Federal Court of Appeal | Cour d'appel fédérale

Date: 20201006

Docket: A-241-19

Citation: 2020 FCA 163

CORAM: **NEAR J.A.**
DE MONTIGNY J.A.
LEBLANC J.A.

BETWEEN:

KILEEL DEVELOPMENTS LTD.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 15, 2020.

Judgment delivered at Ottawa, Ontario, on October 6, 2020.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

I. Overview

[1] This is an application for judicial review of an April 4, 2019 decision of the Canadian International Trade Tribunal (the Tribunal), with reasons issued on April 24, 2019, and cited as *Kileel Developments Ltd.*, 2019 CanLII 110909 (CA CITT), [2019] C.I.T.T. No. 40 (QL)

[Reasons of the Tribunal], in which it dismissed a complaint brought by the applicant, Kileel Developments Ltd. (Kileel), arising from a government procurement process.

[2] In 2018, Public Works and Government Services Canada (Canada) solicited offers for the leasing of office space in Fredericton, New Brunswick. Kileel submitted an offer but the contract was awarded to the Joint Venture of Donald Bondy and Earl Brewer (the Joint Venture). Kileel alleges that the Joint Venture's bid was non-compliant and Canada ought to have disqualified it, which would have left Kileel with the most competitive offer. Kileel argues that, in the result, it should have been awarded the contract.

[3] The Tribunal dismissed Kileel's complaint. Kileel now applies to this Court for judicial review of the Tribunal's decision.

[4] For the reasons that follow, I would dismiss the application.

II. Facts

[5] On February 14, 2018, Canada issued an Invitation to Submit an Expression of Interest to lease office space to it in Fredericton. It received responses from three parties: Kileel, the Joint Venture, and Ross Ventures Ltd. (Ross). All parties proposed the construction of a new building.

[6] On August 2, 2018, Canada issued an Invitation to Offer (ITO) to the parties. The ITO required bidders to provide values for proposed usable area and rentable area in accordance with the Measurement Instructions contained in the ITO. The total usable area had to be at least

3,310.65 square metres. According to the Measurement Instructions, the rentable area consisted of the usable area plus “Accessory Areas” like washrooms, electrical closets, and public corridors. Thus, in the final building, the rentable area would necessarily be larger than the usable area. The annual rental cost a bidder was proposing would be ascertained by multiplying the proposed rentable area by the proposed rental rate per square metre.

[7] The ITO at Clause 5(a), Part 2, also contained provisions ensuring that, no matter what the rentable area ultimately wound up being after construction, Canada would not have to pay an annualized rent above that contemplated in the offer to lease. Thus, the ITO set the minimum space requirements and the maximum rent payable by Canada.

[8] The Kileel bid and the Ross bid proposed rentable area values that were somewhat greater than their proposed usable area values. The Joint Venture bid proposed a rentable area value that was identical to its proposed usable area value. Canada deemed all bids compliant, and proceeded to the financial evaluation stage. The Joint Venture’s bid represented the lowest total annual cost to Canada, and so it selected that bid.

III. The impugned decision

[9] Kileel filed a complaint with the Tribunal under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), alleging the winning bid was non-compliant. After conducting an inquiry, the Tribunal determined that the complaint was not valid.

[10] The Tribunal addressed a jurisdictional argument made by Canada, which has not been raised on this application. The Tribunal found that the *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, Can. T.S. 1994 No. 2 (entered into force 1 January 1994) [*NAFTA*], and the *Protocol Amending the Agreement on Government Procurement*, 30 March 2012, Can. T.S. 2014 No. 12 (entered into force 6 April 2014) [*Revised AGP*], applied to the bidding process, and thus that it had jurisdiction to inquire into the complaint.

[11] The Tribunal determined that the central issue was whether it was an *essential* requirement of the ITO that the rentable area value be larger than the usable area value at the time the bids were submitted. Both *NAFTA* and the *Revised AGP* provide that bids must meet only "essential requirements" to be compliant: *NAFTA*, art. 1015(4)(a); *Revised AGP*, art. XV(4).

[12] The Tribunal considered this issue to be a matter of contractual interpretation. At paragraph 60 of its reasons, the Tribunal cited the Supreme Court of Canada decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 at para. 64 [*Tercon*], for the proposition that, in contractual interpretation, "the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context."

[13] The Tribunal interpreted Clause 5(b) of Part 1 and Clause 5 of Part 2 as requiring bidders to submit values for the usable and rentable area in accordance with the Measurement

Instructions set out in the Tender. The Tribunal accepted that one implication of the Measurement Instructions was that the rentable area would necessarily be larger than the final usable area once construction of the building was complete. However, applying *Tercon*, the Tribunal took into account the purpose of the relevant clauses, the purpose of the process as a whole, and the commercial context, and reasoned that it was not essential for a bidder to provide, at the bidding stage, a value for the rentable area that was larger than that provided for in the usable area: see Reasons of the Tribunal at paras. 72–80.

[14] The Tribunal pointed to the fact "that the true measurement of rentable area will necessarily only be ascertainable once the buildings are constructed and these measurements are verified by the Lessee in accordance with the Measurement Instructions": Reasons of the Tribunal at para. 73. In other words, it was understood by all parties to the process that the rentable area value submitted in the bid would be unlikely to correspond to the final value. In the Tribunal's view, this meant that the purpose of requiring a value for rentable area was simply to fix the maximum annual rent contemplated by a bid: see Reasons of the Tribunal at paras. 73–74. This purpose was achieved by a rentable area value that matched the usable area value, because even if the rentable area proved greater upon construction, Clause 5 of Part 2 provided that Canada would nonetheless pay annualized rent as calculated at the time of the bid.

[15] The Tribunal reasoned that it was therefore not essential that the rentable area value submitted in a bid be higher than the usable area value. In the Tribunal's view, the Joint Venture had not failed to comply with an essential requirement of the bidding process, meaning its bid

was compliant and validly selected by Canada. As such, the Tribunal concluded that the complaint was not valid.

IV. Issue and Standard of Review

[16] The sole issue raised by this application is whether the Tribunal's decision was reasonable.

[17] The parties agree that the standard of review is reasonableness. Although the parties' written submissions were received prior to the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 [*Vavilov*], nothing in that decision changes how this Court must treat this application. The question before the Court is therefore whether the Tribunal's reasoning is internally coherent and justified in light of relevant legal and factual constraints: see *Vavilov* at para. 101.

V. Analysis

[18] In Kileel's view, the Tribunal made three errors in determining that the requirement to provide a value for the rentable area that was greater than the value for the usable area, in accordance with the Measurement Instructions in the ITO, was not an essential requirement. Kileel argues that the Tribunal erroneously prioritized Canada's subjective understanding of the ITO's requirements over an objective perspective of what those requirements were. It further argues that an objective analysis reveals that perfect compliance with the Measurement Instructions was an essential requirement of the bidding process. Finally, it argues that the

Tribunal erroneously endorsed Canada's reliance upon "undisclosed 'commercial leasing practices'" in accepting the Joint Venture's bid as compliant, which Kileel argues undermines the legal principles and policy goals that govern the tendering process.

[19] Before dealing with Kileel's arguments, it is important to note that it remains the case, post-*Vavilov*, that when reviewing a tribunal's decision for reasonableness, the "decision should be approached as an organic whole, without a line-by-line treasure hunt for error": *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458 at para. 54, citing *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para. 14, reaffirmed in *Vavilov* at para. 102.

[20] Thus, it is not this Court's role to conduct its own analysis of the relative importance of the ITO's requirements. Rather, this Court must simply determine whether the Tribunal's reasoning is internally coherent, and its decision reasonable in light of the legal and factual context: see *Vavilov* at para. 101.

[21] I am not convinced that the Tribunal's decision was unreasonable. Instead, I find it both internally coherent, and reasonable in light of the specific facts of the case and the applicable legal rules and principles.

[22] The Tribunal was primarily concerned with the overall purpose of the procurement process, and how the ITO's specific requirements for bidders related to that purpose: see e.g.

Reasons of the Tribunal at para. 65 (“this language must be considered in the context of the requirements of the ITO as well as the purpose of those clauses and of the ITO as a whole”). It understood that conclusively determining the final size of the rentable area, prior to construction, was impossible: see Reasons of the Tribunal at para. 73. It thus determined that the reason a rentable area figure was required at the time of bidding was primarily to establish the maximum amount of rent ultimately payable by Canada.

[23] The Tribunal reached this conclusion based on the presence of the adjustment clause in the ITO. This clause ensured the final annualized rent payable by Canada could not be greater than as calculated at the time of the bid, even if the final rentable area proved larger upon construction than had been proposed in the bid. As the Tribunal wrote at paragraph 68:

> However, Clause 5(a) of Part 2 – Irrevocable Offer to Lease states that “any amount payable under the Lease shall be calculated based upon the actual measured rentable area as determined by the Lessee or the amount of rentable space specified in the Irrevocable Offer to Lease, whichever is less.” … The effect of Clause 5(a) of Part 2 is that the Basic Annual Rent will not increase if the rentable area turns out to be greater than what was quoted in the Irrevocable Offer to Lease – the value that will change is the rental rate per square metre. Accordingly, the government can never be charged more rent than what was quoted in the Offer.
>
> [emphasis added by the Tribunal]

[24] Thus, the Tribunal reasoned that Canada required bidders submit a rentable area figure primarily to calculate annualized rent, and to ensure that bidders understood that the annualized rent figure contemplated in their bid would not increase if the rentable area ultimately increased after construction. In my view, this reasoning is both logical and coherent.

[25] The Tribunal further reasoned that the requirement that a bidder submit a larger value for rentable area than its value for usable area was therefore not essential to the proper functioning of the bidding process as a whole. The purpose of the procurement process was for Canada to obtain leased office space that was both sufficient to meet its needs—*i.e.* that met the usable space requirement—and cost-effective. Given that the final annual cost would not increase if the rentable area increased, the Tribunal reasoned that it was not essential that an accurate estimate of the rentable area be included at the time of the bid. I see no error on the part of the Tribunal in arriving at this conclusion.

[26] Kileel argues that the Tribunal's decision was nonetheless unreasonable because it was inconsistent with the proper application of common law contractual interpretation principles.

[27] To be clear, at issue here is not whether the terms of the ITO required bidders to provide, in their bids, a value for the rentable area that was larger than the proposed value for the usable area. All parties agree that the ITO's language makes this a requirement. However, while Kileel viewed this as an *essential* requirement, Canada and the Joint Venture did not.

[28] Kileel argues that, because the Tribunal ultimately agreed with Canada's interpretation, the Tribunal must necessarily have prioritized Canada's subjective interpretation over the reasonable objective interpretation.

[29] I do not agree. The Tribunal did not base its reasoning on Canada's subjective understanding of the essential requirements. Indeed, the Tribunal understood that it was required

to determine the essential requirements from an objective perspective. It concluded that, viewed objectively, it was not essential that a bid contain a rentable area value larger than the usable area value. As the Tribunal wrote, at paragraph 79:

> The ITO was clear that, regardless of the value of the rentable area and the rental rate, the resulting Basic Annual Rent would be fixed at the time of submission of the Offer, would be used for evaluation purposes and would become the final annual amount of rent in the winning Offer. All Offerors were aware of this condition and acted consistently with this knowledge. Upon evaluating the Offers, [Canada] did not look behind the rentable area values provided by any of the Offerors and simply took those numbers at face value for the purpose of its evaluation.

Thus, in the Tribunal's view, it was both objectively clear and subjectively understood that the purpose of requiring a rentable area value be included in a bid was to fix a maximum value for the total annual rental cost of the lease. The purpose was *not* to establish the actual size of the rentable area, nor to allow Canada to evaluate the bids on the basis of size of the proposed rentable area. Indeed, I agree with the Tribunal that this purpose is objectively clear from the fact that the Tender made provision for the final rentable area to differ, potentially substantially, from the value proposed in the winning bid.

[30] Kileel also argued that Canada relied on "undisclosed 'commercial leasing practices'" in determining that the Joint Ventures's bid was compliant, and that the Tribunal, in referencing Canada's position, endorsed Canada's erroneous approach.

[31] I disagree. Reference by Canada and the Tribunal to common commercial leasing practices was simply an acknowledgment of the commercial context in which the contract was formed. It is necessary to take context into account when interpreting a contract, especially in the

case of tendering contracts: see *Tercon* at paras. 67–68. It was therefore reasonable for the Tribunal to do so.

[32] Kileel's complaint is founded on *NAFTA* and the *Revised AGP*, both of which require that only bids that comply with the "essential requirements" of a tender be considered: *NAFTA*, art. 1015(4)(a); *Revised AGP*, art. XV, (4) [emphasis added]. As the Supreme Court pointed out in *Tercon*, the generally understood purpose of requiring that only compliant bids be considered is to ensure fairness, which in turn "contribut[es] to the integrity and business efficacy of the tendering process": at para. 69.

[33] In other words, the legal requirement of compliance with "essential" or "material" requirements is not intended to eliminate from contention all bids that deviate in technical, immaterial ways from the exact requirements of the tender. It is not to penalize bidders for minor errors that have no impact on how the bidding process unfolds. It is instead to ensure that one bidder cannot in effect undermine the process by submitting a bid that deviates from the tender's requirements in a way that advantages that bidder, and correspondingly disadvantages the others: see e.g. *Tercon* at paras. 67–69.

[34] In this case, the non-compliance of the winning bid was of a technical nature and, in the Tribunal's view, had no material impact on how the bidding process unfolded. It thus followed that in the Tribunal's view, it was not an essential requirement that the rentable area value be larger than the usable area value at the time of the bid. This view is reasonable.

[35] Indeed, I see no error on the part of the Tribunal. *NAFTA*, the *Revised AGP*, and common law doctrine do not require compliance with all requirements, but only with essential requirements. It is understood that winning bids may deviate in immaterial ways from the tender requirements; so long as these requirements are non-essential, and no other bidder is unduly prejudiced, minor deviations from requirements do not make a bid non-compliant.

[36] In my view, it was open to the Tribunal to conclude that the requirement that the proposed rental area value in a bid be larger than the proposed usable area value was not an essential requirement. Such a conclusion is tenable in light of the factual circumstances of the case, and the legal rules that bound the Tribunal: see *Vavilov* at para. 101.

[37] It was therefore reasonable for the Tribunal to decide that Kileel's complaint was not valid.

VI. Conclusion

[38] As a result, I would dismiss the application, with costs.

"D.G. Near"
J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-241-19

APPEAL FROM A JUDGMENT OR ORDER OF THE CANADIAN INTERNATIONAL TRADE TRIBUNAL DATED APRIL 4, 2019, NO. PR-2018-042.

DOCKET:	A-241-19
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DATED:	OCTOBER 6, 2020

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