

Date: 20080610

Docket: A-32-08

Citation: 2008 FCA 208

**CORAM: LINDEN J.A.
NADON J.A.
TRUDEL J.A.**

BETWEEN:

DEFENCE CONSTRUCTION (1951) LIMITED

Applicant

and

SERCO FACILITIES MANAGEMENT INC.

Respondent

Heard at Ottawa, Ontario, on June 10, 2008.

Judgment delivered from the Bench at Ottawa, Ontario, on June 10, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

TRUDEL J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Ottawa, Ontario, on June 10, 2008)

TRUDEL J.A.

[1] This is an application for judicial review in respect of the determination of the Canadian International Trade Tribunal (CITT or the Tribunal), dated December 18, 2007, further to a procurement review inquiry in the Tribunal files PR-2007-053 and PR-2007-054.

[2] Defence Construction (1951) Limited (DCC) rejected Serco Facilities Management Inc.'s (Serco) bids for conflict of interest as Serco had assisted in preparing the solicitation documents. By

its impugned decision, the CITT found that the applicant breached the *Agreement on Internal Trade*, 18 July 1994, C. Gaz. 1995.I.1323 (*AIT*) by not accepting Serco's proposals.

[3] It concluded that DCC's decision to disqualify Serco was based on criteria that were not clearly identified in the solicitation documents and was therefore in violation of Article 506(6) of the *AIT*.

[4] The *AIT* aims at promoting "fair, open and impartial procurement procedures" (Art. 514 of the *AIT*) "for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency" (Art. 501 of the *AIT*).

[5] In *Northeast Marine Services Ltd. v. Atlantic Pilotage Authority*, [1995] 2 F.C. 132 (C.A.), a case in which our Court considered the breadth of a "rejection clause" which allowed the authority to "reject any or all tenders or to accept any tender considered in its best interest", our colleague Létourneau, J.A. stated at page 180:

72. ... Indeed, there is no obligation, as the respondent claims and as the Trial Judge's decision would require, to make any express mention in the advertisements of tenders that the tendering authority will not assist or be an accomplice in the creation or granting of a monopoly to the public detriment. There is no more an obligation to make that kind of consideration a condition of the tendering process than there is to require as a condition of the process that bidders not be in conflict of interest or in breach of the *Competition Act* [R.S.C., 1985, c. C-34 (as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 19)] and be financially sound.

73. The issue of monopoly like those of safety, financial stability of the bidders and conflict of interest are legitimate and relevant commercial considerations that the appellant could, and indeed in the public interest should, take into account in the exercise of its power under the "rejection clause."

[6] We agree with our colleague. The absence of a conflict of interest or the right to reject a bid for that reason are not a requirement of the procurement, an evaluation criterion, or an evaluation methodology which, as contemplated in Article 506(6) of the *AIT*, must be clearly identified in the tender documents.

[7] As there is ample evidence on record that Serco was involved in the preparation of the solicitation documents, Serco's complaints should have been dismissed.

[8] Therefore, DCC's application for judicial review will be allowed without costs and Serco's complaints to the CITT dismissed without costs.

"Johanne Trudel"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-32-08

(APPLICATION FOR JUDICIAL REVIEW IN RESPECT OF THE DETERMINATION OF THE CANADIAN INTERNATIONAL TRADE TRIBUNAL DATED DECEMBER 18, 2007, FURTHER TO A PROCUREMENT REVIEW INQUIRY IN THE TRIBUNAL FILES PR-2007-053 and PR-2007-054)

STYLE OF CAUSE: *Defence Construction (1951) Limited and Serco Facilities Management Inc.*

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: June 10, 2008

REASONS FOR JUDGMENT OF THE COURT BY: (LINDEN, NADON & TRUDEL JJ.A.)

DELIVERED FROM THE BENCH BY: TRUDEL J.A.

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