

Federal Court of Appeal



Cour d'appel fédérale

Date: 20080118

Docket: A-184-07

Citation: 2008 FCA 19

**CORAM: RICHARD C.J.
LÉTOURNEAU J.A.
PELLETIER J.A.**

BETWEEN:

THE ACCESS INFORMATION AGENCY INC.

Applicant

and

**ATTORNEY GENERAL OF CANADA
(TRANSPORT CANADA)**

Respondent

and

IRENA LANG CONSULTING

Respondent

Heard at Ottawa, Ontario, on January 16, 2008.

Judgment delivered at Ottawa, Ontario, on January 18, 2008.

REASONS FOR JUDGMENT:

LÉTOURNEAU J.A.

CONCURRED IN BY:

**RICHARD C.J.
PELLETIER J.A.**

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues

[1] This is an application for judicial review of a decision of the Canadian International Trade Tribunal (the Tribunal).

[2] Despite its victory before the Tribunal, which upheld its complaint regarding a procurement contract with the Department of Transport, the applicant is challenging the Tribunal's decision.

[3] It raised several complaints about the impugned decision. It is not necessary to repeat them all here. Only two of them merit specific mention. Both involve the remedies granted by the Tribunal to the applicant, or, more accurately, those that the Tribunal refused to grant to the applicant. One issue is procedural and the other substantive.

Procedural issue

[4] From a procedural perspective, the applicant submits that it was not given the opportunity to make submissions regarding its request to be compensated for [TRANSLATION] "the opportunity that it lost to participate meaningfully in the procurement process" and for [TRANSLATION] "its reasonable costs incurred in preparing and proceeding with the complaint": see the Applicant's Record, Volume 1, at pages 108 and 120, the applicant's complaint and the remedies sought.

[5] The applicant submitted an initial set of representations on this issue in its complaint form: *ibid.* It withdrew them on December 12, 2006, in its response to the report from the Department of Transport, indicating that it might like to make additional representations: see Applicant's Record, Volume 2, at pages 457 and 458. Finally, it provided more detailed representations on January 14, 2007, in its supplementary response to the report by the Department of Transport: see Applicant's Record, Volume 3, at pages 692 to 694.

[6] Despite this, the applicant submits that the Tribunal should have heard it again before rendering its decision on remedies. In support of its claim, it cites section 8 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, P.C. 1993-2102, December 15, 1993.

[7] However, section 8 applies only to cases in which the Tribunal produces an interim report in respect of the complaint. In such a situation, the Tribunal must provide a copy of the interim report to the complainant, the relevant federal institution and any other party that the Tribunal considers to be an interested party. Any of these parties may make representations on any aspect of the report.

[8] In this case, because the Tribunal did not produce an interim report, section 8 cannot be a valid basis for the applicant's claim.

[9] To conclude with respect to this initial procedural grievance, I find that the rules of natural justice have been followed. As we will see below, an analysis of the second grievance confirms that it was not necessary for the Tribunal to rehear the applicant regarding the two types of compensation that were denied.

Substantive issue

[10] In the Memorandum of Fact and Law that it filed in this case, the applicant claimed a third head of compensation for lost profits. At the hearing, it abandoned this claim to focus on the two heads of compensation mentioned above. This leads me to a consideration of the merits of the applicant's second grievance.

[11] In essence, the applicant is complaining about two things. First, the Tribunal should have granted the two heads of compensation it was seeking. Second, having refused to do so, it should have provided grounds for this refusal.

(a) The refusal to order compensation for the loss of opportunity to participate meaningfully in the procurement process

[12] Given the nature of the breach it identified, the Tribunal, in exercising its discretion and relying on its experience, decided that the appropriate remedy consisted in a new review of the bid submitted by the applicant in the light of a broader analytical framework, which it did. In this way the applicant was able to participate meaningfully in the procurement process.

[13] I understand that the applicant's bid was unsuccessful after this re-evaluation. I also understand that this must be disappointing to the applicant. However, given the fact that the second evaluation was not challenged and that there is no decision quashing it, it would be not only unreasonable but impossible to conclude that the applicant was unable to participate meaningfully in

the current procurement process. I do not believe that the meaningfulness of a bidder's participation in a procurement process can be measured by whether the bid is accepted or rejected.

[14] In my humble opinion, the remedy selected by the Tribunal did not leave any room for compensation for the loss of opportunity to participate meaningfully in the process at issue. I do not believe that the Tribunal was required to say more in the circumstances.

(b) The refusal to order compensation for the reasonable costs incurred in preparing and proceeding with the complaint

[15] The Tribunal has the discretionary power to order that the complainant be reimbursed for the costs incurred in preparing a response to a call for tenders: see subsection 30.15(4) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th supp.); *Canada (Attorney General) v. Envoy Relocation Services*, [2007] F.C.J. No. 626, 2007 FCA 176.

[16] In *The Impact Group v. National Research Council of Canada*, File No. PR-2005-050, June 14, 2006, to which the applicant has directed our attention, the Tribunal ordered that the complainant party be compensated for the costs incurred in preparing its proposal. There had been a serious flaw in the procurement process as a result of deficiencies in the evaluation process relating to the evaluation of relevant criteria.

[17] However, that case can be distinguished from this one in that it did not, as ours does, involve the re-evaluation of the complainant party's bid. In other words, there had been no remedy for the

harm suffered. In the circumstances, the Tribunal concluded that the type of compensation granted was the most suitable means of redressing the harm suffered by Impact Group: see the Tribunal's decision at paragraphs 44 and 47 to 49.

[18] In this case, the remedy selected by the Tribunal redressed, in its view, the harm suffered by the applicant, without the need to add the compensation claimed for the costs of preparing a response to the call for tenders. I see no basis for concluding that the Tribunal erred in law or acted unreasonably in making this choice. Again, I do not find that it was necessary for the Tribunal to say any more about this issue, though I note that had it done so, the debate before us may have been avoided.

Conclusion

[19] For these reasons, I would dismiss the application for judicial review with costs.

“Gilles Létourneau”

J.A.

“I agree.

J. Richard, C.J.”

“I agree

J.D. Denis Pelletier, J.A.”

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-184-07

STYLE OF CAUSE: THE ACCESS INFORMATION AGENCY
INC. v. ATTORNEY GENERAL OF CANADA
(TRANSPORT CANADA) and
IRENA LANG CONSULTING

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: January 16, 2008

REASONS FOR JUDGMENT: LÉTOURNEAU J.A.

CONCURRED IN BY: RICHARD C.J.
PELLETIER J.A.

DATED: January 18, 2008

APPEARANCES:

Marie Crowley

FOR THE APPLICANT

Thomas Dastous

FOR THE RESPONDENT
(A.G. of Canada [Transport Canada]))

SOLICITORS OF RECORD:

John H. Sims, Q.C.
Deputy Attorney General of Canada

FOR THE APPLICANT

Thomas Dastous, LL.B., D.D.N., N.C.A.
Ottawa, Ontario

FOR THE RESPONDENT
(A.G. of Canada [Transport Canada])