Federal Court of Appeal | Cour d'appel fédérale

Date: 20110914

Docket: A-39-11

Citation: 2011 FCA 251

CORAM: **SHARLOW J.A.**
PELLETIER J.A.
MAINVILLE J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

SIEMENS ENTERPRISE COMMUNICATIONS INC.

Respondent

Dealt with in writing without appearance of parties.
Judgment delivered at Ottawa, Ontario, on September 14, 2011

REASONS FOR JUDGMENT BY: MAINVILLE, J.A.

CONCURRED IN BY: SHARLOW J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] The Attorney General of Canada (the "Crown") has applied for judicial review seeking to quash a determination of the Canadian International Trade Tribunal (the "Tribunal") issued on December 23, 2010 with reasons issued on April 19, 2011 in the matter of various complaints filed by Siemens Enterprise Communications Inc. ("Siemens"), formerly Enterasys Networks of Canada Ltd., pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.) c. 47 (the "Act") and concerning Requests for Volume Discounts ("RVD") 773, 781, 783, 784 and 785 and bearing Tribunal file numbers PR-2010-049, PR-2010-050 and PR-2010-056 to PR-2010-058.

[2] The Tribunal's inquiry into these complaints was carried out within the context of a series of inquiries dealing with complaints filed by Enterasys Networks of Canada Ltd. and concerning various RVDs for the supply of networking equipment by the Department of Public Works and Government Services ("PWGSC") on behalf of various federal government departments under a Networking Equipment Support Services National Master Standing Offer, which is a means by which federal government departments may obtain computer networking equipment.

[3] The Crown's principal submissions challenge a) the standing of Siemens and the jurisdiction of the Tribunal concerning some of the complaints, b) the Tribunal's interpretation of Article 1007(3) of the *North American Free Trade Agreement* entered into between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America signed on December 17, 1992 and contemplated by the *North American Free Trade Agreement Implementation Act*, S.C. 1993, c.44 ("*NAFTA*") as it relates to the use of brand names in procurements, and c) the Tribunal's findings regarding the inadequacy of certain time frames in respect of some of the RVDs.

Lack of standing or of jurisdiction

[4] The Crown's main argument in respect to the complaints related to RVD 773, RVD 781 and RVD 785 is that the Tribunal had no jurisdiction because Siemens was not a "potential supplier" nor an "interested party" under the meaning of section 30.1 of the Act, and consequently could not

submit complaints under section 30.11 of the Act since neither Siemens nor any of its agents had submitted a bid in response to these RVDs and the Tribunal had found that no act of PWGSC in the procurement process had precluded Siemens from submitting a bid.

[5] The Tribunal rejected the Crown's arguments on standing and jurisdiction in this case on the same basis as it had rejected a similar objection in its determination concerning another complaint of Enterasys Networks of Canada Ltd., bearing Tribunal file number PR-2009-080. The Tribunal's determination in that file PR-2009-080 was recently reviewed by this Court in *Attorney General of Canada v. Enterasys Networks of Canada Ltd.*, 2011 FCA 207 ("*Enterasys*") at paragraphs 5 to 17. In *Enterasys*, Sharlow J.A. reasoned that in light of the Tribunal's findings of fact the complainant had not been precluded from bidding by any aspect of the procurement process that was objectionable under the *NAFTA*, the complainant did not meet the statutory definition of "potential supplier" and therefore the Tribunal was obligated, as a matter of law, to dismiss the complaints.

[6] In this case, the Tribunal reached similar findings of fact in concluding that "PWGSC's action did not preclude Siemens from submitting a bid and, possibly, being awarded a contract" (Tribunal Reasons at paragraph 274). The circumstances in this case are therefore indistinguishable from those in *Enterasys* and the reasons set out therein are thus binding on this panel of the Court. Consequently, the Crown's application for judicial review should be allowed on this point and the Tribunal's determinations in respect of the complaints pertaining to RVD 773, RVD 781 and RVD 785 should be quashed and the matter returned to the Tribunal with a direction that those complaints be dismissed.

Use of brand names

[7] The complaints pertaining to the use of brand names contrary to Article 1007(3) of the *NAFTA* were made in relation to RVD 773 and RVD 781 (Tribunal Reasons at paragraphs 2 to 14). As noted above, the complaints concerning RVD 773 and RVD 781 should be rejected on the basis of lack of standing or of jurisdiction; it should therefore not be necessary to consider the issue of the use of brand names for the purpose of disposing of this application for judicial review. However, since this issue was also dealt with in *Enterasys*, and in light of the similarities between this case and *Enterasys*, I will add the following.

[8] The Tribunal's determination in this case concerning the use of brand names for the purposes of procurement was largely based on its previous determination relating to the complaints of Enterasys Networks of Canada Ltd. in Tribunal file PR-2009-080 which was reviewed at length by this Court in *Enterasys*, above, at paragraphs 18 to 27. In *Enterasys*, Sharlow J.A. did not accept the proposition implicit in the Tribunal's determination that Article 1007(3) of the *NAFTA* necessarily requires the federal government to take unacceptable operational risks in procuring equipment. It follows that the Tribunal, in determining whether a particular procurement may use a brand name specification, cannot disregard or discount as irrelevant evidence submitted by PWGSC in support of its position that the use of brand names in relation to a particular procurement was necessary to avoid an unacceptable operational risk (*Enterasys* at paragraph 25).

[9] In this case, as in *Enterasys*, the Tribunal's interpretation and application of Article 1007(3) of *NAFTA* was unreasonable in that the Tribunal concluded that no exception to the use of brand names could be sustained on the basis of operational risks, and consequently none of the evidence concerning such risks was pertinent (see notably paragraphs 151 to 153 of the Tribunal's Reasons).

Adequacy of time

[10] The Crown's objection on the basis of standing or jurisdiction did not extend to the complaints with respect to RVD 784 and RVD 783, and consequently the principles set out in *Enterasys* do not find application in respect to these complaints.

[11] The Tribunal found that the bidding periods for RVD 784 and RVD 783 were less than the 4 working days specified in the applicable National Master Standing Offer, and thus contravened Article 1012 of the *NAFTA* which calls for adequate time for suppliers to prepare and submit tenders.

[12] The Crown concedes that the bidding period for RVD 784 was less than the specified 4 working days, but argues that it was justified to reduce the applicable time frame for reason of the urgency of the concerned procurement. Since the solicitation period for this RVD 784 closed on August 24, 2010 and the contract was only awarded on September 13, 2010, the Tribunal found that the Crown had not shown that urgency justified the shortened time frame. Based on the record before me, I cannot find that the conclusion of the Tribunal on this issue was unreasonable.

[13] The Crown also disputes that the bidding period for RVD 783 was less than 4 working days, and asserts that the Tribunal erred in fact at paragraph 216 of its Reasons in finding that "the solicitation period for RVD 783 was limited to two partial and two full working days." Rather, the Crown claims that the bidding period for RVD 783 consisted of 3 full working days and two half working days for a total of 4 working days. However, whether the Tribunal erred or not in calculating the number of days, or whether half working days should be considered or not for the purposes of calculating the bidding period are issues which need not be addressed in the context of this judicial review in light of the Tribunal's conclusion that the degree to which Siemens was prejudiced could have been minimal or even non-existent (Tribunal Reasons at paragraph 275). As noted in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 40, the Federal Court, and by necessary implication this Court, holds a discretion to grant or withhold relief in judicial review proceedings, a discretion which, of course, must be exercised judicially and in accordance with proper principles. A decision of this Court on the calculation of the bidding period will not affect the Tribunal's conclusions as to the lack of prejudice to Siemens and the unavailability to it of any remedies. In these circumstances, a discussion of the method of calculation and of the adequacy of bidding periods for procurement purposes under *NAFTA* is better left for another day.

Costs

[14] Though the Crown has been largely successful in its application for judicial review, the issues which it raised were for the most part already dealt with in *Enterasys*. Moreover, the Tribunal's conclusion as to the unjustified reduction of the 4 working days bidding period for RVD 784 has been found to be reasonable. Finally, the respondent has not participated in these judicial review proceedings. Taking into account all of these factors, I would make no order as to costs.

Conclusions

[15] I would allow in part the Crown's application for judicial review, quash the determinations of the Tribunal in respect of the complaints pertaining to RVD 773, RVD 781 and RVD 785, and return the matter to the Tribunal with a direction that those complaints be dismissed.

"Robert M. Mainville"
J.A.

"I agree
K. Sharlow J.A."

"I agree
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-39-11

Application for judicial review from a determination dated December 23, 2010 of the Canadian International Trade Tribunal

STYLE OF CAUSE:	Attorney General of Canada v. Siemens Enterprise Communications Inc.

DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR JUDGMENT BY:	Mainville J.A.
CONCURRED IN BY:	Sharlow J.A. Pelletier J.A.
DATED:	September 14, 2011

WRITTEN REPRESENTATIONS BY:

David M. Attwater	FOR THE APPLICANT

SOLICITORS OF RECORD:

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