

**Date: 20071026**

**Docket: A-398-07**

**Citation: 2007 FCA 336**

**Present: NOËL J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**NORTHROP GRUMMAN OVERSEAS SERVICES CORPORATION,  
LOCKHEED MARTIN CORPORATION and RAYTHEON COMPANY**

**Respondents**

Heard at Ottawa, Ontario, on October 23, 2007.

Order delivered at Ottawa, Ontario, on October 26, 2007.

**REASONS FOR ORDER BY:**

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**REASONS FOR ORDER**

**NOËL J.A.**

[1] The respondent, Northrop Grumman Overseas Services Corporation (“Northrop Grumman”) brings a motion seeking:

- a. an order directing Public Works and Government Services Canada (“PWGSC”) to give effect to the recommendation made by the *Canadian International Trade Tribunal* (the “CITT”) in support of its decision dated August 30, 2007 that bids involved in a procurement process be re-evaluated;
- b. an order declaring that PWGSC’s application for judicial review of the aforesaid decision does not have the effect of staying it, and alternatively;

- c. an interim stay of the performance of the contract awarded to the respondent, Lockheed Martin Corporation (“Lockheed Martin”) by PWGSC.

## **BACKGROUND**

[2] By a decision dated August 30, 2007, the CITT determined that two of the three complaints brought by Northrop Grumman were valid. In the statement of reasons issued in support of this decision on September 12, 2007, the CITT made the following recommendations (para. 75):

The Tribunal agrees with PWGSC’s submission in the GIR, in which it is stated that “... the best recourse is to recommend a re-evaluation of competing proposals ...”. The Tribunal notes that PWGSC applied a consistent approach in evaluating rated criteria R13 and R44 for all bidders and, consequently, its errors in evaluation may have affected all bidders’ scores. This, in turn, could have led to the award of the contract to the wrong bidder, and it is not clear which of the three bidders would have been the winning bidder if the three proposals had been evaluated correctly. The Tribunal therefore recommends that PWGSC, within 30 days of the publication of this determination, re-evaluate those portions of the proposals relating to rated criteria R13 and R44, for all three bidders in accordance with the following directions ...

[3] On September 19, 2007, PWGSC advised the CITT, purportedly acting pursuant to subsection 30.18(1) of the *Canadian International Trade Tribunal Act* (the “CITT Act”) and section 13 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (“Procurement Regulations”), that it was not going to give effect to the recommendations made by the CITT. The sole reason given by PWGSC for its refusal to implement the CITT’s recommendations was that PWGSC did not agree with the determination made by the CITT and intended to seek a judicial review. PWGSC has since advised Northrop Grumman that it has no intention of suspending the contract awarded to Lockheed Martin pending resolution of its judicial review.

[4] The Attorney General, acting on behalf of PWGSC, has now filed the judicial review application in the present matter wherein PWGSC challenges the CITT's decision to the extent that it upholds Northrop Grumman's complaint. The Attorney General has also filed an application against a prior decision of the CITT in which the CITT assumed jurisdiction over Northrop Grumman's complaint despite PWGSC's objections. This application is also pending.

[5] In support of its motion, Northrop Grumman maintains that PWGSC cannot disregard the recommendations made by the CITT solely because it disagrees with the CITT's decision upholding the complaints and has applied for judicial review. To the extent that PWGSC does not wish to implement the recommendations of the CITT pending the outcome of its judicial review application, it must, as it has done in the past, seek and obtain a stay of that decision (reference is made to *Seprotech Systems Inc. v. Peacock Inc.*, [2002] F.C.J. No. 1764 (FCA)). Northrop Grumman is concerned that by ignoring the recommendations made by the CITT, PWGSC may place itself in a position where it will no longer be in a position to give effect to the CITT's recommendations upon completion of the judicial review application.

[6] The Attorney General resists the motion on two grounds. First, he submits that the first and second relief sought by Northrop Grumman in its motion are not in the nature of interim relief. According to the Attorney General, Northrop Grumman is in fact seeking final relief against the decision of PWGSC not to give effect to the recommendations of the CITT. As subsection 28(1) of the *Federal Courts Act* does not list the Minister of PWGSC as a federal board, commission or other

Tribunal over which the Federal Court of Appeal has jurisdiction, the application can only be heard by the Federal Court.

[7] Alternatively, the Attorney General argues that subsection 30.15(2) of the CITT Act merely provides the CITT with authority to make “recommendations” upon upholding a complaint and section 30.18 allows PWGSC to refrain from implementing such recommendations while its judicial review application is pending. Although this practice has never been challenged until now, the Attorney General points to seven instances over the last few years where, relying on section 30.18, PWGSC advised the CITT that it would not be implementing its recommendations pending the outcome of its judicial review application.

[8] As I understand the position of the Attorney General, only PWGSC would have the option to forego applying the recommendations of the CITT pending a judicial review application. Any other party to a procurement complaint who wishes to prevent the implementation of the recommendations pending a judicial review application would have to obtain a stay in the usual way (see for instance *Profac Facilities Management Services Inc. v. FM One Alliance Corp.*, [2001] F.C.J. No. 1530).

[9] Lockheed Martin also resists Northrop Grumman’s application relying essentially on the same arguments as those advanced by the Attorney General on behalf of PWGSC. The respondent, Raytheon Company takes no position.

## **ANALYSIS AND DISPOSITION**

[10] Dealing first with the issue of jurisdiction, the Attorney General contends that the Federal Court (more precisely the Trial Division of Federal Court as it was known at that time) has assumed jurisdiction to the exclusion of this Court in circumstances identical to the present ones in *ACE/Clear Defence Inc. v. Director, National Gallery of Canada*, File No. T-1526-00. In that case, the National Gallery of Canada refused to implement the recommendations of the CITT pending the outcome of the judicial review of the CITT's decision which it had brought before this Court. ACE/Clear Defence Inc. challenged the Gallery's refusal by way of motion before the Federal Court. However, this motion had yet to be heard when this Court dismissed the Gallery's judicial review application. As a result it became academic and was never heard. Consequently, this case is not authority for the proposition advanced by the Attorney General.

[11] The Attorney General further argues that an interim declaration of right is a contradiction in terms. He relies in this respect on the decision of Hugessen J. in *Sawridge Band v. Canada*, [2003] 4 F.C. 748 (para. 6):

If a court finds that a right exists, a declaration to that effect is the end of the matter and nothing remains to be dealt with in the final judgment. If, on the other hand, the right is not established to the court's satisfaction, there can be no entitlement to have an unproved right declared to exist

[12] However, this case is peculiar in that the Attorney General himself recognizes that the right which is being claimed on behalf of PWGSC (i.e., the right not to give effect to the recommendations of the CITT) is interim in nature:

Thus, if the Attorney General is unsuccessful in its challenge of the Tribunal's jurisdiction to inquire into Northrop Grumman's complaint (A-310-07), and unsuccessful in the within

application, then, subject to further appeal, PWGSC's normal practice would have it conduct a re-evaluation of rated requirements R13 and R44, as recommended by the Tribunal (Memorandum of fact and Law of the Attorney General, at para. 53).

[13] In my respectful view, the remedies sought by Northrop Grumman in its notice of motion properly come within the ambit of section 18.2 of the *Federal Courts Act* which, when read with subsection 28(2), provides the Federal Court of Appeal with the authority to make "any interim orders that it considers appropriate pending the final disposition of the application".

[14] The question as to whether the decision of the CITT upholding a complaint and making recommendations continues to have its effect pending a judicial review application before this Court is in my view an interim matter that properly comes within section 18.2 of the *Federal Courts Act*. Similarly, the question as to whether a stay of execution of the CITT's decision is required in order to allow PWGSC to disregard the recommendations pending the outcome of its judicial review application is also an interim matter that comes within section 18.2 of the *Federal Courts Act*.

[15] I therefore conclude that this Court has jurisdiction to grant the relief sought by Northrop Grumman.

[16] Turning to the substantive issue, the Attorney General maintains that the power of the CITT in upholding a complaint is limited to making recommendations, which recommendations PWGSC is free to ignore pending a judicial review application. Sections 30.15 and 30.18, as well as section 13 of the Procurement Regulations are invoked in support of this proposition. These provisions, with emphasis on the wording on which the Attorney General insists, read as follows:

**CANADIAN INTERNATIONAL  
TRADE TRIBUNAL ACT**

**LOI SUR LE TRIBUNAL CANADIEN  
DU COMMERCE EXTÉRIEUR**

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 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;

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, 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) the degree to which the complainant and all other interested parties were prejudiced;

(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.

#### Cost of preparing response

(4) Subject to the regulations, the Tribunal may award to the complainant the reasonable costs incurred by the complainant in preparing a response to the solicitation for the designated contract.

#### 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.

#### Notice of progress

(3) Where the government institution has advised the Tribunal that it intends to implement the recommendations in whole or in part, it shall further advise the

b) l'ampleur du préjudice causé au plaignant ou à tout autre intéressé;

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.

#### Indemnité

(4) Le Tribunal peut, sous réserve des règlements, accorder au plaignant le remboursement des frais entraînés par la préparation d'une réponse à l'appel d'offres.

#### 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.

#### Idem

(3) Lorsqu'elle a avisé le Tribunal qu'elle entend donner suite aux recommandations, elle doit lui indiquer, dans le délai réglementaire et par écrit,

Tribunal in writing, within the prescribed period, of the extent to which it has then implemented the recommendations.

dans quelle mesure elle l'a fait.

**CANADIAN INTERNATIONAL TRADE  
TRIBUNAL PROCUREMENT  
INQUIRY REGULATIONS**

**RÈGLEMENT SUR LES ENQUÊTES  
DU TRIBUNAL CANADIEN DU  
COMMERCE EXTÉRIEUR SUR LES  
MARCHÉS PUBLICS**

**13.** Where the Tribunal makes recommendations to a government institution under section 30.15 of the Act, the government institution shall:

**13.** Sur réception des recommandations du Tribunal faites en vertu de l'article 30.15 de la Loi, l'institution fédérale :

(a) advise the Tribunal in writing, within 20 days after receipt of the recommendations, 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; and

a) lui fait savoir par écrit, dans les 20 jours suivant la réception des recommandations, dans quelle mesure elle compte les mettre en oeuvre et, dans le cas où elle n'entend pas les appliquer en totalité, lui motive sa décision;

(b) where the government institution has advised the Tribunal that it intends to implement the recommendations in whole or in part, advise the Tribunal in writing, within 60 days after receipt of the recommendations, of the extent to which it has then implemented the recommendations.

b) lorsqu'elle l'a avisé qu'elle entend donner suite aux recommandations, lui indique par écrit, dans les 60 jours suivant la réception de celles-ci, dans quelle mesure elle l'a fait.

[17] In my respectful view, these provisions are not authority for the proposition advanced by the Attorney General in this case. Specifically, section 30.18 of the CITT Act does not authorize PWGSC to ignore the recommendations made by the CITT altogether solely because it disagrees with the decision upholding the complaint and has brought a judicial review application.

[18] This Court has had occasion to consider the scope, purpose and effect of section 30.18 in *Canada (Attorney General) v. Symtron Systems Inc.*, [1999] 2 F.C. 514 (F.C.A.). In that case, Linden J.A. said on behalf of the Court (paras. 12 and 13):

**12** Finally, subsection 30.18(1) [as enacted idem] of the CITT Act creates a type of "enforcement" mechanism, directing that government institutions shall implement the Tribunal's recommendations "to the greatest extent possible." The words "to the greatest extent possible" in subsection 30.18(1) of the CITT Act replace the word "normally" as written in NAFTA Article 1017(1)(l). (...).

**13** Without further modification, this seems to give the government institution some discretion over whether and how much to comply with the Tribunal's recommendation. However, Parliament indicated its intention that government institutions are meant to comply with the Tribunal. The plain language of subsections 30.18(2) [as enacted idem] and 30.18(3) [as enacted idem] is aimed at making non-compliance an awkward and unusual occurrence. The institution must tell the Tribunal what they plan to do and then advise it what they have done to implement the recommendations.

[19] I need not elaborate on the type of reasons that PWGSC may properly invoke pursuant to section 30.18 in order to justify a refusal to abide by recommendations made by the CITT. It is sufficient to say that the simple fact that PWGSC disagrees with a decision of the CITT upholding a complaint and seeks judicial review of that decision, is not one that comes within the ambit of that provision. Nor do I accept that section 30.18 can be construed as allowing for an automatic stay of the recommendations of the CITT, at the option of PWGSC, whenever a challenge is brought against a decision of the CITT.

[20] I therefore conclude that in the absence of a valid invocation of section 30.18, PWGSC must, like any other party to a procurement complaint, abide by the recommendations of the CITT. To the extent that PWGSC cannot invoke section 30.18 on cogent grounds – in this case PWGSC

agreed that the recommendations made by the CITT were appropriate in the event that the complaint was found to be valid – and does not want to give effect to the recommendations, it must seek and obtain an appropriate stay.

[21] An order will therefore issue declaring that the application for judicial review filed by the Attorney General on behalf of PWGSC does not have the effect of staying the recommendations made by the CITT, and ordering PWGSC to abide by these recommendations pending the outcome of the judicial review application. In the circumstances, I believe it appropriate to grant PWGSC leave to apply for a stay of the decision of the CITT conditionally upon this application being brought without delay. The order will so provide.

[22] Given this outcome, it is not necessary to deal with the motion in the alternative. Northrop Grumman is entitled to the costs of this motion regardless of the outcome of PWGSC's judicial review application.

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“Marc Noël”

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

<b>DOCKET:</b>	A-398-07
<b>STYLE OF CAUSE:</b>	Attorney General of Canada v. Northrop Grumman Overseas Services Corporation, Lockheed Martin Corporation and Raytheon Company
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<b>DELIVERED BY:</b>	Noël J.A.
<b>DATE:</b>	October 26, 2007
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