

Federal Court of Appeal



Cour d'appel fédérale

Date: 20180620

Docket: A-66-17

Citation: 2018 FCA 120

[ENGLISH TRANSLATION]

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

AGENCE GRAVEL INC.

Respondent

Heard at Quebec City, Quebec, on June 20, 2018.

Judgment delivered from the bench at Quebec City, Quebec, on June 20, 2018.

**REASONS FOR JUDGMENT OF THE
COURT BY:**

GAUTHIER J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the bench at Quebec City, Quebec, on June 20, 2018.)

GAUTHIER J.A.

[1] This application for judicial review concerns a decision of the Canadian International Trade Tribunal (the CITT) in which the CITT declared that it has jurisdiction to review a complaint filed by Agence Gravel Inc., even though the relevant request for a standing offer (RFSO) process had been cancelled before the complaint was filed. The Attorney General of Canada also contests the CITT's finding that the complaint was well-founded. The complaint

alleged only that the RFSO process had been cancelled for an illegitimate reason and in violation of its requirements.

[2] The RFSO, which is at the centre of the dispute, was issued by Public Works and Government Services Canada (PWGSC) for the supply of firearm suppressors to the Royal Canadian Mounted Police (RCMP) emergency response teams.

[3] The RFSO stipulated that offers would remain open for acceptance for a period of 180 days from the closing date. That time limit was given for the benefit of bidders, who could consent to extending it. PWGSC let that period elapse without awarding the contract or seeking an extension of the offer validity period. When PWGSC informed the bidders of its decision to cancel the contract because the 180-day period had elapsed, only the last step of the final evaluation remained, which was a meeting between PWGSC and the RCMP to discuss the final inspection results. The CITT found that the circumstances that led to the cancellation indicated a surprising and unacceptable situation. According to the CITT, the contract had not been awarded within 180 days because of a series of errors and delays that were entirely the fault of PWGSC, which had failed to demonstrate a minimum degree of due diligence in managing its file and applying its procedures (CITT decision at paragraph 66). The CITT concluded that PWGSC could not cite the privilege clause in such circumstances.

[4] The Attorney General claims that the CITT incorrectly found that it had jurisdiction. The Attorney General also submits that the CITT's decision is unreasonable with respect to its interpretation of the privilege clause in the RFSO and with respect to the appropriate remedy.

[5] In *Canada (Attorney General) v. Access Information Agency Inc.*, 2018 FCA 18 (*Access Information Agency*), this Court found that the standard of review for determining whether the CITT has jurisdiction to hear a complaint, despite the cancellation of the process, is reasonableness (*Access Information Agency* at paras. 13–21). It also found that such a cancellation does not deprive the CITT of its jurisdiction (*Access Information Agency* at paras. 35–42). We note that when the application for judicial review was filed, the Attorney General did not have the benefit of that ruling, which we consider to have completely resolved the first issue, even though the facts are not identical and the complaint in *Access Information Agency* was filed prior to the cancellation. The same reasoning and principles apply since the contract could have been awarded within the meaning of section 30.1 of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.) (the Act).

[6] With regard to questions of interpreting the RFSO and selecting the appropriate remedy, we agree with the Attorney General that the reasonableness standard of review applies (*Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 at paras. 4, 33; *Saskatchewan Polytechnic Institute v. Canada (Attorney General)*, 2015 FCA 16 at para. 6; *Canada (Attorney General) v. L.P. Royer Inc.*, 2018 FCA 27 at para. 25). However, we are not convinced that the CITT's decision is unreasonable.

[7] Although the privilege clause in the RFSO (section 11 of the Standard Instructions) is worded broadly to enable PWGSC “to cancel the RFSO at any time”, the CITT did not err in interpreting it as it did, in light of the other clauses in the contract, the *Agreement on Internal Trade* and the relevant case law (see primarily *M.J.B. Enterprises Ltd. v. Defence Construction*

(1951) Ltd., [1999] 1 S.C.R. 619; *Martel Building Ltd. v. Canada*, 2000 SCC 60). The CITT considered the principles of integrity, trust and transparency that underlie the government procurement system.

[8] In our opinion, the CITT correctly rejected PWGSC's argument that it had no choice but to cancel the RFSO since the 180-day period had already elapsed. The CITT's finding that the privilege clause does not apply in the unique circumstances of this case is reasonable.

[9] As for the recommended remedy, we note that the CITT selected a lesser remedy than that sought by the complainant, which wished to be awarded the contract. Moreover, PWGSC made no submissions on this topic when the decision-maker had to exercise his discretion. In our view, the CITT considered the factors set out in subsection 30.15(3) of the Act, and reasonably weighed the factors to determine the appropriate remedy.

[10] Therefore, the application for judicial review is dismissed with costs, fixed at \$300.00 (all inclusive).

“Johanne Gauthier”

J.A.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-66-17

STYLE OF CAUSE: ATTORNEY GENERAL OF
CANADA v. AGENCE GRAVEL
INC.

PLACE OF HEARING: QUEBEC CITY, QUEBEC

DATE OF HEARING: JUNE 20, 2018

REASONS FOR JUDGMENT OF THE COURT BY: GAUTHIER J.A.
BOIVIN J.A.
DE MONTIGNY J.A.

DELIVERED FROM THE BENCH BY: GAUTHIER J.A.

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