Federal Court of Appeal  Cour d'appel fédérale

**Date: 20121119**

**Docket: A-387-11**

**Citation: 2012 FCA 298**

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

**BETWEEN:**

**ACKLANDS-GRAINGER INC.**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Ottawa, Ontario, on October 17, 2012.

Judgment delivered at Ottawa, Ontario, on November 19, 2012.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

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

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## REASONS FOR JUDGMENT

**SHARLOW J.A.**

[1] This is an application for judicial review of a decision of the Canadian International Trade Tribunal dismissing the complaint of Acklands-Grainger Inc. (Acklands) in respect of a solicitation issued by the Department of Public Works and Government Services Canada (Public Works) for the procurement of fire, safety and rescue equipment pursuant to national standing offers.

[2] Acklands is a distributor of industrial safety and fastener products and equipment. It acquires fire, safety and rescue equipment products from a variety of manufacturers who would have been entitled to bid on the solicitation in issue in competition with Acklands.

[3] Acklands complained to the Tribunal that the solicitation gave manufacturers an unfair advantage over other bidders, and also gave rise to a conflict of interest, in breach of the trade agreements to which Canada is a signatory. The Tribunal determined that the complaint was not valid, and dismissed it with costs.

[4] Acklands has applied for judicial review of the decision of the Tribunal. It is seeking an order quashing the decision and returning this matter to the Tribunal with a direction that the complaint be found valid. For the following reasons, I have concluded that this application for judicial review should be dismissed.

Standard of review

[5] The standard of review in this case is reasonableness: *Zenex Engineering Ltd. v. Defence Construction (1951) Ltd.*, 2008 FCA 109, at paragraphs 20 and 25. Judicial review on the reasonableness standard requires consideration of the decision itself and reasons given for it. The decision must fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", and the reasons must establish "justification, transparency and intelligibility within the decision-making process": *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47.

Preliminary matters

[6] The decision of the Tribunal was issued on September 19, 201! (Procurement Inquiry File PR-2011-007). The application for judicial review was filed within the 30 days required by section

28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. However, the proceedings in this Court were delayed because the Tribunal's reasons were not issued until January 31, 2012.

[7] The Tribunal has the jurisdiction to adjudicate disputes in government procurement matters to which certain trade agreements apply. In this case, there was no dispute as to the jurisdiction of the Tribunal to deal with the Acklands complaint.

[8] The complaint of Acklands relates primarily to what may be referred to as the non-discrimination provisions of the applicable trade agreements. It is not necessary to quote the relevant provisions. It is common ground that they are all intended to prevent governments from adopting a procurement process that gives a potential bidder or class of potential bidders an unfair competitive advantage over others.

[9] Acklands asserted a second basis for its complaint, namely, that the solicitation gives rise to a conflict of interest because of the degree to which potential bidders who are manufacturers can influence the bidding process. The Tribunal concluded that the allegation of conflict of interest, understood against the factual context and the submissions of Acklands, is subsidiary to the allegation of unfair discrimination and does not warrant separate consideration. In its written and oral submissions in this Court, counsel for Acklands challenged the Tribunal's conclusion on this point. Those submissions were rejected without requiring an oral response from counsel for the Crown. Accordingly, the only substantive issue in this application for judicial review is whether the Tribunal was reasonable in concluding that the procurement process in issue did not give manufacturers an unfair competitive advantage over other bidders.

Background

[10] Public Works has a mandate to provide other federal government departments with many services, including services related to the acquisition of goods. On February 3, 2011, Public Works issued a solicitation for the procurement of fire, safety and rescue equipment. The solicitation took the form of a request for standing offers. Its purpose was to establish national master standing offers for the supply of firefighting, safety and rescue equipment for various government departments on an as-and-when-required basis. The standing offers would be for a period of one year. Public Works would have the option to extend the standing offers for two subsequent one-year periods.

[11] Under the solicitation in issue, all fire, safety and rescue equipment was categorized into one of three major groups: (a) firefighting equipment, (b) safety equipment, and (c) rescue equipment. The products were further broken down into 24 categories: 7 categories of firefighting equipment, 12 categories of safety equipment, and 5 categories of rescue equipment.

[12] For each of the 24 categories, Public Works identified specific manufacturers whose goods could be supplied in that category. Each eligible manufacturer of products within any of the 24 categories could choose which product or products within that category it was prepared to supply.

[13] A bidder could be either an eligible manufacturer or a distributor who acquired the products from an eligible manufacturer. In other words, distributors were in competition with all eligible manufacturers, even though those same manufacturers were necessarily the source of the products. Only bidders capable of supplying a minimum of 90% of the eligible manufacturer's products in the category which they proposed to supply could win a standing offer for that category.

[14] Eligible manufacturers were requested to provide all distributors with a price list for all of the products they were prepared to supply, organized according to the 24 product categories. Each listed price was to be "the price suggested by the manufacturer for small quantity sales directly to the consumer", referred to in the solicitation as the "manufacturer's suggested retail price" or "MSRP". They would be used as benchmark prices for that manufacturer's products for the purposes of the solicitation. It appears that Public Works assumed that a manufacturer's MSRP for a particular product would reflect the actual retail value of that product. That assumption has not been challenged.

[15] Each bidder who was not an eligible manufacturer was required to obtain the most recent common MSRP list from each eligible manufacturer whose products it sought to supply. The common MSRP list could be one that the manufacturer had already produced for its own purposes, or one that was prepared specifically for the purposes of the solicitation in issue.

[16] For any product category, each bidder was required to specify a single discount percentage rate to be applied to the MSRP for all of that manufacturer's products within the category. The bidder was also required to submit, with its bid, a document from the manufacturer stating that the bidder was authorized by the manufacturer to supply that manufacturer's products for the purposes of the solicitation in issue.

[17] The bids were to be ranked by Public Works in descending order of the percentage discounts (that is, the higher the percentage discount, the higher the bid would be ranked). In order for a particular manufacturer's products in a given product category to be considered, a minimum of

three bids to supply that manufacturer's products was required. If there were sufficient responsive offers, three standing offers were to be issued with respect to each product category. Only the bidders whose bids ranked first, second and third would be issued a standing offer.

[18] Once the standing offers were issued under the solicitations in issue, the percentage discounts were to remain fixed for the duration of the standing offer. However, the solicitation provided for the potential revision of the MSRP lists every six months on the basis of "current market conditions" (an undefined term). As a result of enquiries from bidders during the solicitation process, certain amendments were made to the solicitation regarding the price change mechanism. The meaning of those amended provisions was the matter of some dispute before the Tribunal. Ultimately the Tribunal concluded that an update to a particular manufacturer's MSRP list for a product category would be considered only if the same list was submitted to Public Works by all three standing offer holders for that category, and that the standing offer holders would receive the updated list directly from the manufacturer. In effect, each standing offer holder had the power to veto any proposal by a manufacturer to update its MSRP list.

Discussion

[19] The complaint of Acklands is that the initial price setting mechanism established by the solicitation in issue, as well as the price update mechanism, gives manufacturers a competitive advantage over distributors in addition to its inherent competitive advantage as a manufacturer. The submissions made by Acklands in this Court are substantially the same as the submissions it made to the Tribunal, which the Tribunal rejected. In light of the Tribunal's cogent and detailed reasons, I

do not consider it necessary to do more than summarize the position of Acklands and the Tribunal's conclusions on each major point.

*(a) Initial pricing mechanism*

[20] Acklands does not contend that the participation of eligible manufacturers as bidders in competition with distributors of its products could, in and by itself, support a complaint of discrimination or unfair competition. Any such complaint would have failed in the face of the Tribunal's rejection of a similar proposition in *Re Complaint Filed by CAE Inc.*, 7 September 2004, PR-2004-008. This is explained as follows in paragraphs 73 to 77 of the Tribunal's reasons in this case (footnotes omitted):

> **¶73.** It is clear that, under normal commercial circumstances, all suppliers, whether manufacturers, distributors or resellers, will possess certain natural competitive advantages vis-à-vis other suppliers. For manufacturers, advantages may lie in their ability to produce goods efficiently while keeping costs, such as input costs and labour costs, as low as possible. For distributors or resellers, advantages may lie in their ability to carry a larger selection of products and to reduce logistical costs normally associated with getting those products in the hands of consumers. For example, they may have warehouses located across the country, established distribution networks and special freight agreements or rates.
>
> **¶74.** It is also understood that, under normal commercial circumstances, distributors may have preferred relationships with specific manufacturers, which results in their obtaining advantageous pricing and commercial terms. Mr. Kaul specifically recognized that such relationships are commonplace. Notwithstanding the existence of preferred relationships, the Tribunal tends to believe that manufacturers generally want to foster positive relationships with all their distributors and resellers, as they help to ensure that the products fabricated by these manufacturers actually make it to market.
>
> **¶75.** Thus, in the context of a solicitation where manufacturers, distributors and resellers compete against each other, it is entirely reasonable to expect that they will each rely on their respective natural competitive advantages in order to offer the lowest possible price or, in the context of the current solicitation, the greatest percentage discount from the prices set out in common MSRP lists. These inherent advantages, which exist independently from the manner in which a solicitation is structured, do not lead to the conclusion that tendering procedures are discriminatory.

**¶76.** This principle was explicitly recognized by the Tribunal in *CAE Inc.*, where it stated the following:

> [43] Regarding the first ground of complaint that PWGSC and DND failed to ensure equal access to the procurement, the Tribunal does not believe that there is necessarily anything inherently discriminatory in the tendering procedures where bidders are on an unequal footing going into the bidding process. As stated by CAE in its March 15, 2004, letter to PWGSC: 'There is no question that certain bidders have certain competitive advantages in certain bids. This is simply part of the ordinary ebb and flow of business." The Tribunal notes that these competitive advantages could be created as a result of incumbency, [intellectual property], [International Traffic in Arms Regulations] or any number of other business factors. The Tribunal is in agreement with CAE's statement as quoted above and is of the opinion that, if a bidder is at a disadvantage, it does not necessarily follow that the tendering procedures used by PWGSC are discriminatory. [Footnote omitted]

**¶77.** Therefore, while the trade agreements impose fairness and transparency obligations upon government entities, the Tribunal is of the view that these obligations cannot be interpreted in a fashion that would require the government to adopt tendering procedures that seek to eliminate the effects of any natural or legitimate competitive advantages that may be held by suppliers. In fact, such tendering procedures, if they were adopted, would likely be construed as discriminatory.

[21] With respect to the initial pricing mechanism, the main argument of Acklands is that because only eligible manufacturers have the right to set the benchmark price for their products, they can manipulate the benchmark prices in their favour and to the prejudice of distributors. Acklands says that this ability to manipulate benchmark prices is not attributable to any inherent advantage of manufacturers, but is entirely the result of the provision in the solicitation that gives manufacturers the power to set the benchmark price.

[22] Suppose that a particular distributor, Smithco, is prepared to supply Product B for $40. It could offer a 20% discount for this category, for any or all of the eligible manufacturers. However,

by the terms of the solicitation, a 20% bid with respect to the Yco products within the category would apply to all Yco products within the category. That means that the bid price for Yco's Product A would be $1,600.

[23] For this product category, bids could be submitted by Xco, Yco, Zco, and any number of other bidders who could acquire Product A from Yco, and Product B from Xco, Yco and Zco. Note that Yco as the manufacturer of Product A would always be able to ensure for itself a price of $1,600 for Product A by submitting a bid for a 20% discount.

[24] Suppose that a particular distributor, Smithco, is prepared to supply Product B for $40. It could offer a 20% discount for Product B acquired from any of the three eligible manufacturers. However, by the terms of the solicitation, Smithco's offer of a 20% discount would apply to all products within the category. Thus, the same 20% discount would have to be applied to Yco's Product A, resulting in a price for Product A of $1,600.

[25] Now, suppose that the $1,600 price for Product A is unacceptable to Smithco because Yco will not sell Product A to Smithco for less than $1,600. If Smithco wishes to submit a bid that ensures that its sale price for Product A is more than $1,600, it would have to ensure that its discount is less than 20% for all Yco products in the category. That necessarily means that, in respect of Product A, Smithco's bid would always rank behind the bid of Yco.

[26] It is part of the inherent advantage of Yco, as manufacturer of Product A, to determine Smithco's cost of Product A at $1,600. However, Acklands argues that because the solicitation

gives manufacturer Yco the further right to set the benchmark price of Product A at $2,000 through its MSRP, Yco has a competitive advantage over Smithco with respect to Product A that is not part of Yco's inherent advantage as manufacturer.

[27] The Tribunal concluded, contrary to the submission of Acklands, that any advantage that might accrue to a manufacturer by virtue of its right to set the benchmark price of the products within a particular category is in fact part of its inherent advantage as a manufacturer and supplier of products to bidders who are its distributors. That advantage flows naturally from the knowledge of a manufacturer of the product costs of its distributors, and the degree of control it has over those costs. That competitive advantage would exist even in respect of a solicitation that did not use a common MSRP list as a benchmark price. Therefore, the use of that pricing technique does not give manufacturers any advantage they do not already have by virtue of being manufacturers.

[28] In my view, it was reasonable for the Tribunal to conclude, on the basis of the record before it, that the inherent advantages of manufacturers existed independently of the pricing mechanism chosen for the solicitation in issue, and were not substantially altered or enhanced by the requirement that manufacturers effectively set the benchmark price for their products.

[29] Acklands also submitted, with respect to the initial price setting mechanism, that manufacturers are under no enforceable obligation to provide the same MSRP list to all bidders. Since a bidder who submits a MSRP list of a particular manufacturer that is not the same as the MSRP list submitted by a majority of that manufacturer's distributors would be deemed non-compliant, the manufacturer effectively has the power to exclude any bidder.

[30] The Tribunal agreed that a manufacturer could not be forced to give the same MSRP list to all bidders and so had a certain ability to cause the exclusion of some bidders. However, the Tribunal noted that a manufacturer inherently has the advantage of excluding a bidder because it might significantly increase its price to a bidder, offer unfavourable terms to a bidder, or refuse to sell to a bidder. The Tribunal concluded that this inherent advantage was no greater as a result of the manufacturer being able to set the benchmark price. In my view, that conclusion is reasonable.

*(b) Price adjustment mechanism*

[31] Acklands submitted that the price adjustment mechanism is fatally flawed because a manufacturer was not obliged to provide the same updated MSRP list to all standing offer holders. The Tribunal rejected that submission on the basis of its interpretation of the terms of the solicitation, as explained above. In my view, that interpretation of the solicitation was reasonably open to the Tribunal, and is a complete answer to this aspect of Acklands' complaint.

[32] Acklands also submitted that manufacturers could make strategic changes to their MSRP lists to favour their own bid, or the bid of a favoured distributor. For example, manufacturers and their preferred suppliers could submit a greater percentage discount initially, increasing their chance of receiving a standing offeqr, and then subsequently submit a new MSRP with higher prices to reduce the burden of the discount. The Tribunal rejected this submission on the basis that any such attempted manipulation would likely result in a subsequent price increase beyond what market conditions would justify, and also would likely result in a rejection of the new MSRP. Again, in my view this was a reasonable conclusion on the part of the Tribunal on the record before it.

[33] Acklands submitted that the fact that Public Works purported to reserve the right to reject an amended MSRP list provided no protection against unfair price manipulation by a manufacturer, because the solicitation did not state any standards or parameters by which Public Works would exercise its discretion to accept or reject an amendment, except a reference to "reasonableness". However, the Tribunal was not persuaded that Public Works would exercise its discretion in an arbitrary or complacent manner, or that it would fail to consider the purpose for which it retained this discretion, which was to deter potential future abuse by standing offer holders. In my view, that conclusion was reasonably open to the Tribunal on the basis of the record before it.

Conclusion

[34] For these reasons, I would dismiss the application for judicial review with costs.

"K. Sharlow"

J.A.

"I agree
Marc Noël J.A."

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

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-387-11 |
| **(APPLICATION MADE FOR JUDICIAL REVIEW OF A DECISION OF THE CANADIAN INTERNATIONAL TRADE TRIBUNAL IN PROCUREMENT INQUIRY PR-2011-007 ISSUED SEPTEMBER 19, 2011)** | |
| **STYLE OF CAUSE:** | Acklands-Grainger Inc. v. Attorney General of Canada |
| **PLACE OF HEARING:** | Ottawa, Ontario |
| **DATE OF HEARING:** | October 17, 2012 |
| **REASONS FOR JUDGMENT BY:** | SHARLOW J.A. |
| **CONCURRED IN BY:** | NOEL, PELLETIER JJ.A. |
| **DATED:** | November 19, 2012 |

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