

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20171005**

**Docket: A-462-16**

**Citation: 2017 FCA 202**

**CORAM: NEAR J.A.  
GLEASON J.A.  
WOODS J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**SPRINGCREST INC.**

**Respondent**

Heard at Ottawa, Ontario, on September 20, 2017.

Judgment delivered at Ottawa, Ontario, on October 5, 2017.

**REASONS FOR JUDGMENT BY:**

**NEAR J.A.**

**CONCURRED IN BY:**

**GLEASON J.A.  
WOODS J.A.**

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**SPRINGCREST INC.**

**Respondent**

**REASONS FOR JUDGMENT**

**NEAR J.A.**

**I. Overview**

[1] The applicant, the Attorney General of Canada on behalf of the Department of Public Works and Government Services (PWGSC), submitted an application for judicial review of a decision of the Canadian International Trade Tribunal (CITT) dated November 21, 2016. The

CITT determined that the complaint of the respondent, Springcrest Inc., that it was impossible for certain suppliers to meet the timeline in a Request for Proposal was valid.

## II. Background

[2] PWGSC issued a Request for Proposal on behalf of the Department of National Defence (DND) for seawater pumps for the Halifax class frigates of the Royal Canadian Navy. PWGSC indicated that DND needed the pumps urgently in order to keep all of its ships fully operational.

[3] The Request for Proposal included a requirement that the bid include a shock testing certificate for the pumps. The original equipment manufacturer was exempt from providing a certificate if it supplied the same motors as those previously certified. The respondent objected, requesting that PWGSC remove the shock testing certificate requirement as it was impossible for any other manufacturer to meet this requirement within the timeline set out in the Request for Proposal. The Request for Proposal was issued on May 17, 2016 and, at the time, the deadline for submitting a bid was set for July 18, 2016 - 62 days later.

[4] Consequently, the respondent filed a complaint with the CITT.

## III. Decision of the CITT

[5] The CITT considered two complaints raised by the respondent: (1) whether PWGSC deliberately structured the Request for Proposal in a discriminatory manner to favour a particular supplier or exclude others; and (2) whether the requirement to provide shock testing certificates

prior to bid closing was impossible to meet for suppliers of equivalent products because of the requisite timing of events in the solicitation process (Reasons at para. 52).

[6] With respect to the first complaint, the respondent complained that the shock testing certificate requirement was discriminatory contrary to article 504(3)(b) of the *Agreement on Internal Trade*, 18 July 1994, C. Gaz. (1995) I, 1323 (entered into force 1 July 1995) (AIT) and article 1007 of the *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994). It argued that the terms of the Request for Proposal were biased in favour of the original equipment manufacturer that would not have to submit a shock testing certificate if offering the same motors that it had already supplied.

[7] Paragraph 504(3)(b) of the AIT reads:

3. Except as otherwise provided in this Chapter, measures that are inconsistent with paragraphs 1 and 2 include, but are not limited to, the following:

...

504(3)(b) the biasing of technical specifications in favour of, or against, particular goods or services, including those goods or services included in construction contracts, or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter;

3. Sauf disposition contraire du présent chapitre, sont comprises parmi les mesures incompatibles avec les paragraphes 1 et 2 :

[...]

504(3)(b) la rédaction des spécifications techniques de façon soit à favoriser ou à défavoriser des produits ou services donnés, y compris des produits ou services inclus dans des marchés de construction, soit à favoriser ou à défavoriser des fournisseurs de tels produits ou services, en vue de se soustraire aux obligations prévues par le présent chapitre;

[8] In response, PWGSC argued that the shock testing certificate requirement was a legitimate operational requirement and thus, was not discriminatory. It argued that the frigate pumps were needed urgently for ships of the Royal Canadian Navy.

[9] The CITT found that the first complaint was not valid. It “accept[ed] that DND had legitimate operational requirements when it sought to secure delivery of the pumps without undue delay” (Reasons at para. 54) and that PWGSC did not deliberately exclude suppliers of equivalent products:

[55] ...Springcrest did not present the Tribunal with evidence that PWGSC *deliberately* structured the terms of the RFP to exclude suppliers of equivalent products and/or favour the OEM [original equipment manufacturer] supplier. Instead, the evidence suggests that the need to procure the pumps as quickly as possible caused PWGSC to *inadvertently* structure the technical specifications in a way that effectively made it impossible for some suppliers to meet... (Reasons at para. 55)

[Emphasis in original]

[10] With respect to the second complaint, the respondent complained that the timeline was impossible for certain suppliers to meet contrary to paragraph 504(3)(c) of the AIT. It takes approximately one year to manufacture the equipment and to provide a shock testing certificate and there were, at that time, 62 days between when the Request for Proposal was issued and bid closing (Reasons at paras. 58–59).

[11] Paragraph 504(3)(c) reads:

3. Except as otherwise provided in this Chapter, measures that are inconsistent with paragraphs 1 and 2 include, but are not limited to, the

3. Sauf disposition contraire du présent chapitre, sont comprises parmi les mesures incompatibles avec les paragraphes 1 et 2 :

following:

...

[...]

(c) the timing of events in the tender process so as to prevent suppliers from submitting bids;

c) l'établissement du calendrier du processus d'appel d'offres de façon à empêcher les fournisseurs de présenter des soumissions;

[12] In response, PWGSC again argued that it did not breach paragraph 504(3)(c) of the AIT because of its legitimate operational requirements.

[13] The CITT, however, found that the second complaint was valid. It explained that intention is irrelevant in considering a potential breach of paragraph 504(3)(c):

[60] Even if PWGSC did not deliberately intend for the requirement for suppliers of equivalent products to submit shock testing certificates prior to bid closing to have a discriminatory effect, in the interests of ensuring fair competition, it should still have provided sufficient time for the suppliers of equivalent products to manufacture the pumps and then obtain those certificates in order for them to be able to compete on a level playing field against OEM [original equipment manufacturer] suppliers. PWGSC did not do so. As such, the Tribunal finds that PWGSC violated Article 504(3)(c) of the AIT, which prohibits the timing of events in the solicitation process so as to prevent suppliers from submitting bids. Unlike Article 504(3)(b), there is no need to find that the government institution acted deliberately to exclude suppliers in order to find a violation of Article 504(3)(c). In that way, the Tribunal finds this ground of Springercrest's complaint valid. (Reasons at para. 60).

[Emphasis added]

[14] The CITT further elaborated that PWGSC could have invoked another provision that would have exempted the procurement from procedural obligations:

[61] With respect to PWGSC's argument regarding DND's legitimate operational requirements, the Tribunal notes that there are other provisions of the trade agreements that could be invoked to exempt the procurement from the procedural obligations of the agreements to serve a legitimate objective, such as public safety

and security. However, PWGSC did not argue that its discriminatory conduct was justified on the basis of any of these exceptions. (Reasons at para. 61).

[15] As a remedy, the CITT recommended that PWGSC cancel the existing solicitation and issue a new one that should either allow a supplier of equivalent products sufficient time to provide a shock testing certificate or remove the requirement (Reasons at para. 78).

[16] Following the CITT's decision, Canada advised the CITT that it would not implement the CITT's recommendations and would continue with its existing Request for Proposal in accordance with subsection 13(a) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, SOR/93-602.

[17] The Application for Judicial Review was issued on December 19, 2016. The respondent advised this Court that it would not participate in the proceeding in a letter dated March 3, 2017.

#### IV. Issues

[18] I would characterize the issue as follows: was the CITT's determination that the Request for Proposal requirement that suppliers of equivalent products provide a valid shock testing certificate at close of bidding violated paragraph 504(3)(c) of the AIT reasonable?

V. Analysis

A. *Standard of Review*

[19] The applicant acknowledges that the standard of review in this matter is reasonableness. I agree. In this case, the CITT is interpreting not only agreements that are closely related to its functions, but agreements that “fall squarely in its area of expertise” (*CGI Information Systems and Management Consultants Inc. v. Canada Post Corp.*, 2015 FCA 272 at para 42, [2015] F.C.J. No. 1400 (QL)); *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2001 FCA 241 at para. 21, [2002] 1 F.C.R. 292. This principle was most recently affirmed by this Court in relation to the expertise of the CITT in procurement disputes in *Francis H.V.A.C. Services Ltd. v. Canada (Public Works and Government Services)*, 2017 FCA 165; [2017] F.C.J. No. 793 at paras. 18, 20.

[20] In assessing reasonableness, we look to the principles laid out in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190 (*Dunsmuir*), namely that “reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process” and that “it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”



B. *Was the CITT's determination that the Request for Proposal requirement that suppliers of equivalent products provide a valid shock testing certificate at close of bidding violated paragraph 504(3)(c) of the AIT reasonable?*

[21] The CITT found that the respondent's complaint under paragraph 504(3)(c) was valid because the timeline and requirements in the Request for Proposal made it impossible for suppliers of equivalent products to submit a bid. At the time of the respondent's complaint, the Request for Proposal allowed only 62 days for a process that both parties confirmed could take approximately one year (Reasons at paras. 58–59). The CITT found that this timeline was a breach of paragraph 504(3)(c) regardless of whether PWGSC intended to prevent suppliers from submitting bids.

[22] The CITT explained that intention is not required to find a violation of paragraph 504(3)(c) regardless of the intention requirement in paragraph 504(3)(b). The CITT's explanation is quoted above at paragraph 13 of these Reasons but is worth repeating:

[60] Even if PWGSC did not deliberately intend for the requirement for suppliers of equivalent products to submit shock testing certificates prior to bid closing to have a discriminatory effect, in the interests of ensuring fair competition, it should still have provided sufficient time for the suppliers of equivalent products to manufacture the pumps and then obtain those certificates in order for them to be able to compete on a level playing field against OEM suppliers. PWGSC did not do so. As such, the Tribunal finds that PWGSC violated Article 504(3)(c) of the AIT, which prohibits the timing of events in the solicitation process so as to prevent suppliers from submitting bids. Unlike Article 504(3)(b), there is no need to find that the government institution acted deliberately to exclude suppliers in order to find a violation of Article 504(3)(c). In that way, the Tribunal finds this ground of Springcrest's complaint valid. (Reasons at para. 60).

[Emphasis added]

[23] Under paragraph 504(3)(b), the CITT found that a legitimate operational requirement caused PWGSC to structure the Request for Proposal to exclude certain suppliers “*inadvertently*” (Reasons at para. 55). PWGSC could not violate paragraph 504(3)(b) unless it did so deliberately. However, whether PWGSC violated paragraph 504(3)(c) intentionally or inadvertently is immaterial. In my view, regardless of any legitimate operational requirement, the fact remained that it was objectively impossible for suppliers of equivalent products to meet the timeline. Further, the CITT explained at paragraph 61 that, with respect to paragraph 504(3)(c), “other provisions of the trade agreement ... could be invoked to exempt the procurement from the procedural obligations of the agreements to serve a legitimate objective...”. The finding of the CITT in this regard is reasonable based on the material before it.

[24] The applicant argued that paragraph 504(3)(c) applies to the process of the procurement, including timelines, whereas paragraph 504(3)(b) only applies to the technical requirements of the bids. I disagree. There is nothing in the broad language of paragraph 504(3)(c) that suggests that it is limited to only process issues and not intended to apply to matters related to technical requirements. In my view, the CITT acted reasonably in finding that there was no such limitation.

VI. Conclusion

[25] For the foregoing reasons, I would dismiss the application for judicial review. In the circumstances, no costs will be awarded.

"David G. Near"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**AN APPLICATION FOR JUDICIAL REVIEW FROM A DETERMINATION OF THE  
CANADIAN INTERNATIONAL TRADE TRIBUNAL, DATED NOVEMBER 21, 2016  
TRIBUNAL FILE NO. PR-2016-021**

**DOCKET:** A-462-16

**STYLE OF CAUSE:** ATTORNEY GENERAL OF  
CANADA v. SPRINGCREST INC.

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** SEPTEMBER 20, 2017

**REASONS FOR JUDGMENT BY:** NEAR J.A.

**CONCURRED IN BY:** GLEASON J.A.  
WOODS J.A.

**DATED:** OCTOBER 5, 2017

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