Federal Court of Appeal | Cour d'appel fédérale

Date: 20161110

Dockets: A-321-15
A-323-15

Citation: 2016 FCA 277

CORAM: **DAWSON J.A.**
NEAR J.A.
WOODS J.A.

BETWEEN:

MONROE SOLUTIONS GROUP INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on November 10, 2016.

Judgment delivered at Toronto, Ontario, on November 10, 2016.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NEAR J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] These two applications for judicial review arise out of two federal government initiatives: the Build in Canada Innovation Program (BinCIP) and the Canadian Safety and Security Program (CSSP). Calls for Proposals were issued by Public Works and Government Services Canada (PWGSC) under both programs. In response, Monroe Solutions Group Inc. submitted a

proposal under the BinCIP and two proposals for innovations made under the CSSP. The proposal submitted under the BinCIP was rejected as being noncompliant with mandatory screening criteria. The two proposals submitted under the CSSP were not selected to advance because of various difficulties.

[2] Monroe then filed complaints with the Canadian International Trade Tribunal. While the Tribunal initially accepted the complaints for inquiry, PWGSC moved under Rule 24 of the *Canadian International Trade Tribunal Rules*, SOR/91-499 for an order ceasing the inquiries. The Tribunal granted the motions and dismissed the complaints on the basis that Article 506(12)(*h*) of the *Agreement on Internal Trade* applied. Article 506(12)(*h*) exempts a procurement from the usual competitive process where "only one supplier is able to meet the requirements of a procurement" and where the procurement is in respect of a "prototype or a first good or service to be developed in the course of and for a particular contract for research, experiment, study or original development, but not for any subsequent purchases". It followed that the complaints had no valid basis.

[3] These are applications for judicial review from two decisions of the Tribunal (rendered in file No. PR-2014-053 in respect of the proposal made under the BinCIP, and in File Nos. PR-2014-054 and PR-2014-056 in respect of the two proposals made under the CSSP).

[4] On these applications Monroe submits that the Tribunal decisions should be set aside because:

i The Tribunal's interpretation of the relevant provisions of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.) (Act) and Article 506 of the *Agreement on Internal Trade* is reviewable on the standard of correctness.

ii The Tribunal erred by incorrectly interpreting its jurisdiction under section 30.13(5) of the Act or incorrectly applying Article 506 of the *Agreement on Internal Trade*.

iii In the alternative, if the applicable standard of review is reasonableness, the Tribunal's decision was unreasonable.

iv The Tribunal breached the duty of procedural fairness as it did not receive submissions from Monroe on whether the complaints had a valid basis.

[5] I respectfully disagree for the following reasons.

[6] Both the Tribunal's interpretation of the Act and the *Agreement on Internal Trade* involve an administrative decision-maker interpreting its home statute or a provision closely related to its function. Nothing in the legislative context or in the nature of the interpretive questions at issue rebuts the presumption of reasonableness review.

[7] Further, as the Attorney General correctly argues, no question of true jurisdiction arises. The Tribunal possessed jurisdiction to dismiss the complaints pursuant to subsection 10(*a*) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (SOR/93-602) which provides that the Tribunal may, at any time, order that a complaint be dismissed where, taking

into account relevant legislative provisions and agreements, the Tribunal determines that "the complaint has no valid basis." This was the provision the Tribunal expressly relied upon when reaching its decisions.

[8] The Tribunal determined that the complaints had no valid basis because, in its view, the procurements fell within Article 506(12)(*h*) of the *Agreement on Internal Trade*. It follows that these applications turn on whether the Tribunal reasonably construed the procurement processes at issue to fall within Article 506(12)(*h*) of the *Agreement on Internal Trade*.

[9] On these applications Monroe does not challenge the Tribunal's conclusion that any procurement was in respect of a "prototype…to be developed." It challenges the Tribunal's conclusion that "only one supplier is able to meet the requirements of a procurement."

[10] In its decision rendered in File No. PR-2014-053 relating to the proposal submitted pursuant to the BinCIP the Tribunal wrote at paragraph 21 of its reasons:

> 21. The process described in the CFP has the rather unique result that the types of innovative goods and services available in the pre-qualified proposals *inform* the needs of the government, through the test department matching process, instead of *responding to* an already identified government requirement. By definition, therefore, only one supplier, the author of a given proposal, will be "able to meet the requirements of a procurement", and the condition set out in Article 506(12) is met.
>
> (Emphasis in original)

[11] Similarly, in its decision rendered in File Nos. PR-2014-054 and PR-2014-056 in respect of the two proposals submitted under the CSSP the Tribunal wrote at paragraph 22:

> 22. The process described in the CFP has the rather unique result that the types of goods and services that are successful in the funding process are not *responding to* an already identified government requirement, but rather are *informing* that need. By definition, therefore, only one supplier, the non-government partner in a given proposal, will be "able to meet the requirements of a procurement", and the condition set out in Article 506(12) is met.
>
> (Emphasis in original)

[12] In my view, Monroe has failed to demonstrate that the analysis of the Tribunal was not justified, transparent and intelligible nor has it demonstrated that the outcome did not fall within the range of rational, acceptable solutions defensible in light of the facts and law.

[13] The interpretation of the *Agreement on Internal Trade* by the Tribunal was reasonable in the unique circumstances presented by the BinCIP and CSSP initiatives. The sole-source nature of each process was reflected in the fact that each Call for Proposal was express that those placed in pre-qualified pools were not guaranteed a contract.

[14] In the case of the BinCIP, the Call for Proposals specified in section 2.2 that:

> The establishment of the Pre-Qualified Pool is "approved in principle" and will not constitute a guarantee on the part of Canada that a contract will be awarded. Approved in principle for contract consideration is defined as conditional acceptance of the Proposal subject to meeting the criteria identified in Part 5, Basis of Selection and the available funding.

[15] In the case of the CSSP, the Synopsis and Full Proposal and Stages of the Call for Proposals created a short list of suppliers with which Canada could negotiate a contract if a number of further conditions were met.

[16] Finally, I have not been persuaded of any breach of procedural fairness. Monroe made submissions to the Tribunal on the application of Article 506(12) of the *Agreement on Internal Trade* and it must be deemed to know that the Tribunal could at any time dismiss a complaint if satisfied that the complaint had no valid basis.

[17] It follows that I would dismiss the applications for judicial review with costs.

"Eleanor R. Dawson"
J.A.

"I agree
D.G. Near J.A."

"I agree
Judith M. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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REASONS DATED:	NOVEMBER 10, 2016

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