

Federal Court of Appeal



Cour d'appel fédérale

Date: 20150204

Docket: A-227-14

Citation: 2015 FCA 39

**CORAM: DAWSON J.A.
RYER J.A.
WEBB J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

TRITECH GROUP LTD.

Respondent

Heard at Ottawa, Ontario, on February 4, 2015.
Judgment delivered from the Bench at Ottawa, Ontario, on February 4, 2015.

REASONS FOR JUDGMENT OF THE COURT BY:

RYER J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on February 4, 2015).

RYER J.A.

[1] This is an application for judicial review of a decision (File No. PR-2013-035 2014) of the Canadian International Trade Tribunal (the “CITT”), dated March 31, 2014: 2014 CanLII 33813. The CITT allowed a complaint by the Respondent, Trittech Group Ltd., that Public Works and Government Services Canada (“PWGSC”) improperly rejected a bid that it made in response

to a Request For Standing Offer (the “RFSO”) that was issued by PWGSC on behalf of the Department of Fisheries and Oceans.

[2] The RFSO requested standing offers for the supply of modular aluminium frames, and certain other related materials, and their fabrication into modular building units of three different sizes (“the Modular Building Units”).

[3] The terms and conditions of the RFSO

- (a) required each bidder to make a standing offer (“Standing Offer”) to sell the Modular Building Units for a period of 1 year, with two one year options (“Standing Offer Duration Period”);
- (b) required the pricing for the Modular Building Units (“Unit Pricing”) to be specified in Annex B to each Standing Offer and fixed (“Fixed Pricing Condition”) throughout the Standing Offer Duration Period;
- (c) permitted PWGSC to accept the Standing Offer for a 90 day period (“90 Day Acceptance Period”) after the closing date for submissions of bids; and
- (d) permitted PWGSC to make a written request (“Acceptance Period Extension Request”) to all responsive bidders for an extension of the 90 Day Acceptance Period.

[4] The Respondent submitted a Standing Offer which specified the Unit Pricing in Annex B. The Respondent also included the following two sentences (the “Impugned Sentences”) in Annex B, namely:

Material pricing is valid for 90 days. After 90 days the material pricing component of the bid will be indexed to North American published aluminium price indices.

[5] The issue in this application turns on the interpretation of the Impugned Sentences.

[6] PWGSC rejected the Respondent's Standing Offer as non-compliant on the basis that the Impugned Sentences were an impermissible modification of the terms and conditions of the RFSO, in particular, the Fixed Pricing Condition.

[7] The Respondent filed a complaint with the CITT and requested that the awarding of the contract be postponed but postponement proved to be impossible. In its complaint, the Respondent alleged that the Impugned Sentences did not relate to the Fixed Pricing Condition. Instead, the Respondent asserted that they were meant to apply only if PWGSC made an Acceptance Period Extension Request.

[8] The CITT found that the Respondent would have been bound by the Fixed Pricing Condition if its Standing Offer had been accepted within the 90 Day Acceptance Period and, accordingly, PWGSC should not have rejected the Respondent's Standing Offer as non-compliant for the reason stated by PWGSC. Because it was not possible to postpone the awarding of the contract, the CITT fashioned a remedy, the particulars of which were not challenged in this application.

[9] In upholding the complaint, the CITT rejected PWGSC's interpretation of the Impugned Sentences as unreasonable and found:

- (a) the inclusion of the Impugned Sentences in Annex B to the Respondent's Standing Offer had "commercial reality" in the sense that a bidder would want to review its pricing if it was given an Acceptance Period Extension Request that would allow PWGSC to accept its Standing Offer after the 90 Day Acceptance Period;
- (b) the Impugned Sentences only referred to "material pricing", i.e. the pricing of the aluminium components of the Modular Building Units, and nowhere else in the Respondent's Standing Offer was there a reference to such "material pricing". Rather, all other pricing references in the Standing Offer were to the Unit Pricing of the Modular Building Units and that pricing was unaffected by the Impugned Sentences;
- (c) there was a "perfect correspondence" between the 90 day period expressed in the Impugned Sentences and the 90 day period in which PWGSC was free to accept the Standing Offer, which was essentially corroborative of the Respondent's assertion, and the CITT's view, that the Impugned Sentences were not aimed at altering Unit Pricing, but were, instead, intended to become operable only if PWGSC made an Acceptance Period Extension Request; and
- (d) any confusion with respect to the meaning of the Impugned Sentences might well have been avoided if PWGSC had requested a clarification from the Respondent.

[10] This Court is obliged to review the decision of the CITT on the deferential standard of reasonableness. (See *Defence Construction (1951) Limited. v. Zenix Engineering Ltd.*, 2008 FCA 109.) This means that we must consider whether there is "justification, transparency and

intelligibility” in the CITT’s reasoning and whether its decision “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”. (See *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 at para. 47.)

[11] The Applicant contends that the CITT erred in imposing a duty on PWGSC to seek a clarification in respect of the Respondent’s insertion of the Impugned Sentences into Annex B of its Standing Offer. In our view, the CITT did not base its decision on PWGSC’s decision not to seek such a clarification. Rather, we interpret the CITT as saying that where a bid contains language that is susceptible of more than one meaning, PWGSC is free to form its own opinion with respect to the meaning of that language. However, in doing so, it runs the risk of making an incorrect or unreasonable interpretation that may have adverse consequences to it – a risk that may be avoided by requesting a clarification with respect to the unclear language.

[12] It is not contested that PWGSC had the authority to reject the Respondent’s bid if it was non-compliant. The controversy in the matter before us stems from the competing interpretations of the Impugned Sentences. To succeed in this application, the Applicant must convince us that the interpretation selected by the CITT is unreasonable.

[13] To this end, the Applicant asserts that it was unreasonable for the CITT to conclude that those sentences did not relate to or modify the Fixed Pricing Condition. However, the only reason given in support of this assertion appears to be that because the Impugned Sentences were inserted into Annex B to the Respondent’s Standing Offer, which also contained the Unit Pricing

with respect to the Modular Building Units, those sentences must be taken as applying to and modifying the Unit Pricing.

[14] With respect, this assertion is unpersuasive and does not establish that the CITT's interpretation of the Impugned Sentences is unreasonable.

[15] In our view, the reasons of the CITT, referred to in paragraphs 9(a), (b) and (c) above, provide a sufficiently transparent and intelligible justification for its conclusion with respect to the meaning of the Impugned Sentences. Moreover, we find that the CITT's decision to uphold the complaint falls within a range of acceptable outcomes.

[16] Accordingly, we are of the view that the application should be dismissed with costs, which the parties have agreed should be \$4,000.00.

"C. Michael Ryer"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-227-14

**THIS IS AN APPLICATION FOR JUDICIAL REVIEW OF THE DECISION OF THE
CANADIAN INTERNATIONAL TRADE TRIBUNAL DATED MARCH 31, 2014**

STYLE OF CAUSE: ATTORNEY GENERAL OF
CANADA v. TRITECH GROUP
LTD.

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: FEBRUARY 4, 2015

REASONS FOR JUDGMENT OF THE COURT BY: DAWSON J.A.
RYER J.A.
WEBB J.A.

DELIVERED FROM THE BENCH BY: RYER J.A.

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