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Client Update

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Breach of Contracting Policy Results in Judicial Review of Procurement Decision

Introduction

In *Attorney General v. Rapiscan* (the "*Rapiscan* case"), the Federal Court of Appeal considered an appeal where a bidder sought judicial review on the grounds that the procuring entity, being the Canadian Air Transport and Security Authority ("CATSA"), allegedly breached its contracting policy.

In its decision, the Federal Court of Appeal confirmed that: a) the grant of relief on judicial review in the procurement context is contingent on the "public" nature of the procurement at issue; and b) a breach of policy (as opposed to a trade agreement or a legislative or regulatory provision) can result in a finding that a procurement decision is "unreasonable" or "unlawful".

Background

Rapiscan was invited to make submissions in response to procurement process initiated by CATSA for the supply of security screening equipment. Rapiscan was not selected for contract award. Rapiscan sought to challenge that determination.

Due to the fact that CATSA's procurement was not subject to a trade agreement, the procurement was not a "designated contract" within the meaning of the *Canadian International Trade Tribunal Act*. As such, the Canadian International Trade Tribunal did not have jurisdiction to conduct an inquiry into any complaint that may be brought by Rapiscan.

Rapiscan, therefore, brought an application for judicial review before the Federal Court of Canada. Pursuant to sections 18 and 18.1 of the *Federal Courts Act*, the Federal Court of Canada has jurisdiction to conduct a judicial review in respect of a decision or order of a federal board, commission or other tribunal.

Federal Court's Decision

The first issue that the Federal Court of Canada had to address was whether a procurement dispute, which is often characterized as commercial or contract dispute, is the proper subject of judicial review under sections 18 and 18.1 of the *Federal Courts Act*.

In doing so, the Federal Court considered the Federal Court of Appeal's decisions in *Irving Shipbuilding Inc. v Canada (Attorney General)*, 2009 FCA 116 and *Air Canada v Toronto Port Authority*, 2011 FCA 347, both of which provide guidance on whether an issue falls within the purview of public law and, hence, the proper subject of judicial review.

In *Irving Shipbuilding Inc. v Canada (Attorney General)*, the Federal Court of Appeal considered whether a subcontractor of an unsuccessful bidder for

a government procurement contract (in this case for the maintenance and servicing of submarines) may apply for judicial review to challenge the fairness of the process for awarding the contract when the unsuccessful bidder decides not to litigate. The Federal Court of Appeal found that a challenge to the exercise of statutory power to award a contract can be the subject of an application for judicial review. However, the Court went on to state that the circumstances in which the Court should grant relief on an application for judicial review challenging the legality of the award of a contract may be limited due to the fact that power being exercised is one of contract that involves a considerable discretion and is governed in large part by the private law of contract. The Federal Court of Appeal went on to find that the contracting authority did not owe a duty of fairness to a subcontractor in the circumstances of this case. Nonetheless, the Court went on to hold that it would not want to exclude the possibility of judicial intervention at the insistence of a subcontractor on the basis of an alleged breach of the duty of fairness where "the misconduct of government officials was so egregious that the public interest in maintaining the essential integrity of the procurement process was engaged", examples of which provided by the Federal Court of Appeal were bribery, fraud and corruption.

The *Rapiscan* case did not involve allegations of bribery, fraud or corruption. The Federal Court in the *Rapiscan* case distinguished the *Irving Shipbuilding* case on the grounds that it sought to address the particular circumstances of a subcontractor and that the high threshold that would allow a subcontractor to obtain a remedy on judicial review did not apply to bidders.

The Federal Court in the *Rapiscan* case then considered whether CATSA's procurement decision was of a sufficient public nature so as to be the proper subject of judicial review. The Federal Court considered the factors set out by the Federal Court of Appeal in *Air Canada v. Toronto Port Authority*.

Air Canada v. Toronto Port Authority was not a procurement case. Rather, it involved an application for judicial review that sought to quash certain bulletins issued by the Toronto Port Authority regarding the Billy Bishop Toronto City Airport. In this case, the Federal Court of Appeal was required to consider whether the bulletins at issue were involved the exercise of a power that is private in nature or one that is public in nature (and hence subject to judicial review). The Federal Court of Appeal conducted a review of the case law and identified a number of factors to assist in the public-private distinction for the purposes of judicial review. These factor include consideration of: a) the character of the matter for which review is sought; b) the nature of the decision-maker and its responsibilities; c) the extent to which the decision is founded in and shaped by law as opposed to discretion; d) the decision-maker's relationship to other statutory schemes or other parts of government; e) the extent to which the

decision-maker is an agent of the government or is otherwise directed, controlled or significantly influenced by a public entity; f) the suitability of public law remedies; g) the existence of a compulsory power; and h) the conduct has a serious public dimension (such as instances of fraud, bribery, corruption or human rights violations).

The Federal Court in *Rapiscan* determined that the factors outlined in the Air Canada case "apply to colour the present matter with a public element."

Having decided that CATSA's procurement decision was the proper subject of judicial review, the Federal Court then analyzed CATSA's decision making process in light of contracting policies that had been implemented by CATSA. The Federal Court found that CATSA's decision making process was not consistent with its policies and "resulted in a decision that was unfair, unreasonable, arbitrary and, in respect of Rapiscan, taken in bad faith in respect of its being invited to participate in [the procurement process]." The Federal Court's decision appears to be primarily based on its finding that CATSA's board did not consider relevant factors as the information on which it relied to make its decision was deficient.

The Federal Court of Appeal's Decision

CATSA appealed to the Federal Court of Appeal. The Federal Court of Appeal upheld the Federal Court's determination, but on a more limited basis.

The Federal Court of Appeal determined the Federal Court's conclusion that CATSA acted in bad faith was not supported and, hence, improper.

The Federal Court of Appeal also took issue with the Federal Court's finding that CATSA's procurement process was "unfair". The Federal Court of Appeal determined that the Federal Court's finding that CATSA's procurement process was "unfair" resulted from the Federal Court confusing substantive review with the requirements of procedural fairness. Implicit in the Federal Court of Appeal's reasons is the notion that procuring entities may not owe a duty of procedural fairness to bidders, with the exception of the extreme circumstances identified in the *Irving Shipbuilding Inc. v Canada (Attorney General)* (i.e. instances of bribery, fraud or corruption). Indeed, the Federal Court of Appeal indicated that it would not *a priori* limit the guidance provided in the *Irving Shipbuilding Inc. v Canada (Attorney General)* to subcontractors. Also implicit in the Federal Court of Appeal's decision is that a breach of procedural fairness is not necessary to obtain a public law remedy with respect to a procurement decision. Rather, a remedy can be granted on the basis of the unreasonableness or unlawfulness of the procurement decision.

The Federal Court of Appeal ultimately upheld the Federal Court's grant of a remedy. In this regard, the Federal Court of Appeal determined that CATSA's decision was "unreasonable and unlawful". The

Federal Court of Appeal based its conclusion on its finding that CATSA did not follow its contracting policy and that the information provided to CATSA's board was deficient.

CATSA's contracting procedures required that CATSA to conduct "an open process" when procuring goods and services (such as Requests for Information, Requests for Quotation, Requests for Proposals and Requests for Standing Offers that include published evaluation criteria), except in exceptional circumstances. It appears that the procurement process adopted by CATSA was not consistent with CATSA's contracting policy in that the procurement process asked potential suppliers to provide information about their respective offerings (including price), but did not provide information regarding the criteria against which those offerings will be evaluated.

The Federal Court of Appeal agreed with the Federal Court that CATSA adopted a process that was not consistent with "an open process" that included published evaluation criteria. Rather, the Federal Court of Appeal found that CATSA reviewed submissions on the basis of criteria that were not disclosed to bidders. Also, the Federal Court of Appeal found that CATSA's board was not made aware of this departure from CATSA's contracting policy as well as other information.

Importantly, CATSA argued that it was entitled to define the procurement process at it did and that CATSA's contracting policy "need[s] to be applied with flexibility and that CATSA requires a 'freedom to manoeuvre'" in light of operational requirements. In direct response to this argument, the Federal Court of Appeal held that those submissions defeat the purpose of implementing contracting policies. This suggests that courts will hold procuring entities to the terms of the contracting policies that they have promulgated and that procuring entities must, therefore, adhere to those policies or risk judicial review.

Why this is important to both procuring entities and potential suppliers

This case is important as it further defines the circumstances in which a procurement decision will be susceptible to judicial review, namely where the procurement is of sufficient public character.

Also, this case confirms that procurement decisions will be judged according to the standards and procedures set out in the procuring entities' contracting policies. As such, contracting policies adopted by public entities must be flexible enough to allow them to meet their various operational requirements as *ad hoc* departures from policies may result in judicial review.

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