

Federal Court of Appeal



Cour d'appel fédérale

Date: 20220518

Docket: A-69-21

Citation: 2022 FCA 88

**CORAM: STRATAS J.A.
BOIVIN J.A.
DE MONTIGNY J.A.**

BETWEEN:

SIGMA RISK MANAGEMENT INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the Registry on May 18, 2022.

Judgment delivered from the Bench at Ottawa, Ontario, on May 18, 2022.

REASONS FOR JUDGMENT OF THE COURT BY:

DE MONTIGNY J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Ottawa, Ontario, on May 18, 2022).

DE MONTIGNY J.A.

[1] This is an application for judicial review, whereby the applicant, Sigma Risk Management Inc. (Sigma), seeks an order setting aside the decision of the Canadian International Trade Tribunal (the Tribunal) not to conduct an inquiry into its complaint stemming from a bid for insurance services submitted as part of a government tendering process. The Tribunal found

that Sigma filed its complaint 57 days after being denied relief by Public Works and Government Services Canada (Public Works), well beyond the 10 working day statutory time limit prescribed by section 6 of the *Canadian International Trade Procurement Inquiry Regulations*, S.O.R./93-602 (the Regulations). The Tribunal also came to the conclusion that the complaint disclosed no reasonable indication of a breach of the applicable trade agreement, in this case the *Canadian Free Trade Agreement* (and more particularly Article 507.3(b)), pursuant to section 7 of the Regulations.

[2] Having carefully considered the written and oral submissions of the parties, this Court is of the view that this application cannot succeed.

[3] There is no issue between the parties that the Tribunal's decision must be reviewed according to the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1; *Canada (Attorney General) v. L.P. Royer Inc.*, 2018 FCA 27, 2018 CarswellNat 196 (WL Can) at para. 25.

[4] Sigma argues that the lateness issue raises concerns of procedural fairness and must therefore be assessed against the standard of correctness. However, Sigma does not claim that the Tribunal breached the duty of procedural fairness, but that it ought to have adopted an alternative interpretation of the deadline requirements under subsection 6(2) of the Regulations, namely by starting the clock only once Sigma had been informed of its right to file a complaint. This argument is more properly characterized as an attack on the reasonableness of the Tribunal's application of its home statute.

[5] The Tribunal found as fact that Sigma filed its objection with Public Works on December 4, 2020, and that the department confirmed its decision to deny relief on December 7, 2020.

Thus, Sigma knew – or ought reasonably to have known – that its relief had been denied on that date, from which the 10 day prescribed deadline began to run. That conclusion is perfectly reasonable on the facts, and in line with numerous previous decisions of the Tribunal.

[6] Sigma takes issue with the fact that Public Works waited until January 25, 2021 to advise them of their right to file a complaint with the Tribunal. However, they did not raise this argument before the Tribunal. That alone is sufficient to dispose of the argument, as a reviewing court is loathe to hear new arguments on judicial review that could have, but were not, raised before the administrative decision-maker: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 23.

[7] Moreover, neither the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.) nor the Regulations require Public Works to inform unsuccessful suppliers of their rights to recourse. As stated by this Court in *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284, 291 N.R. 262 (at para. 17) and repeatedly reiterated by the Tribunal, in procurement matters, time is of the essence. It is for the bidders and potential suppliers to exercise caution, to remain vigilant throughout the procurement process and to react promptly to any perceived flaws in the process. This duty to remain vigilant includes a duty to seek out and understand the legal rights in relation to the tendering process and to file a complaint with the Tribunal.

[8] On the merits, the Tribunal found that the most relevant provision of the Canadian Free Trade Agreement was article 507.3(b), which requires that a procuring entity “base its evaluation on the conditions that the procuring entity has specified in advance in its tender notices or tender documentation”. Sigma claims that its proposed resource, who had only one year of experience in risk management process services, complied with the requirements set out in the mandatory criteria of the Request for Standing Offers, to the extent that the requirement of “3 years of related work experience” did not refer directly to three years of experience in risk management. The Tribunal, however, determined that it was open for Public Works to reject the applicant’s bid for failure to meet the mandatory requirements, because when read conjunctively, the three years of experience related both to work in the general area of risk management process services and to other tasks the proposed resource was expected to have experience in. We are of the view that such an interpretation of the solicitation and of its requirement was perfectly reasonable.

[9] For all of the foregoing reasons, the application will be dismissed with costs.

"Yves de Montigny"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-69-21

STYLE OF CAUSE: SIGMA RISK MANAGEMENT
INC. v. ATTORNEY GENERAL
OF CANADA

PLACE OF HEARING: HEARD BY ONLINE VIDEO
CONFERENCE HOSTED BY
THE REGISTRY

DATE OF HEARING: MAY 18, 2022

**REASONS FOR JUDGMENT OF THE COURT
BY:** STRATAS J.A.
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DELIVERED FROM THE BENCH BY: DE MONTIGNY J.A.

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