

Date: 20071022

Docket: T-1498-07

Citation: 2007 FC 1089

Ottawa, Ontario, October 22, 2007

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

TPG TECHNOLOGY CONSULTING LTD.

Applicant

and

**THE MINISTER OF PUBLIC WORKS AND
GOVERNMENT SERVICES and
CGI GROUP INC.**

Respondents

REASONS FOR ORDER AND ORDER

UPON motion dated the 18th day of September, 2007 on behalf of the applicant for a stay pursuant to section 18.2 of the Federal Courts Act, R.S.C., 1985, c. F-7, prohibiting the respondent Minister from awarding a contract under Solicitation No. EN869-04-0407/A until such time as the underlying application for judicial review is disposed with, or until the Canadian International Trade Tribunal (the “CITT”) determines the applicant’s complaint, whichever comes earlier;

AND UPON considering the material before the Court;

AND UPON hearing from counsel for the applicant and for the respondents;

[1] The applicant, TPG Technology Consulting Ltd. (“TPG”), is seeking an injunction pending, whichever comes earlier, the hearing of its application for judicial review of a decision dated July 16, 2007 made on behalf of the respondent, the Minister of Public Works and Government Services (the “Minister” or “PWGS”), or until the applicant’s complaint bearing File No. PR-2007-025 is determined by the Canadian International Trade Tribunal (“CITT”).

[2] The issue before me was whether I should grant the injunction that TPG was seeking. I have concluded that the injunction should not be granted. My reasons for this decision are provided below.

[3] The TPG complaint before the CITT involves an allegation by TPG filed on June 27, 2007, that the Minister improperly evaluated bids in Solicitation No. EN869-04-0407/A for Engineering and Technical Services Support Services (“New ETS Contract”) in breach of his legal obligations and in breach of applicable trade agreements.

[4] The New ETS Contract has a length of three years from the date of the contract, with the Government of Canada retaining an irrevocable option to extend the contract for up to four additional periods of one year each. The New ETS Contract is valued at approximately \$428 million.

[5] On July 6, 2007, the CITT accepted TPG's complaint for inquiry. The CITT issued to the Minister a Postponement Order pursuant to section 30.13(3) of the Canadian International Trade Tribunal Act, R.S.C., 1985, c.47 (4th Supp.) ("*CITT Act*"), postponing the award of the New ETS Contract until the CITT determined the validity of the complaint.

[6] On July 16, 2007, the Assistant Deputy Minister of the Acquisition Branch at PWGS, pursuant to section 30.13(4) of the *CITT Act*, certified that the procurement of goods and services related to the New ETS Contract was urgent and that a delay in awarding the New ETS Contract would be contrary to the public interest. As a result of the certification made by the agent of the respondent Minister, the CITT was statutorily compelled to rescind the Postponement of Award Order. On July 20, 2007, the CITT issued a Rescission of the Postponement of Award Order.

[7] TPG filed this application for an interim injunction on August 14, 2007.

[8] TPG alleges that the certificate issued by the Minister is void and that the postponement of Award Order by CITT should be restored on the following grounds:

a) The certificate issued by the Minister is a abuse of the Minister's discretionary powers;

b) The certificate contains an error on its face in that no justification of urgency or explanation of the public interest was provided;

c) The Minister owes the applicant a statutory duty of fairness pursuant to s. 313 of the *Federal Accountability Act*;

d) The Minister's decision to issue this certificate violated common law rules of natural justice and interfered with the applicant's right to a fair hearing before the CITT;

e) The certificate process as presently administered by the Minister is arbitrary and unfair and must be subject to statutory and common law obligations of fairness, openness and transparency.

[9] Although the Minister has not yet formally announced any successful bidder, TPG alleges that the award of the New ETS Contract will be made to CGI Group Inc. ("CGI") and that CGI and the Minister are in the process of finalizing the draft contract terms. CGI is the second respondent in this motion.

[10] On September 7, 2007, the CITT informed TPG and the respondents that it will issue its finding with respect to complaint PR-2007-025 by November 9, 2007 at the latest.

The Test for an Interlocutory Injunction

[11] Section 18.2 of the Federal Courts Act provides this Court with the jurisdiction to grant interim relief pending the final disposition of judicial review proceedings before it.

[12] The test for an interlocutory injunction is set out in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (*RJR MacDonald Inc.*). The applicant must show that there is a serious issue arising out of the application for judicial review, that the applicant would suffer irreparable harm if the injunction is not granted, and that the balance of convenience lies in the applicant's favour having regard to the respective positions of the parties. The onus lies on the applicant, on the civil standard, to meet each step of the tripartite test.

Serious Issue

[13] The test for a serious issue is that set out in *RJR MacDonald Inc.*, above, where it was held that the threshold for a serious issue was low, the issue being that the application was not one that is frivolous or vexatious.

[14] In *Cognos Inc. v. Canada (Minister of Public Works and Government Services)*, [2002] F.C.J. No. 1156 at paragraph 12 (*Cognos*), Justice Beaudry held that issues relating to the proper application of section 30.13(4) of the *CITT Act*, the section which grants authority to the Minister to certify that a contract is urgent and that any delay in awarding a contract would be contrary to the public interest, are issues worth raising.

[15] I agree that issues about the proper application of section 30.13(4) are of significance. I am satisfied that TPG has met the requirement that a serious issue arises for the judicial review.

Irreparable Harm

[16] TPG, at present, is the incumbent service provider for the ETS contract. The current ETS contract comprises 70% of its business. The applicant argues that if a stay is not granted, it will lose 70% of its business and that this 70% represents its core business and source of revenue. In addition, the applicant submitted that it would suffer employee and business losses.

[17] TPG also argues that, if at a later time, following the award of the New ETS Contract to CGI, it is determined that the New ETS Contract should have been awarded to the applicant, it will be impossible for the applicant to reconstitute the necessary staff to provide the services required and this would constitute a lasting injury for which financial remuneration alone cannot compensate.

[18] TPG relies on Justice Ryer's decision of the Federal Court of Appeal dated July 7, 2007, in a related proceeding dealing with the New ETS Contract ([2007] F.C.J. No. 810), wherein the CITT determined that the complaint filed by the applicant was not valid for reasons of timeliness. In that case, TPG was seeking a stay pending judicial review of the CITT's decision to not investigate its complaint. Ryer J.A. in his decision stated that TPG could suffer irreparable harm if it lost its business contract before a judicial review of the CITT decision could be conducted. Specifically, Ryer J.A. stated at paragraph 23:

Having regard to the criteria for this element of the test, I am persuaded that the loss of such an important contract prior to the outcome of the judicial review application could cause irreparable harm to TPG, which could manifest itself in a permanent loss of business, a permanent loss of skilled employees and experienced subcontractors, an inability to obtain new large government contracts and damage to its reputation.

[19] The applicant submits that, because there have been no significant changes in circumstances surrounding the new ETC contract since Ryer J.A.'s decision, the issue of irreparable harm has already been adjudicated and found in favour of the applicant.

[20] At issue, in the present proceeding, is the impact of the Minister's certificate rather than the matter at issue in the proceeding before Ryer J.A., namely the impact of the CITT's refusal to investigate. The relevant section of the *CITT Act* provides:

Decision to conduct inquiry

30.13 (1) Subject to the regulations, after the Tribunal determines that a complaint complies with subsection 30.11(2), it shall decide whether to conduct an inquiry into the complaint, which inquiry may include a hearing.

Notice of inquiry

(2) Where the Tribunal decides to conduct an inquiry, it shall notify, in writing, the complainant, the relevant government institution and any other party that the Tribunal considers to be an interested party and give them an opportunity to make representations to the Tribunal with respect to the complaint.

Postponement of award of contract

(3) Where the Tribunal decides to conduct an inquiry into a complaint that concerns a

Enquête

30.13 (1) Après avoir jugé la plainte conforme et sous réserve des règlements, le Tribunal détermine s'il y a lieu d'enquêter. L'enquête peut comporter une audience.

Avis d'enquête

(2) S'il décide d'enquêter sur la plainte, le Tribunal notifie sa décision au plaignant, à l'institution fédérale concernée et à toute autre partie qu'il juge intéressée et leur donne l'occasion de lui présenter leurs arguments.

Report de l'adjudication

(3) Le cas échéant, le Tribunal peut ordonner à l'institution fédérale de différer l'adjudication du contrat

designated contract proposed to be awarded by a government institution, the Tribunal may order the government institution to postpone the awarding of the contract until the Tribunal determines the validity of the complaint.

Idem

(4) The Tribunal shall rescind an order made under subsection (3) if, within the prescribed period after the order is made, the government institution certifies in writing that the procurement of the goods or services to which the designated contract relates is urgent or that a delay in awarding the contract would be contrary to the public interest.

Decision not to conduct or to cease inquiry

(5) The Tribunal may decide not to conduct an inquiry into a complaint or decide to cease conducting an inquiry if it is of the opinion that the complaint is trivial, frivolous or vexatious or is not made in good faith, and where the Tribunal so decides, it shall notify, in writing, the complainant, the relevant government institution and any other party that the Tribunal considers to be an interested party of that decision and the reasons therefore [emphasis added].

spécifique en cause jusqu'à ce qu'il se soit prononcé sur la validité de la plainte.

Annulation

(4) Il doit toutefois annuler l'ordonnance dans le cas où, avant l'expiration du délai réglementaire suivant la date où elle est rendue, l'institution fédérale certifie par écrit que l'acquisition de fournitures ou services qui fait l'objet du contrat spécifique est urgente ou qu'un retard pourrait être contraire à l'intérêt public.

Refus

(5) S'il estime que la plainte est dénuée de tout intérêt ou entachée de mauvaise foi, le Tribunal peut refuser de procéder à l'enquête ou y mettre fin, auquel cas il notifie sa décision, motifs à l'appui, au plaignant, à l'institution fédérale concernée et à toute autre partie qu'il juge intéressée

[nous soulignons].

1993, ch. 44, art. 44.

1993, c. 44, s. 44.

[21] The application before Ryer J.A. involved a situation where the CITT had denied TPG's request for an inquiry. In that circumstance, the TPG was denied potential remedies available under the *CITT Act*. Here TPG's request for an investigation was accepted. The Minister's certificate allows the contracting process to continue but does not prevent CITT from continuing in its investigation of the applicant's complaint. Should TPG's complaint prove well-founded, the remedies under the *CITT Act* are available to the applicant.

[22] Section 30.15 of the *CITT Act* sets out the remedies available to the CITT upon completion of an inquiry:

Findings and
recommendations

30.15 (1) Where the Tribunal decides to conduct an inquiry, it shall, within the prescribed period after the complaint is filed, provide the complainant, the relevant government institution and any other party that the Tribunal considers to be an interested party with the Tribunal's findings and recommendations, if any.

Remedies

(2) Subject to the regulations, where the Tribunal determines

Conclusions et
recommandations

30.15 (1) Lorsqu'il a décidé d'enquêter, le Tribunal, dans le délai réglementaire suivant le dépôt de la plainte, remet au plaignant, à l'institution fédérale concernée et à toute autre partie qu'il juge être intéressée ses conclusions et ses éventuelles recommandations.

Mesures correctives

(2) Sous réserve des règlements, le Tribunal peut,

that a complaint is valid, it may recommend such remedy as it considers appropriate, including any one or more of the following remedies:

- (a) that a new solicitation for the designated contract be issued;
- (b) that the bids be re-evaluated;
- (c) that the designated contract be terminated;
- (d) that the designated contract be awarded to the complainant; or
- (e) that the complainant be compensated by an amount specified by the Tribunal.

Criteria to be applied

(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

- (a) the seriousness of any deficiency in the procurement process found by the Tribunal;
- (b) the degree to which the complainant and all other interested parties were prejudiced;

lorsqu'il donne gain de cause au plaignant, recommander que soient prises des mesures correctives, notamment les suivantes :

- a) un nouvel appel d'offres;
- b) la réévaluation des soumissions présentées;
- c) la résiliation du contrat spécifique;
- d) l'attribution du contrat spécifique au plaignant;
- e) le versement d'une indemnité, dont il précise le montant, au plaignant.

Critères

(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) la gravité des irrégularités qu'il a constatées dans la procédure des marchés publics;
- 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;

(d) whether the parties acted in good faith; and

(e) the extent to which the contract was performed.

c) l'ampleur du préjudice causé à l'intégrité ou à l'efficacité du mécanisme d'adjudication;

d) la bonne foi des parties;

e) le degré d'exécution du contrat.

The remedial provisions also state:

Implementation of recommendations

30.18 (1) Where the Tribunal makes recommendations to a government institution under section 30.15, the government institution shall, subject to the regulations, implement the recommendations to the greatest extent possible.

Notice of intention

(2) Within the prescribed period, the government institution shall advise the Tribunal in writing of the extent to which it intends to implement the recommendations and, if it does not intend to implement them fully, the reasons for not doing so.

Mise en oeuvre des recommandations

30.18 (1) Lorsque le Tribunal lui fait des recommandations en vertu de l'article 30.15, l'institution fédérale doit, sous réserve des règlements, les mettre en oeuvre dans toute la mesure du possible.

Idem

(2) Elle doit en outre, par écrit et dans le délai réglementaire, lui faire savoir dans quelle mesure elle compte mettre en oeuvre les recommandations et, dans tous les cas où elle n'entend pas les appliquer en totalité, lui motiver sa décision.

[23] Justice Heneghan in *Telus Integrated Communications v. Canada (Attorney General)*, [2000] F.C.J. No. 1429 at paragraph 30, in speaking with regards to alleged harm as a result of an award of a contract prior to determination by the CITT of a complaint, stated:

I am in no better position than counsel for the parties in so far as anticipating how the tribunal may exercise the discretion conferred by section 30.15(2) of the CITT Act in the event that it upholds the complaint made by Telus. Section 30.15(2) of the CITT Act is not exhaustive but merely identifies some of the available remedies which may be recommended by the tribunal. The Tribunal has the discretion to recommend a meaningful remedy to the applicant Telus, if Telus succeeds upon its complaint before the Tribunal. It is inappropriate for me to speculate, either positively or negatively, how that tribunal may exercise its discretion to price a remedy, and I decline to do so.

[24] Although the CITT is only to make recommendations, the government institution is required to respond in a substantive manner with reasons for any deviation from the CITT recommendation.

Justice Beaudry in *Cognos*, above, stated at paragraphs 17 and 18:

...The wording of the statute indicates that a CITT ruling imposes obligations on the affected government institution. The government institution would be required to provide reasons for a failure to meet those obligations.

The effect of this provision of the Act, when applied to the case at bar, is that the Respondent would be required to deliver any remedy that the CITT may wish to award, including monetary damages or rescission of the contract, to the greatest possible extent possible, or justify a failure to do so. This Court may intervene in the event of a failure by the Respondent to comply with the recommendations.

[25] TPG, if successful in its complaint to the CITT, will have access to meaningful remedies.

The provisions set out under section 30.15 of the *CITT Act* include, among other things, that bids be re-evaluated, that the contract be awarded to the applicant, and compensation. Such remedies are

significant and the applicant would have further recourse to the Court should the government institution fail to comply with CITT recommendations without justifiable reason.

[26] The claim of irreparable harm alleged by the applicant is diminished by the inconsistencies highlighted in the cross-examination of the President of TPG. TPG had alleged it would incur employee and business losses. The applicant has no employees but uses sub-contractors instead. Generally, the usual relationship between an employer and its employees is closer than a contractor and its sub-contractors who ordinarily would have a greater degree of independence.

[27] Another consideration in addressing the question of irreparable harm is the time frame in which the harm is to be assessed. Justice Beaudry in his analysis of irreparable harm in *Cognos*, above, also stated at paragraph 23:

I must still find that the ability of the Applicant to obtain satisfactory remedies for any harm that it may incur between now and the disposition of its complaint an overarching factor which precludes the granting of this injunction (emphasis added).

[28] The CITT has stated that it will provide its determination on PR-2007-025 by November 9, 2007, at the latest which is a relatively short time frame.

[29] Finally, the harm alleged by TPG would be a result of an improper award of the New ETS Contract. It does not arise from the decision of the Minister to issue a certificate to continue the procurement process, an authority which is granted by statute.

[30] I find that TPG has failed to establish, on the balance of probabilities, that it will suffer harm that is irreparable. Therefore this application for a stay must fail on the second step of the *RJR MacDonald Inc.* test.

Balance of Convenience

[31] As all three steps of the tripartite test must be met for an applicant to be successful and the applicant has not met the second step, I need not consider the balance of convenience.

Conclusion

[32] TPG's application for a stay pending the hearing of its application for judicial review or until the CITT determines the applicant's complaint, whichever comes earlier, is denied.

ORDER

THIS COURT ORDERS THAT the above application be dismissed;

THIS COURT FURTHER ORDERS THAT based on the outcome of this motion, the importance and complexity of the issue raised, and the proposition set out in *Singer v. Enterprise Rent-A-Car Co.*, [1999] F.C.J. No. 1687, costs are awarded to the Respondent Minister, by the Applicant. There will be no order as to costs with respect to the second Respondent, CGI.

“Leonard S. Mandamin”

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1498-07

STYLE OF CAUSE: TPG TECHNOLOGY CONSULTING LTD. v.
THE MINISTER OF PUBLIC WORKS AND
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PLACE OF HEARING: Ottawa, Ontario

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REASONS FOR ORDER
AND ORDER: Judge Leonard Mandamin

DATED: October, 22, 2007

APPEARANCES:

Phuong Ngo For the Applicant
Ronald Lunau

Mr. R. Benjamin Mills For the Respondent, CGI Group Inc.
Mr. Simon Potter

Mr. Ian Fraser For the Respondent, PWGSC
Mr. Robin Carter

SOLICITORS OF RECORD:

Gowling Lafleur Henderson, LLP For the Applicant
Barristers & Solicitors
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

McCarthy Tétrault, LLP For the Respondent, CGI Group Inc.
Barristers & Solicitors
Suite 1400, The Chambers
40 Elgin Street
Ottawa, ON K1P 5K6

John H. Sims, Q.C.
Deputy Attorney General of Canada For the Respondent, PWGSC