Federal Court of Appeal | Cour d'appel fédérale

Date: 20241127

Docket: A-289-23

Citation: 2024 FCA 200

CORAM: **RENNIE J.A.**
WOODS J.A.
LASKIN J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

ELLISDON CORPORATION

Respondent

Heard at Ottawa, Ontario, on November 7, 2024.

Judgment delivered at Ottawa, Ontario, on November 27, 2024.

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: RENNIE J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

WOODS J.A.

[1] On May 12, 2023, the Canadian International Trade Tribunal (Tribunal) received a complaint from EllisDon Corporation alleging that the Department of Public Works and Government Services (PW) had breached trade agreements by mismanaging a procurement process (Complaint). The Tribunal agreed with EllisDon that there had been breaches and provided compensation as a remedy, recommending that the parties negotiate the quantum and

reserving for itself the jurisdiction to establish the final amount. The Tribunal's determination was issued on September 25, 2023 and its reasons were issued on October 10, 2023 (see *EllisDon Corporation v. Department of Public Works and Government Services*, File No. PR-2023-010) (Decision).

[2] Before this Court is an application for judicial review of the Decision by the Attorney General of Canada (AGC). While the AGC does not challenge the Tribunal's finding that there were breaches, the AGC disagrees with the remedy awarded.

[3] For the reasons that follow, I would dismiss the application.

Factual background

[4] The Complaint related to a bid EllisDon made on a large refurbishing project in Charlottetown, Prince Edward Island. Notably, EllisDon does not complain that the contract should have been awarded to it. Instead, EllisDon alleges that it was prejudiced by a poorly managed bid process in which PW improperly awarded the contract to EllisDon for a period of time. EllisDon seeks compensation for prejudice for the period of time that it was under this contract. During this period, EllisDon was under a stop work order imposed by PW but was contractually required to be ready to start work at any moment and so was unable to bid on other projects. Eventually, PW acknowledged its mistake and awarded the contract to the actual winning bidder, Pomerleau Inc.

[5] In order to situate the Complaint in context, I will briefly explain how the bid process unfolded. It starkly shows how the process was mismanaged by PW.

[6] On September 21, 2022, EllisDon and Pomerleau submitted competing bids on the project in response to PW's invitation to tender dated June 13, 2022 (ITT).

[7] On the same day, a PW employee incorrectly processed Pomerleau's documents by downloading Pomerleau's bid security e-bond and "printing" it electronically into a regular PDF, thereby removing the hyperlinks and invalidating its data.

[8] As a result, PW's attempt on September 22, 2022 to verify the defective version of Pomerleau's e-bond with an online verification tool was unsuccessful.

[9] That same day, PW sent Pomerleau's now defective documents to the business that had provided PW with the verification tool. The provider of the online service replied that it appeared the e-bond may have been improperly scanned or printed to create a new PDF document (which is indeed what had occurred). No evidence was submitted by PW before the Tribunal to indicate that it took any further steps to follow up on or investigate this. Rather, in response, PW took the position that Pomerleau's bid was defective.

[10] On February 16, 2023, the contract was awarded to EllisDon and Pomerleau was advised that its bid was rejected because the e-bond was not verifiable.

[11] On February 17, 2023, Pomerleau objected to PW's rejection and stated that, as far as it could determine, the e-bond was verifiable. Pomerleau believed that the problem could have been caused by PW and asked for the award process to be suspended in order to undertake an investigation.

[12] On the same day, PW was able to determine that it did have a verifiable e-bond from Pomerleau. However, PW did not at that time identify that it had made any error.

[13] On February 21, 2023, PW responded to Pomerleau's objection as follows: "After careful review, PWGSC maintains its previous decision of rendering Pomerleau's bid non-responsive as the bond submitted was non-verifiable at the time of bid opening" (Decision at para. 19).

[14] On February 22, 2023, the contract was sent to EllisDon. PW also notified EllisDon that a suspension/stop work order was being issued because Pomerleau had raised an objection to the evaluation of its tender.

[15] On February 28, 2023, Pomerleau was able to verify that it had sent a valid e-bond. A week later, it filed a complaint with the Tribunal. Pomerleau's complaint demonstrated that the error had been made by PW.

[16] On April 5, 2023, PW notified EllisDon that it may have made an error in evaluating Pomerleau's tender. On April 12, 2023, EllisDon notified PW that it was ready to commence

work under the contract, was incurring costs in waiting, and was forced to pass on other opportunities.

[17] On April 21, 2023, EllisDon filed a letter with PW objecting to any potential termination of its contract arising from PW's mishandling of Pomerleau's e-bond.

[18] On April 28, 2023, PW requested a meeting with EllisDon to discuss the contract. The request was made by a voicemail message left on EllisDon's general voicemail for its Halifax office. The meeting never took place.

[19] The same day, Pomerleau withdrew its complaint because PW advised that the contract would be awarded to it.

[20] On May 1, 2023, PW terminated the contract with EllisDon. In its letter, PW stated that it had made "an inadvertent error", and that it was required to award the contract to Pomerleau "in order to maintain the integrity of the procurement process" (Decision at para. 29).

[21] On May 2, 2023, EllisDon replied to this letter, expressing disappointment and advising that a claim for costs would be forthcoming. As mentioned, EllisDon filed the Complaint on May 12, 2023.

Decision of the Tribunal

[22] The main issues before the Tribunal were:

(a) Did PW comply with the requirements in applicable trade agreements?

(b) Was the basis of the Complaint a matter of contract administration or breach of trade agreements?

(c) Should the Tribunal award EllisDon compensation for lost opportunity on third party contracts?

[23] As for whether PW complied with the requirements in applicable trade agreements, the Tribunal discussed these requirements at paragraphs 55 and 62 of the Decision. It noted that under the *Canadian Free Trade Agreement* the procurement process must be fair and impartial. The Tribunal also stated that it was well established that proposals must be "thoroughly and diligently" reviewed (Decision at para. 62).

[24] The Tribunal found that the process was replete with errors. The errors identified by the Tribunal included:

(i) PW improperly awarded the contract to EllisDon, despite having all the information and documentation required to identify and correct its own error at that time;

(ii) PW issued a stop work order the same day it sent the contract to EllisDon, placing EllisDon in an awkward "hostage situation" regarding the performance of the contract for an indeterminate period of time;

(iii) PW then gave Pomerleau false information, namely, that its bid was not verifiable at bid closing when PW knew or ought to have known that this information was false at that time and that the error was due solely to PW's mishandling of Pomerleau's bid; and

(iv) PW inexplicably delayed many weeks before notifying EllisDon and Pomerleau that it may have made a mistake even though it had information for months identifying the source for investigation to uncover PW's error.

[25] The Tribunal concluded that PW had breached its obligations under trade agreements, including article 515 of the *Canadian Free Trade Agreement* (Decision at para. 66). It listed three breaches: (1) "initially failing to properly evaluate the bids in accordance with the requirements of the ITT"; (2) "wrongly awarding the [c]ontract to an unsuccessful bidder"; and (3) "negligently providing false information to a potential supplier" (Decision at para. 63).

[26] As for whether the basis of the Complaint was a matter of contract administration or breach of trade agreements, the Tribunal determined that the breaches, above, were the basis of the Complaint and were properly before the Tribunal because they were not a matter of contract administration (Decision at para. 63).

[27] As for the remedy, the Tribunal had to decide whether EllisDon should receive compensation for its lost opportunity in the amount of the profit that it would reasonably have earned on contracts for which it was unable to tender as a result of PW's breaches. EllisDon argued that these breaches left it in a "hostage situation" where it was unable to pursue other contracts while under the contract with PW since the stop work order could be lifted at a moment's notice and EllisDon had to be ready to start construction at all times.

[28] The Tribunal framed its remedy analysis around the relevant legislative provisions, subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.) (CITT Act).

[29] The Tribunal found that, under subsection 30.15(2), it had a broad discretion in selecting an appropriate remedy, including, pursuant to paragraph (e), compensating the complainant by a specified amount. This subsection provides:

30.15 (2) Subject to the regulations, where the Tribunal determines that a complaint is valid, it may recommend such remedy as it considers appropriate, including any one or more of the following remedies:	**30.15 (2)** Sous réserve des règlements, le Tribunal peut, lorsqu'il donne gain de cause au plaignant, recommander que soient prises des mesures correctives, notamment les suivantes :

(a) that a new solicitation for the designated contract be issued;	**a)** un nouvel appel d'offres;
(b) that the bids be re-evaluated;	**b)** la réévaluation des soumissions présentées;
(c) that the designated contract be terminated;	**c)** la résiliation du contrat spécifique;
(d) that the designated contract be awarded to the complainant; or	**d)** l'attribution du contrat spécifique au plaignant;
(e) that the complainant be compensated by an amount specified by the Tribunal.	**e)** le versement d'une indemnité, dont il précise le montant, au plaignant.

[30] The Tribunal also noted five mandatory factors it must consider under subsection 30.15(3) when recommending a remedy. Subsection 30.15(3) provides:

30.15 (3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including	**30.15 (3)** Dans sa décision, le Tribunal tient compte de tous les facteurs qui interviennent dans le marché de fournitures ou services visé par le contrat spécifique, notamment des suivants :
(a) the seriousness of any deficiency in the procurement process found by the Tribunal;	**a)** la gravité des irrégularités qu'il a constatées dans la procédure des marchés publics;
(b) the degree to which the complainant and all other interested parties were prejudiced;	**b)** l'ampleur du préjudice causé au plaignant ou à tout autre intéressé;
(c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;	**c)** l'ampleur du préjudice causé à l'intégrité ou à l'efficacité du mécanisme d'adjudication;

(d) whether the parties acted in good faith; and	**d)** la bonne foi des parties;
(e) the extent to which the contract was performed.	**e)** le degré d'exécution du contrat.

[31] The Tribunal's consideration of the mandatory factors is summarized below.

[32] The first mandatory factor is the seriousness of the deficiency in the procurement process. The Tribunal determined that the deficiency was serious. PW failed to follow the basic steps required to verify Pomerleau's e-bond, and failed to conduct basic due diligence when PW was unable verify it. Even PW, itself, described the deficiency as serious. The Tribunal concluded that this factor favours the remedy suggested by EllisDon, as it "tailor[s] the compensation to fit the actual circumstances" (Decision at para. 75).

[33] The second factor concerns the prejudice to interested parties. The Tribunal identified the prejudice to EllisDon as occurring during the period where PW withheld the facts regarding its errors in evaluating Pomerleau's e-bond. Since the contract was eventually awarded to Pomerleau, the Tribunal found that this factor also favours the compensation sought by EllisDon.

[34] The third factor is the degree to which the procurement system is prejudiced. The Tribunal concluded that, although the deficiency was significant in this case, the problem was not systemic. For this reason, the remedy suggested by EllisDon was appropriate as it would enable the Tribunal to craft a remedy suited for EllisDon's particular circumstances.

[35] Fourth, the Tribunal is required to consider whether the parties acted in good faith. The Tribunal noted that public servants overseeing the procurement process are presumed to act in good faith, and this had not been rebutted. It found that PW's behaviour "could, at best, be described as negligent, even while lacking malice" (Decision at para. 79). Accordingly, this factor favoured the compensation requested by EllisDon.

[36] The fifth factor is the extent to which the contract was performed. The Tribunal found that this factor was neutral since there was no substantial performance by EllisDon.

[37] As a result, the Tribunal recommended as a remedy that PW compensate EllisDon for its lost opportunity cost, if any. The quantum was to be determined separately.

Analysis

Issue

[38] The applicable standard of review is reasonableness. The Court must consider the reasons and outcome and then decide whether the reasons "fail to reveal a rational chain of analysis" and whether the Decision "is in some respect untenable in light of the relevant factual and legal constraints that bear on it" (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 101, 103).

[39] As for the chain of analysis, the Decision reveals a logical and rational chain of analysis. This is not in dispute. Rather, the dispute is whether the Decision is unreasonable in light of the relevant factual and legal constraints bearing on it. The alleged deficiencies are discussed below.

Is the Complaint a matter of contract administration?

[40] In this Court, the AGC submits that the Tribunal lacked the jurisdiction to recommend the remedy awarded because the Complaint dealt with matters of contract administration and not procurement.

[41] Before the Tribunal, PW submitted that EllisDon's Complaint related to contract administration because it concerned the termination of its contract by PW pursuant to the terms of that contract.

[42] The Tribunal rejected this submission, finding that the Complaint stemmed from how the procurement process was handled, not from EllisDon's contract being cancelled. At paragraph 63 of the Decision, the Tribunal explained:

> [63] Contrary to the submission of PWGSC, the breach of the trade agreements by PWGSC was *not* its decision to cancel the Contract with EllisDon and award the Contract to Pomerleau—indeed, that appears to have been the only reasonable step, albeit a significantly delayed step, that PWGSC took throughout this whole ordeal. Instead, PWGSC's breaches of the trade agreements were initially failing to properly evaluate the bids in accordance with the requirements of the ITT, wrongly awarding the Contract to an unsuccessful bidder, and negligently providing false information to a potential supplier. PWGSC readily admits to the facts underlying those breaches. It is those breaches, which are not a matter of contract administration, that are the basis of the complaint before the Tribunal.

> They may or may not give rise to a specific remedy recommended by the Tribunal.

[43] The Tribunal's conclusion was well supported by the facts which were meticulously set out in the Decision.

[44] In this Court, the AGC submits that the Tribunal failed to consider the fact that the only remaining prejudice it found to EllisDon flowed from PW's delay in terminating the contract, rendering this a matter of contract administration. The AGC submits that PW's relevant actions included issuing the stop work order and the notice of termination of the contract. Since these steps were contemplated by, and made pursuant to, the contract, "[a]ny delay/prejudice flowing from these actions falls squarely within the ambit of contract administration."

[45] In my view, the Tribunal reasonably addressed this argument. The Tribunal acknowledged (at paragraphs 63 and 78) that the only remaining prejudice to EllisDon was due to PW's errors and delays in remedying the situation. However, it found that the breaches at the base of the Complaint related to matters of procurement: improperly evaluating the bids, wrongly awarding the contract to EllisDon, and negligently providing false information to a potential supplier. The Tribunal further found that terminating the contract was remedial. Accordingly, the relevant PW actions included its mismanagement of the procurement process and were reasonably considered by the Tribunal in determining an appropriate remedy.

[46] In my view, the Tribunal reasonably found that the Complaint concerned the procurement process and that it had jurisdiction to recommend an appropriate remedy. The outcome was justifiable, and was justified by the reasons.

Is lost opportunity compensation for third-party contracts an appropriate remedy?

[47] The AGC submits that it was unreasonable for the Tribunal to award EllisDon lost opportunity compensation for the profits it could have earned from third-party contracts for which it was unable to tender due to PW's breaches.

[48] Before the Tribunal, PW submitted that this type of remedy is "unprecedented, not consistent with the purposes of the Tribunal's regulatory regime, and not contemplated by the Tribunal's *Procurement Compensation Guidelines*" (Decision at para. 50). PW further submitted that, beyond awarding the contract to Pomerleau, it is not appropriate to award any further remedy.

[49] As described above, the Tribunal recommended a remedy which, in its view, appropriately addressed the prejudice suffered by EllisDon. It also took into account the five statutory factors that the Tribunal must consider and found that these factors weighed in favour of its recommendation.

[50] In this Court, the AGC has augmented the arguments it made below. In particular, the AGC argues that its position is supported by (1) the legislative scheme; (2) the Tribunal's

comments in *Oshkosh Defense Canada Inc.*, 2018 CanLII 146683 (CA CITT) at paras. 68-75 and 127 (*Oshkosh*); (3) the Tribunal's *Procurement Compensation Guidelines* (Guidelines); and (4) the Tribunal's prior jurisprudence, which has not recognized this remedy.

[51] With respect to the AGC's submissions about the Guidelines and the Tribunal's prior jurisprudence, they were raised before the Tribunal (Decision at para. 50). The argument was that the remedy of compensation for lost opportunity from third-party contracts was not contemplated in these sources and that EllisDon had not shown that the remedies recognized to date should be expanded.

[52] The Tribunal did not explicitly discuss these arguments, but it acknowledged them and, in my view, sufficiently dealt with them. In particular, the reasons explain how the CITT Act provides the Tribunal with the authority to grant this remedy, and they demonstrate, through consideration of each of the factors mandated in subsection 30.15(3), that the remedy is appropriate in this case. In other words, the Tribunal was aware that the remedy was novel, but found that it was appropriate in the circumstances. I disagree with the submissions of the AGC in this Court that the Tribunal's decision on these points is unreasonable.

[53] The other two arguments the AGC made in this Court, concerning the legislative scheme and *Oshkosh*, were not made before the Tribunal. PW's arguments below concerned different aspects of the regulatory regime and of the *Oshkosh* decision from those argued by the AGC on this application.

[54] EllisDon submits that these arguments should not be considered on this application, citing *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 22-25 (*Alberta Teachers*). There, the Supreme Court instructed that a new issue will generally not be considered "where the issue could have been but was not raised before the tribunal" (*Alberta Teachers* at para. 23). This decision is still good law and the principle is applicable to the two issues the AGC is raising for the first time on this application (*Zoghbi v. Air Canada*, 2024 FCA 123 at paras. 26-27).

[55] In any event, even if the principle from *Alberta Teachers* were not applicable, I will explain why, even if one considers these new arguments, the fact that the Tribunal did not explicitly address them does not cause the Decision to be untenable.

[56] In this Court, the AGC's argument concerning the legislative scheme is that the complaint process centres on designated contracts. The AGC notes that, under subsection 30.11(1) of the CITT Act, a complaint may be filed "concerning any aspect of the procurement process that relates to a designated contract." The AGC submits that since the complaint must relate to the designated contract, the remedies must also "be similarly anchored" in the designated contract. This, it suggests, is further supported by other provisions of the CITT Act which give the designated contract a central role, including provisions in relation to non-compensatory remedies in paragraphs 30.15(2)(a)-(d).

[57] This argument suggests that Parliament intended to circumscribe the type of compensation that may be granted under paragraph 30.15(2)(e), limiting it in the same way as

other specified remedies listed in subsection 30.15(2) which refer to the designated contract. Even if the AGC's interpretation is reasonable, which I question, the AGC's arguments do not demonstrate that the Tribunal's decision is unreasonable. This is the focus of reasonableness review, not whether there is some other approach that is reasonable (*Vavilov* at para. 83).

[58] The Tribunal considered, in detail, the legislative scheme for determining remedies set out in subsections 30.15(2) and (3) and concluded that it could award, and should award, a compensatory remedy for lost opportunity on third-party contracts because in this case it was not appropriate to award injunctive-type relief. This conclusion is not unreasonable and the Tribunal did not need to explicitly address the new argument raised by the AGC concerning the legislative scheme.

[59] Finally, with respect to the AGC's submission that the Tribunal unreasonably failed to consider legal constraints from *Oshkosh* at paragraphs 68-75 and 127, I do not agree that these excerpts are legal constraints that the Tribunal needed to take into account.

[60] The AGC stresses, in particular, the following excerpt from paragraph 75 of *Oshkosh*: "The lodestar of the Tribunal's compensation analysis is the solicitation documents and the complainant's proposal …". The AGC suggests that this precludes consideration of lost opportunities from third-party contracts.

[61] However, this short excerpt from *Oshkosh* has been taken out of context. The relevant portion, at paras. 74-75, reads in full as follows:

> 74. The RFP had only two sources of revenue: the Acquisition Contract and the ISS Contract. The classes of revenue recognized under these contracts were itemized in the RFP and the Resulting Contracts and formed the basis of the financial evaluation of the bidders' bid prices. Nevertheless, Oshkosh did not follow this framework in its submissions or expert reports in presenting its estimated lost revenues. Instead, it decided to go beyond the four corners of the RFP, Resulting Contracts and published contract award to try to estimate all possible future sources of revenue. In the process, it identified four classes of revenue (some, such as Mid-Life Reset, not even identified in the RFP), without regard to the solicitation or contractual framework.
>
> 75. The Tribunal rejects this methodology. It is inconsistent with the RFP, the Resulting Contracts, and the published contract award. It also fails to properly distinguish compensation for breach of a trade agreement from an action for damages at common-law for breach of contract. Fundamentally, the Tribunal's discrimination [*sic*] in recommending compensation is limited to considerations surrounding violations of the trade agreements arising during procurement processes. The lodestar of the Tribunal's compensation analysis is the solicitation documents and the complainant's proposal, with reference to the published contract award for revenue figures where recourse to the complainant's proposal is impractical. The compensation phase is not an opportunity for parties to go beyond those and estimate what, if they had won the contract, additional types of revenues they might have been able to negotiate with the government outside or even ancillary to the framework of the RFP.
>
> [Emphasis added.]

[62] This context shows that the principle in *Oshkosh* is narrower than what the AGC suggests and is tailored to the circumstances of that case. In particular, it says that where lost revenue is being sought for failure to be awarded a contract, parties may not go beyond the relevant designated contract documents to estimate "what, if they had won the contract, additional types of revenues they might have been able to negotiate with the government outside or even ancillary to the framework of the RFP." This is not applicable in the case at hand due to the different facts involved: EllisDon is not seeking additional revenues it could have negotiated had it won the contract, but is seeking compensation for a period it was held "hostage" and lost opportunities due to PW's errors and delays in its handling of the procurement process. Given these

differences, the Tribunal did not overlook legal constraints in not considering paras. 68-75 and 127 of *Oshkosh*.

[63] In my view, the Tribunal reasonably found that it may award compensation for lost opportunity from third-party contracts. It also reasonably found that it was appropriate to do so.

Conclusion

[64] For the reasons above, I conclude that the Decision is reasonable. I would dismiss the application for judicial review, with costs.

"Judith Woods"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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