheld the denial of the contractor's claim.

III. Middle East

Finally, in a noteworthy development in the Middle East, Kuwait enacted legislation, effective August 11, 1996, which requires the disclosure of agents' commissions on all sales to the Kuwait Government.[10] Specifically, the legislation requires the disclosure of commissions paid or offered to be paid to a disclosed or undisclosed agent or broker in connection with securing any Kuwaiti Government contract valued at KD 100,000 (approximately $350,000) or more. Previously Kuwait had required such disclosure only in connection with military contracts. The new requirement that agents involved in nonmilitary sales to the government be disclosed is in accord with existing laws in both Egypt and Saudi Arabia.

The new law applies to all Kuwaiti Ministries and public institutions, Kuwait Municipality, and all companies owned at least fifty percent by the Kuwait Government. Disclosure must be made in the contract and by a written declaration by the contractor and the agent. The disclosure must include information regarding the amount of the commission, type of currency in which the commission was or is to be paid, place of payment, and the instrument used to make the payment. All contracting agencies are required to provide a copy of the declaration to the Kuwait Audit Bureau. Significantly, the law requires submission of the declaration for contracts already in effect.

9. John T. Brady & Co. v. United States, 693 F.2d 1380 (Fed. Cir. 1982), and John C. Grimberg v. United States, 869 F.2d 1475 (Fed. Cir. 1989).

10. Law No. 25 of 1996 on Revealing the Commission Offered in Respect of Contracts Concluded by the States. In November 1996, the Kuwait Auditing Bureau issued implementing regulations in Circular No. 1 of 1996, which requires contracting agencies to provide the Bureau with copies of all current contracts concluded prior to the effective date of Law No. 25, with associated declarations, and to note in the agency's contract register whether the contractor complied with the Law.