Date: 20090123

Docket: A-455-07

Citation: 2009 FCA 18

CORAM: **LÉTOURNEAU J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

JEAN-MARC BERGEVIN

Applicant

and

CANADIAN INTERNATIONAL DEVELOPMENT AGENCY

Respondent

Heard at Québec, Quebec, on October 2, 2008.

Judgment delivered at Ottawa, Ontario, on January 23, 2009.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: NADON J.A
PELLETIER J.A.

Date: 20090123

Docket: A-455-07

Citation: 2009 FCA 18

CORAM: **LÉTOURNEAU J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

JEAN-MARC BERGEVIN

Applicant

and

CANADIAN INTERNATIONAL DEVELOPMENT AGENCY

Respondent

REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issue

[1] The purpose of this application for judicial review is to determine conclusively whether the Canadian International Development Agency (CIDA) breached clause 2.3 of the Request for a Summary Proposal (RFSP) filed in relation to a development project with Morocco.

[2] The application challenges the Canadian International Trade Tribunal's interpretation of this provision. This issue is an important one, since the provision aims to prevent favouritism in the procurement process and promote the transparency of public bodies issuing contracts.

[3] I reproduce the clause as it appears in the Tribunal's reasons for decision, at paragraph 28:

> Where this RFSP relates to the implementation of the first or only phase of a project, the Consultant, including EACH member of a consortium, joint venture or association, and all personnel and subcontractors must not have been involved, individually, jointly, or severally, in the planning (i.e. conceptualization, feasibility studies, specifications or design) of this project, nor have been assisted in the preparation of the proposal by any party who has been involved in the planning of this project.
>
> Where this RFSP relates to the evaluation, monitoring or audit of a project, the Consultant, including EACH member of the consortium, joint venture or association, and all personnel and subcontractors must not have been involved, jointly or severally, in the implementation of this project, nor have been assisted in the preparation of the proposal by any party who has been involved in the implementation of the project to be evaluated, monitored or audited.
>
> [Emphasis added]

[4] I hasten to add that the applicant, who is representing himself, has raised the following three additional issues in support of his application for judicial review: the unreasonableness of the remedies recommended by the Tribunal, the invalidation of clause 2.3 of the RFSP and the inadequacy of the public version of the proposal of Stéphane Courtemanche, the bidder who obtained the contract at issue. I will summarily dispose of these last three issues below. For the time being, it is important to succinctly summarize the facts giving rise to the dispute by limiting myself to those that are relevant to the issues raised and necessary for a sound understanding of these reasons.

Factual background

[5] CIDA is involved in implementing the Local Governance Morocco Project (LGM) and describes the purpose as follows:

> [TRANSLATION]
>
> The purpose of the project is to build local capacities to support inclusive, optimal, and sustainable local development in the target regions (Tangiers/Tétouan and Al Hoceima/Taza/Taounate), and to equip Morocco to eventually generalize innovative management approaches to all of its local communities.
>
> [Respondent's Record, volume 1, page 357]

[6] The execution this project required the planning and performance of a contract with the Kingdom of Morocco. It involved the selection of a Canadian support agency (CSA) to implement the project and a monitor/advisor in local governance for the project to perform the monitoring, audit and evaluation thereof. Wherever the duties described above were not carried out by CIDA, they were assigned by contracts submitted to the procurement process.

[7] The RFSP containing the disputed clause 2.3 was published on October 10, 2006, through the Canadian Government Electronic Tendering Service. The purpose of the RFSP was to obtain the services of a consultant acting as a monitor/advisor in local governance for the LGM project: ibid., at page 213. The applicant objects to the process used and the selection made for the reasons below. I would also add that the value of the contract awarded was estimated at $465,000, excluding GST, and the anticipated term of the contract was five years.

[8] In early 2006, CIDA began efforts to select the CSA for the project. On January 19, it issued a solicitation to that end. The following month, Mr. Courtemanche was hired to join the evaluation team responsible for selecting the CSA. Mr. Courtemanche was hired through a consulting and professional services contract.

[9] At the end of this initial process, a consortium (CRC SOGEMA/COWATER International Inc.) was selected as CSA. The consortium was awarded a five-year contract valued at CAD$13,197,000. This contract is currently being executed.

[10] When the RFSP followed in October for the selection of the CSA progress monitor/advisor in governance, Mr. Courtemanche, the applicant and five other consultants each submitted a proposal to obtain the contract. At the end of the selection process, the applicant came in third, but the contract was awarded to Mr. Courtemanche, who would then be called upon to monitor the project's execution and implementation by the CSA that he had helped to select as a member of the evaluation team.

[11] Faced with that fact, the applicant filed two complaints with the Tribunal, on a number of grounds. The first complaint concerned the non-compliance with clause 2.3 of the RFSP and Mr. Courtemanche's lack of competency in local governance. The second complaint, based on the information obtained after the first complaint was filed, accused CIDA of having breached the

contract award rules with regard to the detailed proposal evaluation grid, and of having not provided explanations supporting the scores the bidders received.

[12] The Tribunal agreed with the applicant. At paragraph 76 of its reasons for decision, the Tribunal found that CIDA had lacked transparency and, through its conduct, had violated some of its own provisions, prejudiced the applicant and tarnished the procurement process used at CIDA, although it did not question CIDA's good faith. As a result, it recommended several remedies including, as an overview, re-evaluating all technical proposals that had received a score of 60 percent or higher in the first evaluation, eliminating requirements 10 and 11 of the RFSP during the re-evaluation, modifying the factors to be taken into consideration or disregarded in relation to requirements 4 and 7 of the RFSP, cancelling Mr. Courtemanche's contract and awarding it to the applicant if he were to score the most points or, alternatively, compensating the applicant if CIDA decided not to cancel the contract with Mr. Courtemanche.

[13] Yet, the Tribunal did not agree with the interpretation of clause 2.3 submitted by the applicant. I will now address that issue.

Analysis of the Tribunal's decision

a) Interpretation of clause 2.3 of the RFSP

[14] Before the Tribunal, as before this Court, the applicant alleged that Mr. Courtemanche's bid was inadmissible under clause 2.3 of the RFSP. According to his reading and understanding of the second paragraph of this clause, the fact that Mr. Courtemanche was involved in selecting the CSA disqualified him from the monitoring, evaluation and audit step of the project implemented by the CSA. I believe it is appropriate to quote the text of this clause once again:

> Where this RFSP relates to the implementation of the first or only phase of a project, the Consultant, including EACH member of a consortium, joint venture or association, and all personnel and subcontractors must not have been involved, individually, jointly, or severally, in the planning (i.e. conceptualization, feasibility studies, specifications or design) of this project, nor have been assisted in the preparation of the proposal by any party who has been involved in the planning of this project.
>
> Where this RFSP relates to the evaluation, monitoring or audit of a project, the Consultant, including EACH member of the consortium, joint venture or association, and all personnel and subcontractors must not have been involved, jointly or severally, in the implementation of this project, nor have been assisted in the preparation of the proposal by any party who has been involved in the implementation of the project to be evaluated, monitored or audited.
>
> [Emphasis added]

[15] In the applicant's view, the CSA selection was part of the implementation phase of the project. Conversely, CIDA submitted that the CSA selection was part of the planning of the project.

[16] The Tribunal disagreed with the allegations of each party. It found instead that the selection process for the CSA was a linking step, a kind of "no man's land" between the planning phase and

the implementation phase. The Tribunal stated the following at paragraph 34 in its reasons for decision:

> 34. The Tribunal has closely examined the scope of clause 2.3 of the RFSP and the arguments submitted by the parties. The Tribunal is of the view that it is very difficult, if not impossible, to place the step of choosing the CSA into one of these two closed categories. The selection process for the CSA is a step that links the planning phase to the implementation phase. In other words, at the point of choosing the CSA, the project has usually already been planned and its implementation has not yet begun. In the Tribunal's view, there has therefore been no breach of clause 2.3 as worded in the RFSP.
>
> [Emphasis added]

[17] With respect, I believe that the Tribunal erred in its interpretation of clause 2.3. This error is specifically with respect to the principles and purpose behind clause 2.3 and the exhibits on record.

[18] The planning phase of a project involves defining the parameters and stipulating the instruments or mechanisms required for its implementation. See Mitchell L. Springer, *A Concise Guide to Program Management: Fundamental Concepts and Issues*, West Lafayette, IN, Purdue University Press, 2005, at page 55, where the author writes:

> The planning function involves the process of identifying the work to be performed, determining which of the requirements of the job are required by the customer (stated requirements) and which are required by internal processes or required in support of the customer's stated requirements (derived requirements). The basic premise is to identify what is required to satisfy the program's overall goal and objectives.

The implementation phase is characterized by putting the plan into action and meeting its objectives. Under the heading "Execution and Control" at page 14 in his book entitled *Fundamentals of Project Management*, WorkSmart Series, 3rd ed., New York: Amacom Books,

2007, author James P. Lewis notes that the execution phase begins when the plan has been made and approved and that the monitoring of a project is part of the execution or implementation phase. He writes:

> **Execution and Control**
>
> **Once the plan has been developed and approved, the team can begin work. This is the execution phase, but it also includes control, because while the plan is being implemented, progress is monitored to ensure that the work is progressing according to the plan**.

[Emphasis added]

[19] In the case at bar, the plan was to select a CSA and hire a monitor/advisor for monitoring and audit purposes. This element of the planning came into being during the implementation step, through the issuing of an RFSP to select the CSA and the formation of a bid evaluation team.

[20] Since selecting a CSA for the implementation of the project was a planned activity, I agree with the applicant that contrary to the Tribunal's ruling, this activity could not take place outside the project's two phases of planning and implementation.

[21] Clause 2.3 of the RFSP was aimed at avoiding situations of actual or apparent conflicts of interest, since such conflicts could cast a shadow over the quality and credibility of the project's monitoring, audit and evaluation operations. The clause was also aimed at ensuring fairness in the procurement process by preventing any bidder from having an undue advantage over the others as a result of the bidder's involvement in the implementation phase and the confidential or beneficial

information he or she could have obtained at that time. In short, clause 2.3 was aimed specifically at situations such as the one that occurred in this case.

[22] In interpreting clause 2.3 in a literal and narrow way, the Tribunal created a vacuum that allows and favours a repeat of what happened, to the detriment not only of the bidders but also of the procurement process and mechanism. Even disregarding principle and drawing inspiration from the purpose sought, it was not only possible and desirable, but also necessary to categorize the selection of the CSA, and, consequently, the work of the bid evaluation team, as part of the project implementation phase.

[23] In fact, the CSA selection process was the first step in the project implementation phase. The prior planning phase, then completed, stipulated that a person or group would be hired to implement the project. But the pre-planned selection process was part of the project implementation stage, and it was during that stage that it would be carried out. I also refer to the following exhibits on record to support this conclusion.

[24] The public version of the Government Institution Report (GIR) filed with the Tribunal described the respective roles and duties of CIDA and the CSA for the LGM project. Paragraph 12 of the Report indicates that the CSA is responsible for implementing the project (ibid., at page 186):

> [TRANSLATION]
>
> 12. The CSA must implement the LGM project and manage all activities funded by the project. To this end, the CSA must produce an implementation plan, prepare an annual work plan, participate in the committees which bring together the various participants in this project, provide technical support to the Moroccan partners and produce reports;

The selection of the CSA that will be responsible for providing the services described in the contract and required by the LGM project therefore occurs during the implementation step of the project. In my understanding, this confirms the statement in paragraph 52 of the GIR: [TRANSLATION] "In other words, CIDA is in charge of planning and the CSA is in charge of implementing the LGM project".

[25] In conclusion on this first ground of attack, in my opinion, the Tribunal erred in its interpretation of clause 2.3 in that, contrary to its findings, this clause was breached when the monitor/advisor contract was awarded to Mr. Courtemanche.

[26] This leads me to discuss the applicant's second complaint.

b) Unreasonableness of the Tribunal's recommended remedies

[27] The applicant submits that the remedies recommended by the Tribunal in his favour are unreasonable.

[28] Section 30.15 of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47 (Act) gives the Tribunal broad discretion in terms of the remedies it may grant, taking numerous factors into account, including the stage and extent to which the contract was performed:

Findings and recommendations	Conclusions et recommandations
30.15 (1) Where the Tribunal decides to conduct an inquiry, it shall, within the prescribed period after the complaint is filed, provide the complainant, the relevant government institution and any other party that the Tribunal considers to be an interested party with the Tribunal's findings and recommendations, if any.	**30.15** (1) Lorsqu'il a décidé d'enquêter, le Tribunal, dans le délai réglementaire suivant le dépôt de la plainte, remet au plaignant, à l'institution fédérale concernée et à toute autre partie qu'il juge être intéressée ses conclusions et ses éventuelles recommandations.
Remedies	Mesures correctives
(2) Subject to the regulations, where the Tribunal determines that a complaint is valid, it may recommend such remedy as it considers appropriate, including any one or more of the following remedies:	(2) Sous réserve des règlements, le Tribunal peut, lorsqu'il donne gain de cause au plaignant, recommander que soient prises des mesures correctives, notamment les suivantes :
(*a*) that a new solicitation for the designated contract be issued;	*a*) un nouvel appel d'offres;
(*b*) that the bids be re-evaluated;	*b*) la réévaluation des soumissions présentées;
(*c*) that the designated contract be terminated;	*c*) la résiliation du contrat spécifique;
(*d*) that the designated contract be awarded to the complainant; or	*d*) l'attribution du contrat spécifique au plaignant;
(*e*) that the complainant be compensated by an amount specified by the Tribunal.	*e*) le versement d'une indemnité, dont il précise le montant, au plaignant.
Criteria to be applied	Critères
(3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates,	(3) Dans sa décision, le Tribunal tient compte de tous les facteurs qui interviennent dans le marché de fournitures ou services visé par le contrat spécifique, notamment des suivants :

including	
(*a*) the seriousness of any deficiency in the procurement process found by the Tribunal;	*a*) la gravité des irrégularités qu'il a constatées dans la procédure des marchés publics;
(*b*) the degree to which the complainant and all other interested parties were prejudiced;	*b*) l'ampleur du préjudice causé au plaignant ou à tout autre intéressé;
(*c*) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;	*c*) l'ampleur du préjudice causé à l'intégrité ou à l'efficacité du mécanisme d'adjudication;
(*d*) whether the parties acted in good faith; and	*d*) la bonne foi des parties;
(*e*) the extent to which the contract was performed.	*e*) le degré d'exécution du contrat.
Cost of preparing response	Indemnité
(4) Subject to the regulations, the Tribunal may award to the complainant the reasonable costs incurred by the complainant in preparing a response to the solicitation for the designated contract.	(4) Le Tribunal peut, sous réserve des règlements, accorder au plaignant le remboursement des frais entraînés par la préparation d'une réponse à l'appel d'offres.

[29] This Court has recognized that the termination of a contract is not a remedy when a contract is improperly awarded to a non-compliant bidder: see *Seprotech Systems Inc. v. Peacock Inc.*, 2003 FCA 71. The Tribunal must reconcile the injured bidder's interest in being adequately compensated for the prejudice suffered with the public interest in having the contract performed as soon as possible and, where possible, without interruption, unless warranted by, *inter alia*, the other factors listed at subsection 30.15(3) of the Act.

[30] The Tribunal's only power in terms of remedies is to make recommendations to the federal institution. While the institution must implement the recommendations to the greatest extent possible, it may nevertheless not implement them fully: see subsection 30.15(1) and section 30.18 of the Act.

[31] In this case, the applicant has not established that the Tribunal, on the basis of its findings, exercised its discretion in way that was abusive, unreasonable or contrary to the Act. The fact is that the Tribunal applied the criteria stipulated at section 30.15 of the Act. Absent error by the Tribunal in exercising its discretion, nothing warrants this Court's intervention, let alone its exercising its discretion and then substituting its findings for those of the Tribunal.

[32] However, following our conclusion that clause 2.3 was breached and, accordingly, that Mr. Courtemanche's proposal was inadmissible, the issue of an appropriate remedy in this case arises.

[33] As we will recall, the applicant had ranked third, and the Tribunal had ordered that the proposals be re-evaluated. The Tribunal had recommended that the contract awarded to Mr. Courtemanche be cancelled and awarded to the applicant, if he were now to score the most points. The Tribunal had also proposed that the applicant be compensated if CIDA decided not to cancel Mr. Courtemanche's contract.

[34] This Court was informed at the hearing that the proposal re-evaluation had taken place in accordance with the Tribunal's decision and that Mr. Courtemanche had once again ranked first. We are unaware of the applicant's new ranking. However, we do know that Mr. Courtemanche's proposal was inadmissible and should have been set aside from the outset so that it could not be submitted for re-evaluation, as it should not have been.

[35] This Court is also aware, as was the Tribunal, that the contract is currently being executed, as it has been for a rather significant period of time to date, and that substituting the monitor/advisor for the project while it is in progress may prove extremely problematic. The only reasonable remedy in the circumstances may perhaps be to adequately compensate the applicant.

[36] Considering the little, if not the complete lack of, information available to us following the re-evaluation that was done, I believe that the fairest and most equitable way of deciding the question would be to return the file to the Tribunal so that it may propose an appropriate remedy for the applicant that takes into account the fact that Mr. Courtemanche's proposal was inadmissible, the applicant's results from the proposal re-evaluation and the advisability of cancelling Mr. Courtemanche's contract given how far the work has progressed.

c) Invalidation of clause 2.3 of the RFSP

[37] The applicant submits that the Tribunal did not properly understand the arguments he made on conflicts of interest. On that basis, he requests that clause 2.3 be invalidated.

[38] In light of my conclusion regarding clause 2.3, it is clear that were it to be accepted, the applicant's request for invalidation would be of consequence to him. However, it would also be of consequence to the other bidders and to the guarantees regarding conflicts of interest and fairness in the procurement process. Removing paragraph two of clause 2.3 would leave the door wide open to the type of abuse that it is specifically intended to prevent.

[39] Beyond these predictable and undesirable consequences, the applicant has not provided any legal basis for this Court to invalidate the second paragraph of clause 2.3.

d) Inadequacy of the public version of Mr. Stéphane Courtemanche's proposal

[40] The applicant seeks declaratory relief from this Court regarding the legal standards governing the filing of documents with the Tribunal. Essentially, he submits that he could have been more persuasive in his arguments to the Tribunal if he had had greater and better access to the relevant information. He states as evidence that he obtained, according to him, a more complete public version of Mr. Courtemanche's proposal through the *Access to Information Act* than the one he obtained through the Tribunal, which, he says, was the version submitted to Mr. Courtemanche for his approval by a counsel for CIDA before it was submitted.

[41] Sections 43 to 49 of the Act govern disclosure of information to the parties. Section 46 allows some information to be kept confidential. Therefore, where necessary, an edited version of a document is submitted to the Tribunal.

[42] In the case at bar, the Tribunal found that the public version of Mr. Courtemanche's technical proposal complied with section 46 of the Act. The Tribunal rightly emphasized the difficulty in terms of access to confidential information caused by the fact that the applicant was representing himself. The Tribunal stated that, by that very fact, the applicant was restricting his access to the public information on record: see Respondent's Record, volume 2, pages 818 and 819, the Tribunal's response to the applicant's complaint regarding this issue.

[43] By virtue of the fact that the declaratory relief claimed by the applicant does not concern this file but, rather, future eventualities, I believe that this Court is better advised not to speculate on those possibilities and to wait until it hears a concrete case requiring an analysis and revision of the rules regarding disclosure of information.

Conclusion

[44] For these reasons, I would allow the application for judicial review and I would declare that clause 2.3 of the Request for Summary Proposals SEL: 2007-A-032436-1 was breached and that Mr. Courtemanche's proposal was inadmissible. I would return the file to the Tribunal so that it may take these reasons into account in exercising its jurisdiction to grant the applicant an appropriate remedy in the circumstances.

[45] I would grant the applicant the amount of $1500, payable by the respondent, for disbursements in his application for judicial review.

"Gilles Létourneau"
J.A.

"I agree.
Marc Nadon J.A."

"I agree.
J.D. Denis Pelletier J.A."

Certified true translation
Sarah Burns

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-455-07
STYLE OF CAUSE:	JEAN-MARC BERGEVIN v. CANADIAN INTERNATIONAL DEVELOPMENT AGENCY
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	October 2, 2008
REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	NADON J.A. PELLETIER J.A.
DATED:	January 23, 2009

APPEARANCES:

Jean-Marc Bergevin	FOR HIMSELF
Bernard Letarte	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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