Federal Court of Appeal | Cour d'appel fédérale

Date: 20251215

Docket: A-63-25

Citation: 2025 FCA 227

CORAM: **STRATAS J.A.**
RENNIE J.A.
BIRINGER J.A.

BETWEEN:

ADGA GROUP CONSULTANTS INC.

Applicant

and

THE ATTORNEY GENERAL OF CANADA,
RHEA INC. and PALADIN TECHNOLOGIES INC.

Respondents

Heard at Ottawa, Ontario, on November 25, 2025.

Judgment delivered at Ottawa, Ontario, on December 15, 2025.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: STRATAS J.A.
BIRINGER J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] The Canadian International Trade Tribunal dismissed a complaint by ADGA Group Consultants Inc. (ADGA) that the Department of Public Works and Government Services (also known as Public Services and Procurement Canada or PSPC) wrongly awarded contracts to RHEA Inc. and Paladin Technologies Inc. (RHEA/Paladin) for the provision of technical resources and services for the electronic security systems used by Correctional Service of

Canada. ADGA commenced a judicial review application in this Court to have the decision set aside (*ADGA Group Consultants Inc. v. Department of Public Works and Government Services* (2025), PR-2024-038 (CITT) (Tribunal Decision)).

[2] The facts and chronology of events with respect to the procurement, the assessment of the competing tenders, the award of the contract and the transition from the incumbent supplier, ADGA to the successful bidder, RHEA/Paladin, are set forth in the reasons of the Tribunal. Little is served in repeating them; it is sufficient to note two points. First, the Tribunal observed that poor planning and tender design, and the failure of negotiations between the incumbent supplier and PSPC to extend the contract pending the new contract coming into effect, led to a much abbreviated transition period between contracts than originally anticipated. Second, after winning three of five contracts in the Request for Proposal (RFP), RHEA/Paladin proposed to PSPC that 44 of the 45 personnel previously certified in RHEA/Paladin's winning tender as being available to fulfill the requirements of the contract be replaced or substituted with different personnel.

[3] ADGA pleaded this was a case of "bait and switch". The Tribunal disagreed and concluded that the substitutions were matters of contract administration and therefore beyond its jurisdiction.

[4] Before the Tribunal, ADGA contended that section 5.2.3.1 of the RFP imposes an obligation on a bidder to certify the availability of the resources included in a bid. ADGA asserted that the obligation is continuous, running throughout the duration of the RFP up to the

point of the award. It contended that RHEA/Paladin's certification of the availability of the personnel named in its bid was false, a claim purportedly proven by the fact that 44 of the 45 personnel tendered as resources by RHEA/Paladin were proposed to be substituted after contract award.

[5] Before this Court, ADGA focused on the circumstances of several individuals as evidence of a bait and switch. All former employees of ADGA, they had been proposed by it in its bid to fill certain positions, only to find that after the award and implementation of the contract they were occupying positions for which ADGA asserted that they did not meet the minimum mandatory requirements. For example, PSPC approved the substitution of one individual into the role of regional supervisor. The RFP required that a person certified for that role have 60 months' experience delivering maintenance to certain systems listed in the RFP, and 24 months' experience managing a team of five. At the time bidding closed, according to ADGA, the person substituted had only 20 months of relevant systems maintenance experience, and less than 24 months of management experience.

[6] RHEA/Paladin was required to justify the substitutions to PSPC. Those justifications included the accelerated time frame for transition, attrition, the highly competitive market for information technology employees and the availability of more qualified personnel.

[7] The Tribunal accepted the evidence of the RHEA/Paladin representative that RHEA/Paladin's certifications were correct at the time of its RFP and that it had no intention to engage in a bait and switch. The Tribunal observed that "[t]he terms of the resulting contract

explicitly permitted substitution of resources during the term of the contract" (Tribunal Decision at para. 140). The Tribunal concluded that the substitutions of replacement personnel by RHEA/Paladin, arising as they did after the award of the contract, were a matter of contract administration rather than a matter concerning the procurement process itself, and consequently, that it had no jurisdiction to inquire into whether the substitutions complied with the RFP.

[8] There is no question that the Tribunal directed itself to the correct legal principles which guide the demarcation between procurement and contract administration. The Tribunal considered subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), and the definition of "any aspect of the procurement process". It defined the procurement process as "the process that begins after an entity has decided on its requirement and continues through to and including contract award" (Tribunal Decision at para. 121, citing WTO-AGP, "Canada – General Notes – Annex 7", General Note 4, online: <e-gpa.wto.org/en/GPACoverage/Annex7/14>). The Tribunal also considered decisions in its own jurisprudence distinguishing the procurement process from contract administration (*Eclipsys Solutions Inc. v. Canada Border Services Agency* (2016), PR-2015-038 (CITT) at para. 39). In identifying where the procurement process ended and the contract began, the Tribunal considered its mandate as expressed by this Court in *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 (*Almon*), specifically to ensure fairness in the procurement system, competition among bidders, efficiency, and integrity (*Almon* at para. 23).

[9] Drawing the line between matters that affect the procurement process and the administration of the resulting contract is very much the bailiwick of the Tribunal. A decision in

this regard will not be set aside unless it is unreasonable considering the legal and evidentiary constraints. In its analysis the Tribunal rightly noted that substitutions were expressly permitted under the contract. The Tribunal also noted that the employees hired by RHEA/Paladin and proposed as substitutes became available after ADGA began to issue termination notices and that the notices of substitution were only sent after the new contract with RHEA/Paladin came into effect (Tribunal Decision at paras. 138, 142). The Tribunal accepted the Attorney General's characterization of the evidence and determined that the potential compromise of mission critical systems warranted acceptance of the replacements (Tribunal Decision at paras. 153-155). I see nothing unreasonable in this.

[10] The Tribunal then looked at whether the acceptance of the substitutions proposed by RHEA/Paladin altered or changed the contract from what was required by the RFP. The Tribunal referred to previous cases in which it found a government entity had conducted a different procurement given its actions after the award of the contract. However, it distinguished such cases on the basis that they dealt with goods, rather than services:

> Nor can the circumstances of this case be characterized as PSPC accepting services that differ from those specified by the RFP. Cases where the government entity has been found to have conducted a different procurement after the fact have involved situations where the tender pertained to goods having specific, objective specifications. The goods supplied did not comply with those specifications or reflected distinct variations. In the present case, the specifications of the RFP are not specific to individual persons or resources but rather pertain to qualifications and work experience that are not inherently reproducible as between individuals. During bid evaluation, the proposed resources are assessed and scored relative to the prescribed assessment criteria.
>
> (Tribunal Decision at para. 152)

[11] This is an error. In this context, there is no distinction between goods and services as asserted. The provision of services can be, and often is, assessed on objective, mandatory criteria, such as a prescribed level of certification, training or years of experience (see for example, *Heiltsuk Horizon Maritime Services Ltd./Horizon Maritime Services Ltd.*, 2021 CarswellNat 4402 (CITT) at para. 41, and its sequel, *Heiltsuk Horizon Maritime Services Ltd. v. Atlantic Towing Ltd.*, 2023 FCA 88). If the mandatory requirements are met, professional services are then often also assessed on a more subjective basis, or "rated". In this case, although pertaining to services, the RFP contained both mandatory and rated criteria. Under the terms of the RFP, if the proposed resource did not meet the mandatory criteria, the bid is disqualified.

[12] The Tribunal did not sufficiently analyze this argument. The Tribunal's finding that RHEA/Paladin's certifications were true at the time of the tender is not an answer to the question raised before it as to whether, in accepting substitutions after the award which allegedly lacked the mandatory requirements under the RFP, the government conducted a new and different procurement.

[13] In its written submission, the Attorney General says that ADGA is not entitled to challenge Canada's acceptance of the substitutions "when they were later proposed by RHEA/Paladin for different roles following the award". As a general proposition, this is correct, but it is not responsive to the argument that they were substituted for roles for which they did not meet the mandatory requirements. Counsel suggests that we can assume that the individuals gained the necessary experience during the currency of the RFP. This is a bridge too far. It is one

thing to ask a court to fill in a blank or gap in the reasoning, it is quite another thing to ask it to assume certain facts exist.

[14] There is a distinction between a clause dealing with the availability of resources in an RFP and a clause dealing with the substitution of resources after the award and during the contract. The clauses have different purposes and are governed by different principles. The government, as a procuring entity, has the right to deploy the resources contracted for as it considers appropriate. But, as the Tribunal itself explained, this authority does not allow the government, through the power of substitution, to change the contract into something different from that contemplated by the RFP.

[15] The Tribunal concluded that the large number of changes and substitutions was driven by the exigent circumstances and the availability of newly released staff from ADGA and thus were a matter of contract administration. The same cannot be said about the substitution of persons to positions for which it was argued, before the Tribunal, the substitutes lacked the minimum objective qualifications. On this issue, the reasons are silent. The public policy reasons requiring decision makers give reasons for their decisions are well understood. Reasons justify the result and ensure that the losing party knows why he or she has lost such that informed consideration can be given to grounds for appeal.

[16] I draw no conclusion whatsoever as to whether the individuals were, in fact, substituted into positions for which they did not have the minimum qualifications of the RFP. That is a finding of fact for the Tribunal to make. However, it was a key assertion made by ADGA before

the Tribunal and it was not addressed. If the Tribunal finds this to be the case, it must then assess the implications for the RFP process; put otherwise, whether the substitutions, either by their nature or quantity, and taking into account the changed circumstances and concerns for operational disruption, changed the contract into something that was not contemplated by the RFP.

[17] I would therefore allow the application in this limited respect and remit it to the Tribunal for redetermination.

[18] I turn to ADGA's contention that PSPC failed to properly evaluate ADGA's bid.

[19] This dispute arises from a requirement in the RFP that the bid include reference contracts demonstrating the bidder's experience in "preventative" and "corrective" maintenance on both hardware and software systems. The bid evaluators discounted one of ADGA's proposed reference contracts on the basis that it "did not demonstrate experience with conducting preventative maintenance with respect to both hardware and software systems" (Tribunal Decision at para. 161).

[20] Before the Tribunal ADGA argued that its bid included evidence of preventative maintenance on hardware and software. It concedes that while the language in the reference contracts may not have been express, each proposed reference contract should be evaluated with reference to the bid as a whole. ADGA alleges that PSPC was unreasonable in deciding not to

allocate points for one of four reference contracts under the first technical criteria set out in the RFP.

[21] The Tribunal rejected this argument, noting that the bid evaluators determined that the impugned reference contract "only reflected experience with preventative maintenance referable to software," and not hardware (Tribunal Decision at para. 161). According to the Tribunal, the bid evaluators' conclusion was reached because, while there was reference to software maintenance, there was "no explicit equivalent reference to hardware components" (Tribunal Decision at para. 174).

[22] The Tribunal identified reasonableness as the applicable standard of review in its review of a bid evaluator's decision (Tribunal Decision at paras. 168-170, citing *Saskatchewan Polytechnic Institute v. Canada (Attorney General)*, 2015 FCA 16 at para. 7). This Court, in consequence is engaged in a second-order reasonableness review. ADGA must establish that the Tribunal was unreasonable in concluding that PSPC's bid evaluation was reasonable insofar as PSPC chose not to allocate points to ADGA's bid for one of its reference contracts.

[23] There is no reviewable error in the Tribunal's reasoning.

[24] The Tribunal has consistently held that a bid evaluator's decision is only unreasonable where the evaluators "have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the

evaluation in a procedurally fair way" (*Enveloppe Laurentide Inc.* (2025), PR-2024-073 (CITT) at para. 20).

[25] This Court has in the past emphasized that the Tribunal owes deference to evaluators in conducting a reasonableness review of evaluations of procurement proposals (*Heiltsuk Horizon Maritime Services Ltd. v. Atlantic Towing Limited*, 2021 FCA 26 at para. 70). Here, the Tribunal recognized its deferential role, stating that even though ADGA made a "plausible argument in support of its premise," it would be beyond the scope of the mandated reasonableness review for the Tribunal to "place itself in the shoes of the evaluators, redo the assessment and substitute its own judgment for that of the evaluators" (Tribunal Decision at para. 176). I agree.

[26] I would therefore allow the application with costs and remit the matter to the Tribunal for redetermination in accordance with these reasons.

"Donald J. Rennie"
J.A.

"I agree.
David Stratas J.A."

"I agree.
Monica Biringer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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