

**Date: 20080129**

**Docket: A-128-07**

**Citation: 2008 FCA 36**

**CORAM: DESJARDINS J.A.  
NADON J.A.  
TRUDEL J.A.**

**BETWEEN:**

**LES SYSTÈMES EQUINOX INC.**

**Applicant**

**and**

**THE MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES, LGS GROUP  
INC. and THE ATTORNEY GENERAL OF CANADA**

**Respondents**

Heard at Ottawa, Ontario, on January 16, 2008.

Judgment delivered at Ottawa, Ontario, on January 29, 2008.

**REASONS FOR JUDGMENT BY:**

**DESJARDINS J.A.**

**CONCURRED IN BY:**

**NADON J.A.  
TRUDEL J.A.**

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**REASONS FOR JUDGMENT**

**DESJARDINS J.A.**

[1] On February 14, 2007, the Canadian International Trade Tribunal (CITT or the Tribunal) accepted, in part, to inquire into a complaint filed by Les Systèmes Equinox (Equinox or the applicant) regarding Public Works and Government Services Canada (PWGSC) Solicitation No. 21120-053631/B (the solicitation). The applicant seeks judicial review of the Tribunal's decision to inquire into only part of its complaint.

[2] At issue is whether the Tribunal made a reviewable error in declining to inquire independently into the allegation that PWGSC had evaluated improperly or with bias the applicant's proposal for the solicitation.

## THE FACTS

[3] On June 30, 2005, PWGSC issued a Request for Proposal (RFP) on behalf of Correctional Services Canada (CSC) concerning a procurement of Point of Sales Equipment. In response, the applicant submitted a proposal. PWGSC advised the applicant by correspondence dated December 12, 2005 that its proposal did not meet certain mandatory requirements of the RFP and that the contract had been awarded to LGS Group Inc. (LGS). Specifically, the applicant's financial proposal was found to be non-compliant with the RFP on the following two points (A.R., Vol. 1, tab 4, p. 215).

As indicated in the solicitation, a proposal was required to meet each and every mandatory requirement. Unfortunately, the evaluation team determined that your proposal did not comply with all the mandatory requirements of the solicitation.

As per our findings, your financial proposal is non-compliant on two points:

- (1) the per diem rates bid, do not provide a calculable single per diem rate for the work as required by the RFP; and
- (2) no calculable single price was bid for the Entity-wide license in accordance with the terms contained in Appendix C.

To provide you with information on the characteristics and relative advantages of the winning tender, I can advise you that the winning proposal satisfied all the mandatory requirements of the solicitation and scored as follows:

	Technical Score	Total Assessed Price	Cost per Point
LGS' proposal	78.0	\$4,090,255.17	\$52,439.17

Equinox's proposal	72.0	Non-compliant	n/a
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As a result of finding your financial proposal to be non-compliant, your proposal was disqualified and Canada did not proceed further with your evaluation.

[Emphasis added.]

[4] The applicant requested and was granted a debriefing session with PWGSC officials on January 6, 2006. During the session, the applicant was advised that an evaluation of the Equinox financial proposal had not been conducted by PWGSC as part of the evaluation because the Equinox bid was determined to be non-compliant.

[5] Equinox filed a procurement complaint pursuant to section 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4<sup>th</sup> Supp.), c. 47, (CITT Act or the Act) on February 3, 2006, challenging PWGSC's determination that its bid did not meet the mandatory requirements of the RFP. The Tribunal advised Equinox on February 15, 2006 that it decided not to conduct an inquiry into the complaint on the basis that the claim had not been filed within the required ten working day period. The Tribunal did not consider any other matter raised by Equinox in its complaint.

[6] In October and November 2006, Equinox obtained information, including a financial evaluation document about the procurement process, through an Access to Information request. On the basis of the obtained information, Equinox raised objections about the procurement process with PWGSC. On January 24, 2007 PWGSC rejected these objections (A.R., Vol. 1, tab 29, p. 181-182) based on the following reasons:

We have reviewed the procurement very carefully in response to your concerns, in addition an independent review was conducted by a separate organization within the department, and our conclusions are as follows:

- The Equinox bid was correctly evaluated in accordance with the evaluation criteria stated in the RFP, and as a result was evaluated as non-compliant for the reasons already stated in our letter dated December 12, 2005.
- The LGS bid was evaluated correctly as compliant in accordance with the evaluation criteria stated in the RFP, and the resulting contract issued to LGS was in full compliance with all the requirements of the RFP.

[7] Pursuant to section 30.11 of the Act, Equinox subsequently filed a complaint with the Tribunal on February 5, 2007.

[8] In a letter dated February 14, 2007, the Tribunal agreed to investigate part of the applicant's complaint. In response to a request to reconsider from the applicant, the Tribunal confirmed in a letter dated February 19, 2007 that it would only investigate part of the complaint.

[9] Prior to the hearing of this appeal, the Tribunal, on June 20, 2007, upheld that part of the applicant's complaint that it had agreed to consider and recommended a remedy. (File No. PR-2006-045).

## **THE COMPLAINT**

[10] In its complaint, Equinox submitted the following propositions (A.R., p. 47):

- (a) That PWGSC and CSC have violated the obligations of the AIT and the NAFTA by determining that the bid submitted by LGS complied with the mandatory requirements of the RFP.
- (b) That PWGSC and CSC improperly evaluated the bid submitted on behalf of Equinox contrary to the obligations of the AIT and the NAFTA.
- (c) That PWGSC and CSC did not ensure equal access to procurement in violation of the obligations of the AIT.
- (d) That the evidence raises a reasonable apprehension of bias in favour of LGS and against Equinox which led the evaluators to improperly determine that the Equinox bid did not comply with the RFP.

**EVALUATION OF THE EQUINOX BID – BIAS AGAINST EQUINOX -- ((b) and (d) of the complaint)**

[11] The documents obtained through the Access to Information process provided the grounds for the complaint which Equinox filed before the Tribunal. The third document package included another copy of the evaluation document, but this time it included a detailed analysis of the cost of Equinox's bid (A.R., p. 40, para. 66; exhibit 27 NCV).

[12] According to the complaint, the document package revealed that PWGSC evaluated the Equinox financial bid and, in doing so, added an amount of money to the Equinox bid, the exact sum of which was confidentially disclosed to the Court (A.R., p. 40, para. 67; the sign [\*], used further down, refers to the confidentially disclosed sum of money).

[13] The complaint indicates that, “[t]he existence of the cost evaluation document demonstrates that PWGSC conducted this evaluation contrary to the statement by Ms. Jalbert made during the January 6, 2006 debriefing that no such evaluation was conducted” (A.R., p. 41, para. 68).

[14] The complaint further states (para. 70) that “[a]t no point during or subsequent to the debriefing sessions did PWGSC or CSC explain that an additional \$[\*] had been added to the Equinox bid price or explain why this addition was justified. Rather, PWGSC claimed that a price evaluation had not been conducted and the \$[\*] added to the Equinox bid was not discussed”.

[15] Equinox complains (A.R., p. 75, para. 186 to 194) that by adding \$[\*] to the Equinox bid price, the evaluation violated the *Agreement of Internal Trade* (AIT) Article 501 and the *North American Free Trade Agreement* (NAFTA) Article 1008(1)(a) which require equal and non-discriminatory treatment of all bidders.

[16] Equinox claims that PWGSC violated AIT Article 506(6) which requires fairness and transparency in the procurement process. Specifically, Article 506(6) does not permit the evaluators to unilaterally amend the price and then take that amended price into account. By adding \$[\*] to the Equinox price, the evaluators failed to take the price submitted by Equinox into account but, in fact, considered an artificially, and improperly, inflated price.

[17] Equinox also claims that by improperly adding \$[\*] to its bid, PWGSC violated the requirement to conduct an evaluation of the bid originally submitted, as required by NAFTA Article 1015(4)(a). In this case, rather than accepting bid repair by the bidder, PWGSC took an active role in modifying the Equinox bid, and did so to the detriment of Equinox.

[18] Equinox submits finally that the decision by PWGSC officials to state that an evaluation of the Equinox financial bid was not undertaken, when one was obviously made, and the failure of those officials to explain the decision to add \$[\*] to the Equinox bid, further illustrates the general failure to ensure equal treatment, fairness and transparency, and that by improperly adding [\*] to the price of its bid, PWGSC and CSC improperly evaluated its bid in violation of AIT Articles 501 and 506(6) and NAFTA Articles 1015(4)(a) and 1008(1)(a).

**EQUAL ACCESS TO INFORMATION -- ((c) of the complaint)**

[19] Equinox submits in its complaint (A.R., p. 77, para. 194-198) that prior to August 15, 2005, the date of the bid submission, LGS asked for clarification of specific issues. Although PWGSC noted that the request had been made outside the time for questions and answers, it responded to the question. PWGSC did not circulate the questions and answers to Equinox, notwithstanding the fact that LGS confirmed that the response constituted an important clarification. Under RFP clause 7.2, enquiries must be received no less than 10 calendar days prior to the bid closing date. R.F.P. clause 7.3 provides moreover that, to ensure consistency and quality of information, PWGSC will provide any significant enquiries received, and answers, to all bidders.

[20] Equinox never received a copy of this request and answer. It was informed about their existence through the document package received through its Access to Information request (A.R., para. 19, page 212, affidavit of Gilles Goguen, president of Equinox).



## DECISION UNDER REVIEW

[21] The Tribunal accepted part of the applicant's complaint for inquiry, stating in the letter dated February 14, 2007 that:

... This inquiry will be limited to the allegations that PWGSC awarded the contract to a bidder, LGS Group Inc. (LGS), whose proposal was not compliant with the mandatory requirements of the Request for Proposal, that PWGSC allowed LGS to amend its proposal after the deadline for the receipt of bids and that PWGSC did not treat the bidders equally, thereby creating a reasonable apprehension of bias in favour of LGS...

[22] In response to a letter from the applicant requesting the Tribunal reconsider its decision to inquire into only part of the applicant's complaint, the Tribunal responded in the letter dated February 19, 2007 that:

... The Tribunal has accepted the ground of complaint having to do with the apprehension of bias in relation to how LGS Group Inc.'s proposal was evaluated in comparison to that of Equinox. The Tribunal considered the existence of a financial evaluation tabulation as insufficient evidence to demonstrate that Equinox's proposal had been found compliant. The Tribunal will not reconsider its decision in that matter....

## LEGISLATIVE PROVISIONS

[23] Subsection 30.13(1) of the Act states:

### **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.

[Emphasis added.]

### **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.

[Je souligne.]

[24] The relevant regulation alluded to in paragraph 30.13(1) of the Act is Section 7 of *Canadian International Trade Tribunal Procurement Inquiry Regulations*, S.O.R./93-602 (the Regulations)

which provides in part:

**CONDITIONS FOR INQUIRY**

7. (1) The Tribunal shall, within five working days after the day on which a complaint is filed, determine whether the following conditions are met in respect of the complaint:

(a) the complainant is a potential supplier;

(b) the complaint is in respect of a designated contract; and

(c) the information provided by the complainant, and any other information examined by the Tribunal in respect of the complaint, discloses a reasonable indication that the procurement has not been conducted in accordance with whichever of Chapter Ten of NAFTA, Chapter Five of the Agreement on Internal Trade or the Agreement on Government Procurement applies.

(2) Where the Tribunal determines that the conditions set out in subsection (1) in respect of a complaint have been met and it decides to conduct an inquiry, the Tribunal shall publish a notice of the filing of the complaint in a circular or periodical designated by the Treasury Board.

[Emphasis added.]

**CONDITIONS DE L'ENQUÊTE**

7. (1) Dans les cinq jours ouvrables suivant la date du dépôt d'une plainte, le Tribunal détermine si les conditions suivantes sont remplies :

a) le plaignant est un fournisseur potentiel;

b) la plainte porte sur un contrat spécifique;

c) les renseignements fournis par le plaignant et les autres renseignements examinés par le Tribunal relativement à la plainte démontrent, dans une mesure raisonnable, que la procédure du marché public n'a pas été suivie conformément au chapitre 10 de l'ALÉNA, au chapitre cinq de l'Accord sur le commerce intérieur ou à l'Accord sur les marchés publics, selon le cas.

(2) Si le Tribunal détermine que les conditions énoncées au paragraphe (1) sont remplies et s'il décide d'enquêter sur la plainte, il fait paraître un avis du dépôt de la plainte dans une circulaire ou un périodique désigné par le Conseil du Trésor.

[Je souligne]

[25] In *E. H. Industries Ltd. v. Canada (Minister of Public Works and Government Services)*, 2001 FCA 48, Malone J. A. for the Court wrote at paragraph 9 that the three conditions set out in subsection 7(1) of the Regulations must be met in order for the Tribunal to have jurisdiction.

[26] The provisions Equinox claims have been violated by PWGSC are the following:

***Agreement on Internal Trade (AIT)***

**Article 501: Purpose**

Consistent with the principles set out in Article 101(3) (Mutually Agreed Principles) and the statement of their application set out in Article 101(4), the purpose of this Chapter is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency.

**Article 506: Procedures for Procurement**

6. In evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, transition costs, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.

[Emphasis added.]

***North American Free Trade Agreement***

***Accord sur le commerce intérieur (ACI)***

**Article 501 : Objet**

Conformément aux principes énoncés au paragraphe 101(3) (Principes convenus) et à leurs modalités d'application énoncées au paragraphe 101(4), le présent chapitre vise à établir un cadre qui assurera à tous les fournisseurs canadiens un accès égal aux marchés publics, de manière à réduire les coûts d'achat et à favoriser l'établissement d'une économie vigoureuse, dans un contexte de transparence et d'efficience.

**Article 506 : Procédures de passation des marchés publics**

6. Dans l'évaluation des offres, une Partie peut tenir compte non seulement du prix indiqué, mais également de la qualité, de la quantité, des coûts de transition, des modalités de livraison, du service offert, de la capacité du fournisseur de satisfaire aux conditions du marché public et de tout autre critère se rapportant directement au marché public et compatible avec l'article 504. Les documents d'appel d'offres doivent indiquer clairement les conditions du marché public, les critères qui seront appliqués dans l'évaluation des soumissions et les méthodes de pondération et d'évaluation des critères.

[Je souligne.]

***Accord de libre-échange nord-américain***

**Article 1008: Tendering Procedures**

1. Each Party shall ensure that the tendering procedures of its entities are:

- (a) applied in a nondiscriminatory manner; and

[...]

**Article 1015: Submission, Receipt and Opening of Tenders and Awarding of Contracts**

4. An entity shall award contracts in accordance with the following:

- (a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation;

[Emphasis added.]

**Article 1008 : Procédures de passation des marchés**

1. Chacune des Parties fera en sorte que les procédures de passation des marchés suivies par ses entités

- a) soient appliquées de façon non discriminatoire, et

[...]

**Article 1015: Présentation, réception et ouverture des soumissions et adjudication des marchés**

4. L'adjudication des marchés s'effectuera conformément aux procédures suivantes :

- a) pour être considérée en vue de l'adjudication, une soumission devra être conforme, au moment de son ouverture, aux conditions essentielles spécifiées dans les avis ou dans la documentation relative à l'appel d'offres, et avoir été présentée par un fournisseur remplissant les conditions de participation;

[Je souligne.]

[27] In addition, Equinox claims the following provisions of the RFP were violated:

**Request For Proposal**

**7.0 Enquiries During the Solicitation Process**

[...]

7.2 All enquiries (questions) regarding this Request For Proposal must be submitted in writing or by E-mail to the Contracting Authority named below as early as possible

within the bidding period. Enquiries must be received no less than 10 calendar days prior to the bid closing date to allow sufficient time to provide a response. Canada makes no commitment to provide answers to questions submitted after such time.

[...]

- 7.3 To ensure consistency and quality of information provided to bidders, the Contracting Authority will provide, simultaneously to all companies to which this solicitation has been sent, any significant enquiries received and the replies to such enquiries without revealing the sources of the enquiries.

[Emphasis added.]

## STANDARD OF REVIEW

[28] It is not disputed that the standard of review applicable to a decision by the Tribunal not to conduct an inquiry is patent unreasonableness (*E. H. Industries Ltd.*, *loc cit.*, at paragraph 12; and *Envoy Relocation Services Inc. v. Canada (Minister of Public Works and Government Services)*, 2005 FCA 364 at paragraph 7). In *E.H. Industries Ltd.*, this Court explained its rationale in light of the words “reasonable indication” found in paragraph 7(1)(c) of the Regulations:

9 [...] Clearly, the purpose of an assessment under subsection 7(1)(c), as to whether or not a complaint discloses a "reasonable indication" of a violation of AIT is to determine if the evidence and arguments in support of the complaint are sufficient to warrant investigation. What the phrase "reasonable indication" means is the subject of debate. There are at least two possible interpretations.

10 The first suggests that "reasonable indication" creates a modest threshold that only allows CITT to refuse to investigate complaints that are almost certain to fail. This interpretation would make it mandatory for the Tribunal to investigate any complaint that reasonably demonstrates that a violation may have occurred. It follows that any complaint that is not frivolous or vexatious must be investigated. Not only does such an interpretation read words into the section, in my analysis, it impairs CITT's discretion in a manner contrary to the legislative scheme.

11 In my opinion, the correct interpretation of subsections 7(1) and (2) must account for the fact that the functions to be performed are administrative in nature. That is, the decision of whether or not to investigate a complaint by conducting an inquiry is non-adjudicative and largely a matter of discretion to which CITT should be accorded a wide degree of

deference. This is made abundantly clear in subsections 7(2) where even in the circumstance where the conditions set out in subsection (1) have been met, CITT may still decide not to conduct an inquiry.

12 It follows that the Tribunal's decision not to conduct an inquiry should only be the subject of intervention by this Court where it is patently unreasonable. In reaching this conclusion, I am supported by the decision of another panel of this Court in *Jastram Technologies Inc. v. Canada (Minister of Public Works and Government Services)*, [2000] F.C.J. No. 367 (Q.L.)(F.C.A.) where Robertson J.A. concluded that where the CITT had refused to investigate a complaint on the issue of timeliness that the standard of review was patently unreasonable.

[Emphasis added.]

## **SUBMISSIONS OF THE PARTIES**

[29] The applicant claims firstly that it is impossible to determine that a decision maker is biased in favour of one bidder without finding that the decision maker is biased against the other bidders. By limiting its inquiry to bias in favour of LGS without also considering whether there was bias against the applicant, the Tribunal committed a patently unreasonable error which is apparent on the face of its decision. In addition, by determining that it would not consider the evaluation of the applicant's bid, the Tribunal cannot establish the basis for a comparison of the relative evaluation of the LGS and Equinox bids and, thus, cannot determine whether there was an apprehension of bias in favour of LGS on the basis of the test for bias.

[30] Secondly, the applicant takes issue with the Tribunal's determination regarding "the existence of a financial evaluation tabulation as insufficient evidence to demonstrate that Equinox's proposal had been found compliant". The applicant argues that there was other evidence in support of its complaint which the Tribunal ignored. The applicant submits that the Tribunal made a patently unreasonable error in not looking at the whole bidding process relative to the applicant,

including the requirements under AIT and NAFTA, before deciding not to inquire into the complaint.

[31] The respondent submits that the Tribunal, under subsection 7(1) of the Regulations, is required to determine whether the information before it discloses a “reasonable indication” of a breach of the proper procurement process. The respondent submits that the Tribunal properly considered the evidence before it and did nothing patently unreasonable in finding the applicant’s financial proposal was not compliant with the RFP requirements.

## **ANALYSIS**

[32] Based on the disclosure of new documents from the Access to Information request, the complaint raises issues of a fundamental nature related to equal access to a procurement process for all Canadian suppliers, non-discrimination in the tendering procedures, and transparency in the tendering process. These elements are all part of the integrity of the system the invoked legislative provisions are meant to protect. While the decision of whether or not to investigate a complaint has been characterized by this Court in *E.H. Industries Ltd.* as administrative in nature and non adjudicative, the new documents point to the amendment by PWGSC of Equinox’s bid in a manner not yet explained, and show an appearance of a preferred treatment of the LGS proposal. The wide discretion accorded to the Tribunal by the case law does not go so far as permitting the Tribunal to set aside evidence of such character while it accepts at the same time to investigate a closely connected facet of the same bid process, i.e. the evaluation of LGS’s proposal “in comparison to that of Equinox” (letter of February 19, 2007).

[33] In its letter of February 14, 2007, the Tribunal determined that it would limit its inquiry to three issues, the third one being that “PWGSC did not treat the bidders equally, thereby creating a reasonable apprehension of bias in favour of LGS”.

[34] It is difficult to understand how the Tribunal would accept to inquire into “the apprehension of bias in relation to how LGS Group Inc.’s proposal was evaluated in comparison to that of Equinox” (letter of February 19, 2007) and yet refuse to consider the grounds of complaint filed by Equinox “relating to the improper evaluation of Equinox’s bid”. An acceptance to look into the evaluation of LGS’ bid in light of the applicable legislation will throw no light on whether PWGSC treated the bidders equally (letter of February 14, 2007) since all the relevant bidders will not have been included in the inquiry and analysis.

[35] The new evidence obtained by Equinox through the Access to Information request challenges the earlier statement of PWGSC that Equinox’s financial proposal was non-compliant and that Canada did not proceed further with an evaluation of Equinox’s bid (letter of PWGSC dated December 12, 2005). It appears on the face of the evidence, that Equinox’s bid was in fact evaluated and a confidentially disclosed amount of money was added to its bid. It is not open to the Tribunal to refuse to inquire into PWGSC’s evaluation of the Equinox bid, without impairing the appearance of equal access of the bidders, as is required by the AIT and the NAFTA.



[36] Such alleged breaches, which challenge the basic principles of AIT and NAFTA, warrant the intervention of this Court.

## **CONCLUSION**

[37] I would allow, with costs, this application for judicial review, I would set aside partly the decisions of the Tribunal dated February 14, 2007 and February 19, 2007, and I would order that the Tribunal independently inquire into whether Equinox's bid was improperly evaluated and when investigating bias, I would order that it consider bias for and against both Equinox and LGS.

"Alice Desjardins"

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J.A.

"I agree  
M. Nadon J.A."

"I agree  
Johanne Trudel J.A."

**FEDERAL COURT OF APPEAL**  
**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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**REASONS FOR JUDGMENT BY:** DESJARDINS J.A.

**CONCURRED IN BY:** NADON J.A.  
TRUDEL J.A.

**DATED:** January 29, 2008

**APPEARANCES:**

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