Federal Court of Appeal  Cour d'appel fédérale

Date: 20180118

Docket: A-323-16

Citation: 2018 FCA 17

[ENGLISH TRANSLATION]

CORAM: **NADON J.A.**
PELLETIER J.A.
GAUTHIER J.A.

BETWEEN:

THE ACCESS INFORMATION AGENCY INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 5, 2017.

Judgment delivered at Ottawa, Ontario, on January 18, 2018.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: NADON J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. INTRODUCTION

[1] These reasons complement those delivered in docket A-329-16, which involves the issue of the jurisdiction of the Canadian International Trade Tribunal (the Tribunal) to conduct an inquiry when a procurement that gives rise to a complaint is cancelled. Since this Court has already held that the Tribunal has the requisite jurisdiction, these reasons address only the

application for judicial review of the Tribunal's determination dismissing the applicant's complaint.

[2] This litigation arises from a request for availability (RFA) issued by Global Affairs Canada (GAC) for the temporary help services of an advanced-level access to information and privacy officer in the professional services category. The applicant, Access Information Agency (AIA), submitted its bid to GAC. When GAC informed AIA of its intention to award the contract to another bidder, AIA filed a complaint with the Tribunal. On the same day that the complaint was filed, GAC cancelled the procurement and issued a second RFA. Despite the fact that GAC awarded it the contract under the second RFA, AIA decided nevertheless to proceed with its complaint.

[3] The Tribunal held that the complaint was valid on the grounds that AIA's first bid was not evaluated in accordance with the criteria stated in the RFA. However, the Tribunal did not want to recommend that AIA be compensated for its loss of profits because, in its opinion, the AIA had not incurred a loss of profits given that GAC had awarded it the second contract. AIA contends that, given the differences between the two contracts, the Tribunal erred in finding that the second contract replaced the first.

[4] Finally, the Tribunal held that each party had to bear its own costs, a determination that AIA disputes on the grounds that the Tribunal did not hear it before denying it the costs that it could have expected.

[5] In my opinion, this application for judicial review must be dismissed. AIA did not establish that this Court's intervention is warranted.

II. THE FACTS

[6] On March 9, 2016, GAC issued an RFA of temporary help services for an advanced-level access to information and privacy officer in the professional services category.

[7] The Tribunal explained how the standing offer system works in its reasons (File No. PR-2016-001 (Reasons)):

> . . . the current standing offer states that, subject to certain exceptions, the allocation of call-ups is done using the "right of first refusal" method. This requires the identified user to issue a call-up to the qualified offeror with the lowest price that meets all the mandatory requirements outlined by the identified user.
>
> Reasons at para. 12.

[8] In this case, the RFA set out certain mandatory criteria, that is, the qualifications that the resources had to have. Moreover, it identified certain asset qualifications, including having experience at GAC.

[9] On March 21, 2016, GAC informed AIA that the contract had been awarded to another bidder, LRO Staffing, since AIA's bid did not satisfy the GAC experience criterion. AIA objected to GAC's decision and argued that the GAC experience criterion was only an asset qualification and not a mandatory criterion.

[10] On April 6, 2016, AIA filed its complaint with the Tribunal. A few hours later, GAC informed all the bidders that the RFA dated March 9 was canceled and that [TRANSLATION] "it would re-issue a solicitation in order to correct inadvertent errors and omissions contained in the RFA and to make other changes in order to address certain deficiencies in the description of the requirements": Joint Record, Vol. 1, Tab J, p. 311.

[11] On May 24, 2016, GAC issued a new RFA, and on June 3, the contract under that RFA was awarded to AIA.

III. THE DETERMINATION AT ISSUE

[12] GAC admitted to the Tribunal that its evaluation of the bids received in connection with the RFA dated March 9 did not comply with the criteria set out in that RFA. More specifically, GAC conceded that it had applied as a mandatory criterion what the RFA described as an asset qualification and had disqualified two bidders, including AIA, on that basis. In light of this admission, the Tribunal found that AIA's complaint was valid.

[13] AIA requested, as a remedy, that it be awarded the contract under the RFA dated March 9. GAC alleged that the contract under the RFA of May 24 replaced the contract under the RFA of March 9, and that, accordingly, AIA had not incurred any loss. AIA argued that the contract under the RFA dated May 24 was an entirely different contract and that GAC did not have the right to cancel the RFA dated March 9.

[14] The Tribunal considered these two arguments. With respect to the authority to cancel the RFA, the Tribunal was of the opinion that the existence of that authority was a question of interpretation of the clauses incorporated into the RFA, including those of the standing offer. The Tribunal considered the following clause in particular:

> 2005 02 (2006-08-15) General
>
> The Offeror acknowledges that a standing offer is not a contract and that the issuance of a Standing Offer and Call-up Authority does not oblige or commit Canada to procure or contract for any goods, services or both listed in the Standing Offer. The Offeror understands and agrees that Canada has the right to procure the goods, services or both specified in the Standing Offer by means of any other contract, standing offer or contracting method.
>
> Joint Record, Vol. 4, Tab Z, p. 1160, "General Conditions - Standing Offers - Goods or Services", also available online: https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/3/2005/11.

[15] According to the Tribunal, the effect of this clause was an acknowledgement by the bidders that the standing offer did not oblige the federal institution to enter into a contract. The Tribunal found that the scope of this clause was broad enough to permit a federal institution that issued an RFA to cancel it if the federal institution considered it necessary. The Tribunal stated the following:

> Indeed, nothing in the RFA indicated that GAC had waived its discretion to not award a contract under the standing offer once the RFA had been issued or was obliged through the mere issuance of the RFA to enter into a contract under the RFA. (Citations omitted.)
>
> Reasons at para. 83

[16] The Tribunal, in arriving at this conclusion, dismissed the AIA's argument to the effect that the cancellation of the RFA had breached another contractual clause, which was allegedly incorporated into the RFA, which states that when a call-up is made it "constitutes an

unconditional acceptance by Canada of the Offeror's Offer for the provision . . . of the services described in the [Standing Offer] . . .": Reasons at para. 81, footnote 46. The Tribunal dismissed the interpretation proposed by AIA because "this sentence, read in its immediate context and in light of the clauses in the standing offer included in the RFA, does not have the scope that AIA contends it has and does not oblige GAC to issue a call-up": *ibidem*.

[17] In support of its allegation that the contracts under the March 9 and May 24 RFAs were different, AIA pointed out, in its written and oral submissions, certain differences between the two contracts:

- The contract under the RFA dated May 24 is for a term of 17 weeks and a value of $59,325.75 (taxes not included), while the contract dated March 9 is for a term of 48 weeks and a value of $158,059.19 (taxes included);
- The typical duties of the resource sought in the two requests are different;
- The number of resources that a bidder could propose was not the same in both cases.

[18] To be able to determine whether the contract under the RFA dated May 24 was the same contract as the one under the RFA dated March 9, the Tribunal agreed, exceptionally, to hear a witness, Mr. Mucci, Director of GAC's Access to Information and Privacy Protection Division.

[19] Given this testimony, the Tribunal concluded that both RFAs were intended to fill the same operational requirement within GAC. With respect to the duration and the value of the two contracts under the RFAs, the Tribunal considered that even though the contract under the RFA dated March 9 was for a term of 48 weeks, it could be cancelled at any time, on short notice. However, the contract under the RFA dated May 24, which was for a term of 17 weeks, had the

possibility of an extension, which would have taken it up to 48 weeks. Therefore, despite the difference in form, both contracts had potentially the same maximum term; the actual term depended on the contingencies of the extension or cancellation of the contracts awarded.

[20] The Tribunal also determined that Mr. Mucci had given a reasonable explanation for the differences between the typical duties in the two RFAs. Indeed, Mr. Mucci testified that, following AIA's complaint, GAC found that it was not required to use the Department of Public Works and Government Services' description of typical duties. It therefore amended the description of the duties to better reflect the position's actual requirements, which, in any event, were the same in both cases.

[21] In light of all of the evidence at its disposal, the Tribunal found that the contract awarded to AIA following the RFA dated May 24 replaced the contract under the RFA dated March 9. The Tribunal expressed its conclusion on the appropriate remedy in this case in the following terms:

> In sum, based on the evidence and considering the relative value of the contracts and the imponderables, including changing operational requirements at GAC, which could have affected the contract that would have been awarded to AIA if the RFA criteria had been correctly applied, the Tribunal finds that the contract awarded on June 3, 2016, to AIA adequately covers the loss of any profit it might have incurred, had the contract resulting from the RFA been awarded to it.
>
> Reasons at para. 115.

[22] To put AIA in the position it would have been in had the violations of the RFA dated March 9 and the trade agreements not occurred, the Tribunal awarded AIA the reimbursement of

the reasonable costs that were incurred as a result of its response to this RFA. However, considering the divided success, the Tribunal did not award costs to either party.

IV. THE ISSUES

[23] In its memorandum of fact and law, AIA sets out three broad categories of issues: procedural fairness, errors of fact, and errors in the interpretation of the contract documents. That said, it is important to remember that the Tribunal found in favour of AIA with respect to the evaluation of its bid in response to the RFA dated March 9. On reading the memorandum of fact and law filed by AIA, it appears that the real issue, and the subject of this application for judicial review, is the Tribunal's finding that AIA did not lose profits because of the improper evaluation since it was awarded the contract under the RFA dated May 24. AIA is also of the opinion that GAC's alleged bad faith and lack of candour were not taken into account in the assessment of the indemnity that the Tribunal should have recommended.

[24] It may be useful to remind litigants that judicial review does not repeat the process that took place before the administrative tribunal. Judicial review allows litigants to identify the errors that warrant the Court's intervention, considering the applicable standard of review. It may also be useful to point out that Parliament has entrusted administrative tribunals with certain issues in light of their expertise in the relevant field. It is therefore not surprising that the large majority of their decisions do not contain an error that warrants a court's intervention. When there are errors, in general there are not many, and they do not all have the same consequences.

[25] These principles require some degree of rigour on the part of litigants who bring an application for judicial review. Indeed, litigants cannot merely allege a multitude of errors in the hope that the Court will take it upon itself to sort out those that are relevant and determinative and those that are not. The multiplication of allegations of error at every step of the administrative tribunal's reasoning is, for all practical purposes, an invitation for the Court to redo the work of the administrative tribunal, which is not its role. Faced with this situation, the Court reserves the right to state the issues that appear to best correspond to the true crux of the dispute.

[26] In this case, the memorandum of fact and law filed by AIA alleges dozens of errors relating to each of the issues addressed by the Tribunal, allegations supported by an abundance of references to the evidence. Therefore, it must be concluded that AIA is seeking to impose on the Court the burden of repeating the Tribunal's work down to the minutest detail. That being so, and considering the fact that the Tribunal found in favour of AIA on the merits of its complaint, the Court is of the opinion that the true issues in this case are the following:

- Was GAC entitled to cancel the RFA dated March 9?
- Was the contract under the RFA dated May 24 the same as the one under the RFA dated March 9?
- Did the Tribunal err in its assessment of GAC's conduct in dealing with the complaint?
- Costs

V. THE STANDARD OF REVIEW

[27] Decisions of an administrative tribunal that deal with the interpretation of its own statute enjoy a presumption that the standard of review is reasonableness: *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 21, [2013] 3 S.C.R. 895; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at para. 46, [2015] 2 S.C.R. 3; *Monroe Solutions Group Inc. v. Canada (Attorney General)*, 2016 FCA 277 at para. 6, [2016] F.C.J. No. 1283. The same applies to questions of fact and questions of mixed fact and law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 53; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 50. Contractual interpretation involves issues of mixed fact and law (*Sattva Capital Corp. v. Creston Moly Corp.)*, 2014 SCC 53, [2014] 2 S.C.R. 633 at para. 50) that are therefore subject to the standard of reasonableness.

VI. ANALYSIS

A. *Was GAC entitled to cancel the RFA dated March 9?*

[28] The issue of whether GAC was entitled to cancel the RFA dated March 9 is relevant because AIA contends that the Tribunal had to recommend that the contract under this RFA be awarded to it, which is not possible if the RFA was cancelled.

[29] The Tribunal considered this issue. It based its analysis on provision 2005-02, referred to above, which was incorporated into the RFA and which provides that a federal institution is not obliged to enter into a contract at the end of the standing offer process. It also considered the provision relied upon by AIA that states that Canada agreed to accept “the Offeror’s Offer for the

provision . . . of the services described in the [Standing Offer]". The Tribunal held that this provision "read in its immediate context and in light of the clauses in the standing offer included in the RFA, does not have the scope that AIA contends it has": Reasons at para. 81, footnote 46.

[30] AIA points out that the Tribunal cited only part of the text on which it based its argument and that the text, taken as a whole, has a meaning other than the meaning that the Tribunal assigns to it. The full text is the following:

> [TRANSLATION]
>
> A separate contract is formed each time a call-up for the provision of services is made against a [sic] SO. When a call-up is made, it constitutes an unconditional acceptance by Canada of the Offeror's Offer for the provision, to the extent specified in such call-up, of the services described in the SO. Canada's liability will be limited to the actual value of the call-ups made in accordance with the SO by the duly authorized Identified User(s) within the period specified in the call-up.
>
> Applicant's Memorandum of Fact and Law at p. 19, para. 18.

[31] According to the Supreme Court's jurisprudence, the words of one provision "must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context": *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at para. 64, [2010] 1 S.C.R. 69. This is indeed what the Tribunal did in this case when it found that the immediate context and the clauses of the standing offer incorporated into the RFA were insufficient for it to find that the clause that AIA relied on had the scope that the AIA gave it.

[32] This analysis and interpretation is at the heart of the role of the Tribunal, which is responsible for ensuring the integrity of procurements. The Tribunal has in-depth knowledge of

the documents at issue and an understanding of the objectives of the procurement system. AIA failed to demonstrate that the Tribunal made an unreasonable finding with regard to the right to cancel a procurement.

[33] Indeed, it would be surprising to say the least if Canada were not entitled to cancel an RFA that contains errors either in the evaluation of bids or in the drafting of the RFA. Canada is not setting traps for itself in RFAs in order to burden itself with ill-defined or useless services. That being said, compensation for those adversely affected by a cancellation is an entirely different issue.

B. *Was the contract under the RFA dated May 24 the same as the one under the RFA dated March 9?*

[34] The Tribunal found that despite "some differences in the description of typical tasks for the desired resource", the contract awarded subsequent to the RFA dated May 24 replaced the contract under the RFA dated March 9: Reasons at para. 112. This finding is based on its assessment of the credibility of Mr. Mucci, who testified *viva voce* regarding the process followed in the drafting of the RFA dated March 9, its cancellation, and the issuance of the one dated May 24.

[35] The AIA representative cross-examined Mr. Mucci and identified certain inconsistencies in his testimony. AIA contends that in light of these inconsistencies, the Tribunal was wrong to give credence to Mr. Mucci's testimony. However, it is trite law that the person who hears a witness is in the best position to assess the testimony given and to weigh the evidence: *Housen v.*

Nikolaisen, 2002 SCC 33 at para. 12, [2002] 2 S.C.R. 235; *Schwartz v. Canada*, [1996] 1 S.C.R. 254, 133 D.L.R. (4th) 289 at para. 32. In this case, the Tribunal heard Mr. Mucci and determined that the explanations that he provided were credible and reasonable: Reasons at paras. 105 and 112.

[36] The Tribunal held, in light of this testimony and its analysis of the other evidence, that ". . . the two requests for availability were basically intended to fill the same requirement: a resource capable of providing professional services at an advanced level in GAC's Privacy Protection Division": Reasons at para. 113.

[37] AIA failed to demonstrate that this finding is unreasonable.

C. *Did the Tribunal err in its assessment of GAC's conduct in dealing with the complaint?*

[38] AIA alleges that the Tribunal erred in failing to condemn GAC's lack of candour during the proceedings and its flawed and incomplete disclosure of the evidence. In fact, these reasons are included in the conclusions sought by AIA. AIA requests that its application for judicial review be allowed and that this Court:

> [TRANSLATION]
>
> Issue an order that the Tribunal's determination in File No. PR-2016-001 be set aside or quashed and referred back for redetermination, giving the Canadian International Trade Tribunal proper instructions for a *de novo* hearing, including instructions regarding the scope of the Crown's obligations of candour and transparency and regarding the disclosure of documents held by the Crown.
>
> Applicant's Memorandum of Fact and Law at para. 25.

[39] There is no doubt that the Tribunal must consider "the seriousness of any deficiency [it finds] in the procurement process" and "whether the parties acted in good faith" in making its determination at the conclusion of its inquiry. This is what paragraphs 30.15(3)(*a*) and (*d*) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.) require it to do.

[40] The Tribunal did not ignore GAC's lack of rigour in dealing with AIA's complaint. It took note of the allegation that GAC had not fully complied with the order to produce certain documents, while noting that GAC was not rigorous in managing this matter. GAC's lack of rigour was, according to the Tribunal, at the root of these "apparent inconsistenc[i]es" (Reasons at para. 120) in the file, which explains why some documents were not produced in response to the Tribunal's order.

[41] Moreover, the Tribunal was very aware of the fact that there was, along the way, an alteration to one of the documents that GAC had attached to its Government Institution Report, an alteration that suggested that the bid of another supplier had been received within the time limit set out in the RFA, which was not the case. The Tribunal reminded GAC that "any alteration of evidence, whether intentional or not, poses serious concerns" and emphasized that it was the responsibility of the parties and their legal counsel "to ensure that the evidence is complete and has not been altered": Reasons at para. 120, footnote 77.

[42] Despite the lack of rigour that it noted and the concerns raised by the alteration of a document, the Tribunal did not question GAC's good faith. It is useful to reproduce the Tribunal's reasoning:

> Despite AIA's numerous allegations of bad faith, the Tribunal is satisfied that the parties all acted in good faith. The parties' good faith is one of the factors that the Tribunal must take into consideration when recommending appropriate corrective action. However, allegations of bad faith are serious accusations that go well beyond procedural irregularities or failures. Good faith is assumed, and the Tribunal does not expect to have to consider the lack of good faith by one of the parties, except in very rare and exceptional cases. In particular, the Tribunal reaffirms that unfounded allegations of bad faith are unfortunate, are not productive and do not pave the way for any greater remedy.
>
> Reasons at para. 119.

[43] AIA challenges this conclusion, relying on the Tribunal's findings regarding GAC's lapses in the disclosure of the evidence, findings that give rise to, according to AIA, [TRANSLATION] "the appearance of bad faith". AIA goes as far as to allege that the Tribunal [TRANSLATION] "created the excuse of confusion" to downplay the breaches of the disclosure order [TRANSLATION] ". . . and to justify the fact that the Tribunal did not consider the prima facie and uncontradicted evidence submitted by AIA": Applicant's Memorandum of Fact and Law at para. 17.

[44] The necessary conclusion on reading AIA's statement setting out this ground of appeal is that the facts are not at issue, but rather the probative value assigned to them by the Tribunal. Where AIA sees bad faith and an attempt to downplay GAC's errors, the Tribunal sees a lack of organization and rigour. The Tribunal heard Mr. Mucci's testimony and accepted the elements that it considered trustworthy. That is what it was supposed to do and that is what it did: *Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union, Local 454*, [1998] 1 S.C.R. 1079, 160 D.L.R. (4th) 1 at paras. 26–27, 47.

[45] It is not because AIA has another perspective on these facts that the Tribunal acted in bad faith ([TRANSLATION] "created the excuse of confusion") or acted unreasonably. This ground of appeal is without merit.

D. *Costs*

[46] AIA alleges that the Tribunal breached its right to procedural fairness by failing to grant it the right to be heard before denying it the costs that it could expect. The failure to award costs in a case of divided success does not raise any procedural fairness issue.

VII. CONCLUSION

[47] For these reasons, the application for judicial review should be dismissed with costs.

"J.D. Denis Pelletier"
J.A.

"I agree.
Marc Nadon, J.A."

"I agree.
Johanne Gauthier, J.A."

Certified true translation
Janine Anderson, Revisor

SOLICITORS OF RECORD

DOCKET:	A-323-16
Appeal of a determination by the Canadian International Trade Tribunal issued on August 19, 2016	
STYLE OF CAUSE:	THE ACCESS INFORMATION AGENCY INC. v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 5, 2017
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	NADON J.A. GAUTHIER J.A.
DATED:	JANUARY 18, 2018

APPEARANCES:

Thomas Dastous	FOR THE APPLICANT THE ACCESS INFORMATION AGENCY INC.
Alexandre Kaufman	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

The Access Information Agency Inc. Ottawa, Ontario	FOR THE APPLICANT THE ACCESS INFORMATION AGENCY INC.
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA