Date: 20080331

Docket: A-238-07

Citation: 2008 FCA 109

CORAM: **DESJARDINS J.A.**
LÉTOURNEAU J.A.
TRUDEL J.A.

BETWEEN:

DEFENCE CONSTRUCTION (1951) LIMITED

Applicant

and

ZENIX ENGINEERING LTD.

Respondent

Heard at Ottawa, Ontario, on February 12, 2008.

Judgment delivered at Ottawa, Ontario, on March 31, 2008.

REASONS FOR JUDGMENT BY: DESJARDINS J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

DESJARDINS J.A.

[1] On December 7, 2006 Zenix Engineering Ltd. (Zenix) filed a procurement complaint regarding Solicitation No. IE070336 (the solicitation) with the Canadian International Trade Tribunal (CITT or the Tribunal). The solicitation concerned a Request for Abbreviated Proposal (RFAP) from Defence Construction (1951) Limited (the applicant) for life-safety assessment and remediation analysis of modular quarters for use by the Department of National Defence (DND). Any reference to DCC in quotes in these reasons is a reference to the applicant.

[2] In an April 20, 2007 Determination (File No. PR-2006-035), the CITT found that it had jurisdiction under both the *North American Free Trade Agreement* (NAFTA) and the *Agreement on Internal Trade* (AIT) to consider the complaint, and that the applicant had violated a clause of the RFAP. As a result the CITT ordered that Zenix be compensated by an amount equal to its lost profit.

[3] The applicant seeks judicial review of the CITT's determination before us.

[4] Zenix did not make any written representations or appear at the hearing of this application for judicial review.

[5] I would dismiss the application for the reasons that follow.

ISSUES

[6] The applicant seeks judicial review of two parts of the CITT's determination:

1. The CITT's jurisdiction under the NAFTA to consider the complaint.
2. The CITT's determination that the applicant breached the AIT and the NAFTA by failing to disclose DND's budget limits to Zenix during the negotiations.

THE FACTS

[7] A summary of the pertinent public facts follows.

[8] The applicant is a Crown corporation created under a provision of the *Defence Production Act* R.S.C., 1985, c. D-1. It provides contracting and contract management services to DND and the Canadian Forces in the development and management of its facilities infrastructure (affidavit of Ron de Vries - A.R., Book 1, tab 4, p. 290-291).

[9] The RFAP that is the subject of this application was made public by the applicant on July 13, 2006, with a closing date for receipt of bids of August 17, 2006. Material to this application, the RFAP provided that:

> **3.3 Results of Evaluation / Contract Award**
> The RFAP technical scores, as well as the Offer of Services scores (calculated as per paragraph 6 of the RFAP), are added to determine the relative ranking of proponents. The Proponent with the highest overall score will be selected to negotiate a contract with DCC. Negotiations will include an agreement on a maximum amount for services authorized by DCC. In the event that these negotiations fail, DCC will enter into negotiations with the next-ranked Proponent. The services offered by the Proponent shall be in accordance with this RFAP document.

[10] In response to the RFAP, Zenix along with five other bidders submitted proposals. On August 30, 2006 Zenix was informed by telephone that its proposal had received the highest overall score. As a result, Zenix was selected for negotiations by the applicant.

[11] I adopt the factual findings of the CITT found in paragraph 44 of its determination regarding the negotiations between the applicant and Zenix:

> 44. The evidence demonstrates that an initial price for services was submitted by Zenix. The evidence also indicates that Zenix modified its price offer shortly after the start of the negotiations as a result of an exchange of information regarding certain redundancies under the proposed contract. As a result of those discussions, the evidence shows that the initial difference between the estimated value of the contract and the initial price submitted by Zenix was significantly reduced. Further discussions took place concerning the inclusion of certain elements of cost in the second price submitted by Zenix, but the evidence then shows nothing significant happening after that point,

> except for inquiries from Zenix as to the status of the proposed contract. Finally, on November 2, 2006, DCC informed Zenix that it was initiating negotiations with the second-ranked proponent.

[12] In a letter dated November 3, 2006 Zenix responded with "surprise and disappointment" to the applicant's November 2, 2006 decision. Zenix requested a meeting to discuss the applicant's concerns with its bid.

[13] On November 23, 2006 the applicant informed Zenix that its decision rejecting Zenix's proposal was final.

[14] By letter dated November 29, 2006 the applicant informed Zenix that the RFAP had been awarded to the second ranked proponent.

[15] On December 7, 2006 Zenix filed a complaint about the above procurement with the CITT pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47 (the Act).

[16] On April 20, 2007 the CITT rendered its determination, finding Zenix's complaint to be valid. The CITT ordered that Zenix be compensated by an amount equal to the profit that it would reasonably have earned had it won the procurement. Reasons were issued by the CITT on May 3, 2007.

ANALYSIS

STANDARD OF REVIEW

[17] The Supreme Court's recent decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*) has altered the administrative law landscape in Canada. Notably the standard of review of patent unreasonableness has been eliminated. Before applying this Court's previous decisions about the standards of review applicable to the CITT, they must be re-considered in light of *Dunsmuir*.

[18] Fortunately, the questions before us fall into two distinct categories for which there is clear precedent and for which *Dunsmuir* does not significantly change the law applicable.

[19] The first question before us is a question concerning the CITT's jurisdiction under the NAFTA. As this Court found in *Canada (Attorney General) v. Symtron Systems Inc.*, [1999] 2 F.C. 514 (C.A.) at para. 45 (*Symtron*), questions related to the CITT's jurisdiction are to be reviewed on a standard of correctness. The holding in *Dunsmuir* does nothing to change this finding, nor does *Dunsmuir* change the meaning of correctness (see *Dunsmuir* at paragraph 50).

[20] The second question before us relates to the CITT's interpretation and application of the terms of the tendering (solicitation) documents. This is a question that is well within the jurisdiction of the CITT and a Court should accord significant deference to the CITT's findings on such matters. Prior to *Dunsmuir* such a question attracted a standard of review of patent unreasonableness (see *Symtron* at paragraph 45). *Dunsmuir* does not change the fact that the applicable standard is still the

most deferential standard. The applicable standard for a question within the jurisdiction of the CITT is therefore now reasonableness. At paragraph 47ff of *Dunsmuir*, Justices Bastarache and LeBel, writing for the majority, provide the definition of reasonableness that I will apply in this case:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But 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.
>
> [48] The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. […]
>
> [My emphasis.]

THE CITT'S JURISDICTION

[21] The applicant argued vigorously during the hearing that the CITT does not have jurisdiction under the NAFTA to hear this complaint. Its point of contention is with the CITT's determination that it was acting as an agent for DND in the procurement. I note from the outset that the applicant did not take issue with the CITT's jurisdiction to consider the complaint under the AIT.

[22] The applicability of the NAFTA with regards to procurement complaints before the CITT depends on different minimum monetary thresholds for the procurement contract for different government institutions (see Articles 1001, Annex 1001.1a-1, Annex 1001.1a-2 of the NAFTA and Treasury Board Contracting Policy Notice 2005-3). In this particular case, if DND was the government institution at issue, the value of the procurement contract would meet the minimum

monetary threshold and the CITT would have jurisdiction under the NAFTA to hear the complaint. This would not be the case if the applicant was found to be the government institution at issue because a different monetary threshold would be applicable. Because the CITT found that the applicant was acting as an agent for DND, the CITT held that the relevant government institution was DND and thus it had jurisdiction under the NAFTA to consider the complaint (see paragraph 18 of the CITT's determination).

[23] TDepartment of National Defence he applicant argued that it was not acting as an agent for DND in the procurement at issue. The applicant relied on, *inter alia*, subsection 6(3) of the *Defence Production Act* to argue that it can only be an agent of Her Majesty, and therefore not of DND. The applicant also sought to have us clarify or overturn the finding of this Court in *Symtron*, *supra* where we held that for the procurement at issue in that case, the applicant was acting as an agent for DND (see paragraphs 59 to 64 of *Symtron*). Specifically, *Symtron* states the following at paragraphs 62 and 63:

> 62 The intention of the parties is manifest. Under NAFTA, parties may not design contracts so as to hide them from compliance. If Canada is to honourably uphold its NAFTA obligations, the CITT must be able to decide that the true contracting agent was [page539] DND, not DCC. In this case, the Tribunal based its conclusion on the following findings of fact: (a) the FFTS [Fire Fighter Training System] is required by DND; (b) DND ultimately approved the specifications drafted by DCC; (c) DND conducted technical evaluations of the proposals; (d) DND will pay for the work; and, (e) DND will own the work. I would add to this list that the RFP itself has the following words in bold capital letters on top of its cover page: "DEPARTMENT OF NATIONAL DEFENCE". Nowhere on the cover of the RFP are the words "Defence Construction (1951) Canada Limited" to be found. Further, each and every page of the RFP has a header which reads:
>
> > Fire Fighter Training Facility
> > Halifax, Nova Scotia
> > Esquimalt, British Columbia

> 63. I am of the view, therefore, that the CITT did not err when it found that this contract should be evaluated as having been let by the Department of National Defence. On facts such as these, a contract should not be exempt from NAFTA simply because the government has decided to let the contract through DCC. The decisions of the Canadian civil service, no matter how well intentioned, may not supercede our international obligations.

[24] I find it unnecessary to determine this issue. The applicant did not dispute that the CITT had jurisdiction to consider this complaint under the AIT. As will be discussed in more detail below, in this case the application of the material articles of the AIT and the NAFTA are of much the same effect. Whether the CITT had jurisdiction under the AIT or the NAFTA individually or together is of no material consequence to the final determination of this matter. The undisputed fact is that the CITT had jurisdiction under the AIT to make the decision it did, and that alone is sufficient to dispose of this issue. Any comments I would make with regard to the CITT's jurisdiction under the NAFTA would be unnecessary *obiter dicta*.

WHETHER THE APPLICANT BREACHED ITS AIT AND NAFTA OBLIGATIONS BY FAILING TO DISCLOSE DND'S BUDGET LIMITS TO ZENIX DURING THE NEGOTIATIONS

[25] The CITT's determinations regarding any possible breaches of the AIT and/or the NAFTA are matters within the CITT's jurisdiction. The applicable standard of review is reasonableness.

[26] The articles that Zenix alleged the applicant to have breached are Article 506(6) of the AIT and Article 1015(4) of the NAFTA. Article 506(6) of the AIT states:

> In evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The

> tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.

[27] Materially, Article 1015(4) of the NAFTA states:

> (d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation;

[28] As I discussed briefly above, these two articles are of the same legal effect on this particular procurement complaint. Both articles require that the evaluation of bids follow the criteria stated in the tender documents. As such, it is immaterial which article the applicant is found to have breached.

[29] The tender document at issue in this case is the RFAP. The RFAP has two requirements that are at issue in this application: first that the negotiations must include an agreement on a maximum amount for services authorized; and second before the applicant can enter into negotiations with the second ranked bidder, the negotiations between it and the first ranked bidder must have failed. For convenience, I quote again paragraph 3.3 of the RFAP:

> **3.3 Results of Evaluation / <u>Contract Award</u>**
>
> The RFAP technical scores, as well as the Offer of Services scores (calculated as per paragraph 6 of the RFAP), are added to determine the relative ranking of proponents. The Proponent with the highest overall score will be selected to negotiate a contract with DCC. <u>Negotiations will include an agreement on a maximum amount for services authorized by DCC. In the event that these negotiations fail, DCC will enter into negotiations with the next-ranked Proponent.</u> The services offered by the Proponent shall be in accordance with this RFAP document.
>
> [My emphasis.]

[30] The applicant "submits that the language of paragraph 3.3 of the RFAP did not require it to disclose DND's budget limits during its negotiations with Zenix" (paragraph 91 of the applicant's memorandum of fact and law). The applicant submits that the CITT committed a reviewable error by making such a finding.

[31] The applicant points to the findings of the CITT at paragraph 49 of its determination:

> 49. In that context, the Tribunal is of the view that the criteria for evaluating Zenix's proposal and the methods of weighting and evaluating the criteria contained in paragraph 3.3 of the RFAP required DCC to clearly indicate to Zenix that, in its view, the negotiation had reached an impasse on the maximum amount for services to be provided and on the opportunity to meet a price imposed by DND's budget limitations. The Tribunal believes that it is only after communicating this information to Zenix and having sought a final response from Zenix in this regard that DCC could have reached the conclusion that the negotiations had failed.

[32] I would also point to paragraph 45 of the CITT's determination:

> 45. According to paragraph 3.3 of RFAP, the negotiations were to include ". . . an agreement on a maximum amount for services authorized by DCC . . . ." The Tribunal is of the view that DCC never clearly communicated to Zenix what constituted the maximum budgeted amount authorized by DND. The Tribunal is of the view that, if the negotiation were to lead to an agreement on a maximum amount for services authorized, it was reasonable to expect that either DCC or DND would have had to identify, during the course of the negotiations, the monetary limit of DND's budget authority …
>
> [My emphasis.]

[33] In support of its submission that there is no obligation to disclose its budget limit, the applicant cites paragraph 3 of the RFAP, which states:

> The objective of this competitive call for Abbreviated Proposals for selecting a Proponent and their Consultant Team is to obtain optimum value for DND and to ensure fair treatment of their consulting industry.
>
> [My emphasis.]

[34] In my opinion the applicant is correct. The CITT committed an unreasonable error in finding that the applicant was required to disclose the monetary limit of DND's budget authority. In my view, there was no basis or justification that would allow the CITT to reach this conclusion. As pointed out by the applicant, the Supreme Court in another context has provided some guidance on this point. In *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860 at para. 67, the Supreme Court stated:

> 67 It would defeat the essence of negotiation and hobble the marketplace to extend a duty of care to the conduct of negotiations, and to label a party's failure to disclose its bottom line, its motives or its final position as negligent. Such a conclusion would of necessity force the disclosure of privately acquired information and the dissipation of any competitive advantage derived from it, all of which is incompatible with the activity of negotiating and bargaining.
>
> [My emphasis.]

[35] In my view, a proper contextual interpretation of paragraph 3.3 of the RFAP is that in order for the applicant to award the contract, there must be an agreement between the negotiating parties on the maximum amount to be paid for services. It is quite sensible and typical of commercial negotiations that there be an agreement between the parties on the maximum amount to be paid before awarding a contract. Article 506(6) of the AIT requires that evaluation of the tenders follow the criteria outlined in the tender documents. I find that neither the RFAP itself, nor Article 506(6) of the AIT requires that the applicant disclose DND's budget limits to Zenix. Such a reading would prevent the applicant from being able to use its competitive advantage to obtain the optimum value for DND, which is an object of the competitive tendering process.

[36] I would not, however, preclude such a situation from ever occurring. If a clause of the tender documents clearly required the applicant to disclose its budget limit, then under the AIT or

NAFTA Articles discussed, the applicant would be required to abide by it. However, such a requirement would require clear language in the RFAP, as it is counter to the very nature of a competitive bidding and negotiated procurement process. In my view paragraph 3.3 of RFAP is clear in not requiring the applicant to disclose its budget limit while negotiating, and the CITT had no basis or justification for making such a finding.

[37] This finding is not, however, determinative of this application for judicial review. This application is still refused because I can find no error in the CITT's determination that the negotiations between the applicant and Zenix had not failed and the applicant has not challenged that determination.

[38] Paragraph 3.3 of the RFAP requires that, "[i]n the event that these negotiations fail, DCC will enter into negotiations with the next-ranked Proponent." Paragraph 3 of the RFAP also states that part of the object of the competitive RFAP process is, "to ensure fair treatment of their consulting industry". For convenience, I quote again the factual findings from paragraph 44 of the CITT's determination:

> 44. The evidence demonstrates that an initial price for services was submitted by Zenix. The evidence also indicates that Zenix modified its price offer shortly after the start of the negotiations as a result of an exchange of information regarding certain redundancies under the proposed contract. As a result of those discussions, the evidence shows that the initial difference between the estimated value of the contract and the initial price submitted by Zenix was significantly reduced. Further discussions took place concerning the inclusion of certain elements of cost in the second price submitted by Zenix, but the evidence then shows nothing significant happening after that point, except for inquiries from Zenix as to the status of the proposed contract. Finally, on November 2, 2006, DCC informed Zenix that it was initiating negotiations with the second-ranked proponent.

[39] None of these factual findings are challenged by the applicant. Based on these factual findings, the CITT determined that the negotiations between the applicant and Zenix had not failed. The applicant submits at paragraph 92 of its memorandum of fact and law that, "it was entitled to unilaterally terminate the negotiations when it was reasonably satisfied that the parties could not agree 'on a maximum amount for the services authorized by the DCC.'"

[40] I do not accept the applicant's submission on this point. I agree with the CITT's findings at paragraph 47 of its determination:

> 47. There is nothing in the language of paragraph 3.3 of the RFAP that could directly or indirectly be construed as indicating that the negotiations would be conducted in a manner that is different from what can generally be understood to take place in the context of a commercial negotiation. Nothing in that paragraph indicated that, contrary to what would normally be expected in the context of a negotiation, DCC could unilaterally determine when the negotiations had reach [*sic*] the point of failure.

[41] On this basis alone, I would dismiss the application.

[42] However, even if I were to agree with the applicant's submission about unilateral termination, I can find no factual basis that would allow the applicant to come to the conclusion that the negotiations had failed and that the parties could not agree on a maximum price.

[43] The factual findings of the CITT are that shortly after the start of the negotiations in early to mid September 2006, in response to discussions with the applicant, Zenix modified its bid by lowering its price offer. There were then some discussions in early October, 2006 concerning the inclusion of certain elements of cost in the modified price submitted by Zenix. Zenix was then left

in the dark as to the status of the bid despite a number of requests by Zenix for a status update. This ended on November 2, 2006 when the applicant unilaterally announced negotiations had failed and that it was beginning negotiations with the second-placed proponent.

[44] Zenix was never accorded a further opportunity to respond to the applicant's concerns about price. Zenix had no reasonable basis to believe there were any problems with its modified bid until it was told the negotiations had failed. This in spite of the fact Zenix left the door open to further negotiations by periodically seeking updates on the status of the bid. I simply do not see how the applicant could conclude that there could be no agreement with Zenix on a maximum price for services. From the facts, Zenix was open to further negotiation, but it was never accorded that opportunity by the applicant.

[45] The conclusion of the CITT at paragraph 50 of its determination that the negotiations between the applicant and Zenix had not failed was justified and reasonable.

> 50. Thus, the Tribunal concludes that DCC acted contrary to paragraph 3.3 of the RFAP by unilaterally concluding that the negotiations had failed and by entering into negotiations with the second-ranked proponent. In acting in that manner, DCC violated Article 506(6) of the AIT and Article 1015(4)(d) of NAFTA, in that it did not respect the criteria and the methods of weighting and evaluating the criteria prescribed in the RFAP.

[46] Since the negotiations between the applicant and Zenix had not failed, the applicant was not entitled under paragraph 3.3 of the RFAP to begin negotiations with the second-placed proponent.

[47] In the result, I agree with the determination of the CITT and I would therefore dismiss this application for judicial review.

CONCLUSION

[48] I would dismiss the application without costs.

"Alice Desjardins"
J.A.

"I agree.
Gilles Létourneau J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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