

Federal Court



Cour fédérale

Date: 20110607

Docket: T-724-10

Citation: 2011 FC 641

Ottawa, Ontario, June 7, 2011

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

TOP ACES CONSULTING INC

Applicant

and

**THE MINISTER OF NATIONAL DEFENCE
AND THE MINISTER OF PUBLIC WORKS
AND GOVERNMENT SERVICES**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review pursuant to section 44 of the *Access to Information Act*, R.S.C., 1985, c. A-1 (the Act), concerns the decision rendered on April 22, 2010 by the Department of National Defence (DND) to disclose certain records in its possession that relates to several National Individual Standing Offers for Interim Contracted Airborne Training Services (the Standing Offers), and the contracts that arise from call-ups to the Standing Offers. The application has been discontinued against the Minister of Public Works and Government Services.

[2] For the reasons that follow, the application for judicial review shall be dismissed.

Facts

[3] The applicant, has in the past years, been awarded several contracts through the Standing Offer process.

[4] On October 13, 2009, DND received an access to information request for all Standing Offers and contracts it awarded to the applicant since January 1, 2003.

[5] On January 19, 2010, the respondent, DND, informed the applicant of the request and asked that it review the enclosed documents to identify any information that, in its view, ought to be protected under the *Access to Information Act* (the Act). The applicant provided its representations on the matter between February 5, 2010 and April 20, 2010, (Applicant's Record, Vol. II, Tab 4, Affidavit of Linda LeBlanc, para 4, sworn July 26, 2010).

[6] The applicant agreed to the disclosure of certain records, but objected to the disclosure of its unit prices as set out in the Standing Offers.

[7] On April 22, 2010, DND advised the applicant that it was going to release the unit prices notwithstanding the applicant's objection; it is this letter (the Decision) that is under review in the present application.

Decision under review

[8] The April 22, 2010 letter states that, due to the disclosure clause found at section 31.0a of the Standing Offers, the unit prices could not be withheld. DND states that such information could be protected in contracts but not in the Standing Offers.

Relevant legislation

[9] The relevant legislation is in the attached appendix.

Issues

[10] The only issue in this application is as follows:

1. Whether the disclosure clause in the Standing Offers can be considered consent by the applicant pursuant to section 30 of the *Defence Production Act*, R.S.C., 1985, c. D-1, (DPA).

Standard of Review

[11] The applicant submits that the standard of review applicable to the judicial review of government decisions pursuant to the Act is correctness, citing *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001, FCA 254, at paras 28-42.

[12] The applicant underscores that, although it was released before *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Federal Court of Appeal in the above decision addressed the factors that need to be examined in a standard of review analysis (listed in *Dunsmuir, supra*, at paras 51 to 55).

[13] The respondent argues that review pursuant to section 44 of the Act requires that the Court undertake a new and independent review of the matter, comparable to a trial *de novo*. It is therefore up to the Court to arrive at its own conclusions based on the evidence adduced (*Blood Band v. Canada (Minister of Indian Affairs and Northern Development)*, 2003 FC 1397, at paras 45 and 46).

[14] I adopt the reasons in *Blood Band, supra*, at para 46 and as such; the Court shall review the evidence and arrived at its own conclusions.

a. Whether the disclosure clause in the Standing Offers can be considered consent by the applicant pursuant to section 30 of the *Defence Production Act*, R.S.C., 1985, c. D-1, (DPA)?

Applicant's arguments

[15] The applicant submits that the government is required to refuse to disclose records requested under the *Act* (section 24(1)) where disclosure is restricted pursuant to section 30 of the *DPA*, which is listed in Schedule II of the *Act*.

[16] The applicant highlights section 1.9 of the Standing Offers, which states that contracts arising from call-ups to the Standing Offers are defence contracts pursuant to the *DPA*. It appears to indicate that the Standing Offers themselves are not defence contracts. But the applicant adds that the *DPA* does not merely prohibit the disclosure of defence contracts, but rather prohibits the disclosure of information obtained “under or by virtue of this act.” As such, the applicant contends that the prohibition is significantly broader than the government purports it to be, and includes the information presented in Standing Offers.

[17] It underscores that DND derives its authority to enter into defence contracts from section 16 of the DPA. Pursuant to the wording of this section, the applicant argues that Standing Offers, which give the government the ability to expedite new contracts for services related to national defence, are “incidental to or necessary or expedient for” the procurement of goods and services.

[18] The applicant further states that this interpretation of section 30 of the DPA has previously been confirmed by the Court in *Siemens Canada Ltd v. Canada (Minister of Public Works & Government Services)*, 2001 FCT 1202, at para 19. In that case, the Court held that it did not matter whether the information requested was part of the contract or was a pre-condition to the formation of the contract for the purpose of section 30 of the DPA.

[19] The applicant therefore argues that, since it does not consent to the disclosure of the records, the government cannot agree to the disclosure request.

[20] With regards to the respondent’s position that a disclosure clause in the Standing Offers allows DND to disclose the records, the applicant urges that DND’s own actions and admissions lead to the conclusion that the disclosure clause cannot be interpreted in this manner because DND has admitted that information contained in contracts is exempt from disclosure by virtue of section 30 of the DPA (Applicant’s Record, letter from DND to the applicant, January 19, 2010, pages 319 and 320). Therefore, even though a disclosure clause in the Standing Offers is present, DND has agreed not to disclose any such information.

[21] The applicant states that DND admitted in its April 22, 2010 letter that information contained in contracts is exempt from disclosure by virtue of section 30 of the DPA notwithstanding the disclosure clause and has therefore agreed not to disclose any such information. The same reasoning should apply for the disclosure clause in the Standing Offers. The applicant therefore submits that the government cannot disclose its unit prices without its consent.

Respondent's arguments

[22] The respondent's position is that the information is not exempt pursuant to section 30 of the DPA.

[23] It argues that the *Siemens*' decision is distinguishable from the case at bar because in that case there was no disclosure clause. Justice McKeown wrote at paragraph 20, "Therefore, pursuant to section 30 of the DPA, the documents should not be disclosed since the applicant has not provided its consent" (my underline). The respondent contends that, in the present case, the applicant provided its consent for the purpose of section 30 of the DPA by virtue of the disclosure clause in the Standing Offers.

[24] The respondent submits that the applicant cannot consent to disclosing its unit prices and then later revoke that consent. It further argues that there is no evidence in the record to suggest that the applicant was not aware of the disclosure clause when it signed the Standing Offers, or that it did not intend to comply with the disclosure clause or agreed to the disclosure clause in error.

[25] The respondent also states that, the disclosure clause is a valid consent by the applicant for the purpose of section 30 of the DPA. Therefore, the respondent can disclose the unit prices as set out in the Standing Offers.

Analysis

[26] Section 30 of the DPA states:

30. No information with respect to an individual business that has been obtained under or by virtue of this Act shall be disclosed without the consent of the person carrying on that business, except

(a) to a government department, or any person authorized by a government department, requiring the information for the purpose of the discharge of the functions of that department; or

(b) for the purposes of any prosecution for an offence under this Act or, with the consent of the Minister, for the purposes of any civil suit or other proceeding at law.

30. Les renseignements recueillis sur une entreprise dans le cadre de la présente loi ne peuvent être communiqués sans le consentement de l'exploitant de l'entreprise, sauf :

a) à un ministère, ou à une personne autorisée par un ministère, qui en a besoin pour l'accomplissement de ses fonctions;

b) aux fins de toute poursuite pour infraction à la présente loi ou, avec le consentement du ministre, de toute affaire civile ou autre procédure judiciaire.

[27] The disclosure clause in the Standing Offers provides that: (Applicant's Record, Vol. II, page 423, section 31.0a)

“a. The Offeror agrees to the disclosure of its unit prices by Canada, and further agrees that it shall have no right of claim against Canada, the Minister, the Identified User, their employees, agents or servants, or any of them, in relation to such disclosure.”

[28] I also note the purpose of the Act as set out in subsection 2(1):

2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

2. (1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.

[29] Considering these provisions, I must conclude that the underlying principle here is the existence of a restriction of disclosure of information concerning a business which information was obtained "under or by virtue of the Act"(section 30 of the DPA) without the consent of the responsible person for that business. The exceptions pursuant to paragraphs 30*a*) and *b*) have no relevance here.

[30] Applying this principle to the case at bar, I determine that the unit prices included in the Standing Offers were obtained "under or by virtue of the Act". In fact, the information was obtained as a pre-condition to the calls-up or the contracts. Once the contracts come under the DPA, then section 30 does not distinguish between documents which were part of the contract and documents which were part of the solicitation *Siemens*, para 19.

[31] The remaining question therefore is whether or not there has been consent to disclosure, or, in other words, whether the disclosure clause constitutes “consent” under section 30 of the DPA.

[32] In my view, the disclosure clause is clear and not ambiguous. The applicant has never argued that it did not understand the disclosure clause. Rather, it acknowledges having signed it, but argues that it should not be interpreted as applying in this case. I cannot accept this argument.

[33] The applicant cites *Canada (Information Commissioner) v. Canada (Minister of Industry)*, [2007] ACF 780, for the proposition that subsection 24(1) of the Act imposes an unqualified duty on the head of a government institution to refuse to disclose any record requested under the Act which contains information, the disclosure of which is restricted by a provision listed in schedule II (para 69).

[34] I note that Evans J.A. wrote the dissenting reasons. Although Décary J.A. agreed with the identification of issues 1 to 4 as proposed by his colleague Evans, he adopted the solution proposed by the Chief Justice.

[35] In *Canada (Information Commissioner)*, three statutes were at issue, the *Access to Information Act*, the *Statistics Act* and the *Privacy Act*. Kelen J., the presiding Judge of the Federal Court in that case, had also made an analysis of section 35 of the *Constitution Act*, 1982.

[36] In *Siemens, supra*, McKeown J. dealt specifically with subsection 24(1) of the Act and section 30 of the DPA. The appeal in that case was dismissed (2002 FCA 414). I see no reasons why I should depart from his reasoning.

[37] After a review of the evidence in the case at bar, I have to conclude that by signing the disclosure clause in the Standing Offers, the applicant provided its consent pursuant to section 30 of the DPA. Based on the foregoing, I find that the unit prices in question are not exempt from disclosure by virtue of that section.

[38] At the suggestion of the Court, the parties agree that an amount of \$4,000 for costs should be allocated to the winning party.

JUDGMENT

THIS COURT ORDERS that the application be dismissed. The applicant shall pay costs for an amount of \$4,000 to the respondent.

“Michel Beaudry”

Judge

APPENDIX

Defence Production Act (R.S.C. 1985, c. D-1)

16. The Minister may, on behalf of Her Majesty and subject to this Act,

(g) do all such things as appear to the Minister to be incidental to or necessary or expedient for the matters referred to in the foregoing provisions of this section or as may be authorized by the Governor in Council with respect to the procurement, construction or disposal of defence supplies or defence projects.

30. No information with respect to an individual business that has been obtained under or by virtue of this Act shall be disclosed without the consent of the person carrying on that business, except

- (a) to a government department, or any person authorized by a government department, requiring the information for the purpose of the discharge of the functions of that department; or
- (b) for the purposes of any prosecution for an offence under this Act or, with the consent of the Minister, for the purposes of any civil suit or other proceeding at law.

Access to Information Act R.S.C. 1985, c. A-1

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

- (a) trade secrets of a third party;
- (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

(b.1) information that is supplied in confidence

16. Le ministre peut, au nom de Sa Majesté et sous réserve des autres dispositions de la présente loi :

g) prendre toute autre mesure qu'il juge accessoire, nécessaire ou utile aux matières visées au présent article ou que le gouverneur en conseil peut autoriser en ce qui a trait à la fourniture, la construction ou la disposition de matériel de défense ou d'ouvrages de défense.

30. Les renseignements recueillis sur une entreprise dans le cadre de la présente loi ne peuvent être communiqués sans le consentement de l'exploitant de l'entreprise, sauf :

- a) à un ministère, ou à une personne autorisée par un ministère, qui en a besoin pour l'accomplissement de ses fonctions;
- b) aux fins de toute poursuite pour infraction à la présente loi ou, avec le consentement du ministre, de toute affaire civile ou autre procédure judiciaire.

20. (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :

- a) des secrets industriels de tiers;
- b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;

to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans within the meaning of section 2 of the Emergency Management Act and that concerns the vulnerability of the third party's buildings or other structures, its networks or systems, including its computer or communications networks or systems, or the methods used to protect any of those buildings, structures, networks or systems;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

(b.1) des renseignements qui, d'une part, sont fournis à titre confidentiel à une institution fédérale par un tiers en vue de l'élaboration, de la mise à jour, de la mise à l'essai ou de la mise en oeuvre par celle-ci de plans de gestion des urgences au sens de l'article 2 de la Loi sur la gestion des urgences et, d'autre part, portent sur la vulnérabilité des bâtiments ou autres ouvrages de ce tiers, ou de ses réseaux ou systèmes, y compris ses réseaux ou systèmes informatiques ou de communication, ou sur les méthodes employées pour leur protection;

c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;

d) des renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations menées par un tiers en vue de contrats ou à d'autres fins.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-724-10

STYLE OF CAUSE: Top Aces Consulting Inc.
and the Minister of National Defence
and the Minister of Public Works and Government
Services

PLACE OF HEARING: Ottawa

DATE OF HEARING: May 19, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** BEAUDRY J.

DATED: June 7, 2011

APPEARANCES:

Me Richard Sinclair FOR THE APPLICANT

Me Jennifer Francis FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kelly Santini LLP FOR THE APPLICANT
Barristers & Solicitors
Ottawa (Ontario)

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada
Department of Justice
Ottawa (Ontario)