Date: 20070926

Docket: T-277-07

Citation: 2007 FC 933

Ottawa, Ontario, September 26, 2007

PRESENT: The Honourable Madam Justice Layden-Stevenson

BETWEEN:

IRVING SHIPBUILDING INC. and FLEETWAY INC.

Applicants

and

THE ATTORNEY GENERAL OF CANADA and CSMG INC.

Respondents

REASONS FOR ORDER AND ORDER
[Confidential Reasons for Order and Order issued on September 20, 2007]

[1] By order dated July 13, 2007, Prothonotary Tabib dismissed the Attorney General's motion to strike a notice of application for judicial review, filed by Irving Shipbuilding Inc. (ISI) and Fleetway Inc. (Fleetway), for want of standing. On this motion, the Attorney General appeals Prothonotary Tabib's order. The respondent CSMG Inc. (CSMG) supports the Attorney General's position. For the reasons that follow, I conclude that the motion should be dismissed.

[2] This matter arises in the context of a federal government procurement process for the Victoria Class In-Service Support Contract (the contract). In July of 2006, Public Works and

Government Services Canada (PWGSC) issued a request for proposals (RFP) on behalf of the Department of National Defence (DND) in relation to the contract. The RFP provided that the contract would be awarded for a term of five years, with optional extensions for an additional ten years.

[3] BAE Systems Projects (Canada) Ltd. (BAE) entered into a Teaming Agreement with ISI and Fleetway for the express purpose of bidding for the contract. It was open to BAE, ISI and Fleetway to respond to the RFP as a joint venture. Nonetheless, BAE (as the bidder) submitted the bid proposal regarding the RFP to PWSGC. Three bids were received in response to the RFP. CMSG, a joint venture company comprised of Devonport Management Limited (DMI) and Weir Canada Inc. (Weir), was selected as the successful bidder.

[4] ISI and Fleetway filed an application for judicial review of the decision awarding the contract to CSMG and asserted that the process was flawed. Specifically, they alleged that Weir participated in the development of the statement of work and evaluation criteria for the contract, thereby violating conflict of interest rules and giving CSMG an unfair advantage. ISI and Fleetway, in the application, seek to have the decision quashed and the solicitation reissued with a direction that it be properly conducted in a manner consistent with procurement policies, principles of procedural fairness and applicable law.

[5] The Attorney General’s motion to strike was premised on the submission that ISI and Fleetway lack standing. In the alternative, the Attorney General sought directions on how to proceed.

[6] The standard of review with respect to an appeal of a prothonotary's decision is articulated in *Canada v. Aqua-Gem Investments Ltd*., [1993] 2 F.C. 425; 149 N.R. 273 (F.C.A.) (*Aqua-Gem*) and *Merck & Co., Inc. v. Apotex Inc*., [2004] 2 F.C.R. 459; (2003) 315 N.R. 175 (F.C.A.) (*Merck*). At paragraph 98 of *Aqua-Gem*, the Court stated:

> The question before the prothonotary in the case at bar can be considered interlocutory only because the prothonotary decided it in favour of the appellant. If he had decided it for the respondent, it would itself have been a final decision of the case: *A-G of Canada v. S.F. Enterprises Inc. et al.* (1990), 90 DTC 6195 (F.C.A.) at pages 6197-6198; *Ainsworth v. Bickersteth et al*., [1947] O.R. 525 (C.A.). It seems to me that a decision which can thus be either interlocutory or final depending on how it is decided, even if interlocutory because of the result, must nevertheless be considered vital to the final resolution of the case. Another way of putting the matter would be to say that for the test as to relevance to the final issue of the case, the issue to be decided should be looked to [page 465] before the question is answered by the prothonotary, whereas that as to whether it is interlocutory or final (which is purely a pro forma matter) should be put after the prothonotary's decision. Any other approach, it seems to me, would reduce the more substantial question of "vital to the issue of the case" to the merely procedural issue of interlocutory or final, and preserve all interlocutory rulings from attack (except in relation to errors of law).

[7] ISI and Fleetway submit that, in accordance with the reasoning of Mr. Justice Hugessen in *Peter G. White Management Ltd. v. Canada*, 2007 FC 686; F.C.J. No. 931 (*Peter G. White*) and Mr. Justice Evans (then of the Federal Court Trial Division) in *Sierra Club of Canada v. Canada (Minister of Finance*), [1999] 2 F.C. 211 (T.D.) (*Sierra Club*), the prothonotary's decision is not vital to the final resolution of the case because she did not strike out the application. The Attorney General and CMSG argue contra and contend that I must, in accordance with the direction of the Federal Court of Appeal in the earlier-noted authorities, exercise my discretion *de novo*. In my

view, nothing turns on this debate because, on either approach, I arrive at the same result as the prothonotary.

[8] As stated earlier, the prothonotary dismissed the motion to strike. In so doing, she made the following material findings:

- although it may be the case (in accordance with *Design Services Ltd. v. Canada* (2006), 272 D.L.R. (4th) 361; 352 N.R. 157 (F.C.A.) (*Design Services*)), that there is insufficient proximity between a sub-contractor and an awarding authority in a public tendering process to support an action in tort or contract, this does not necessarily mean that a sub-contractor cannot have standing as a person "directly affected" by the decision of an awarding authority to maintain a judicial review application thereof;

- an applicant may have standing as a person directly affected if there is a direct, substantial, immediate relationship between itself and the decision at issue, but not necessarily the decision maker: *Ogden Martin Systems of Nova Scotia Ltd. v. Nova Scotia (Minister of the Environment)* (1995), 130 D.L.R. (4th) 326; 146 N.S.R. (2d) 372 (C.A.) (*Ogden*);

- the applicants have a contractual relationship with BAE and, as a result of the decision, the contract was bound to completely disappear. Had BAE been awarded the contract, the applicants would have immediately been entitled to specific and significant legal rights and financial benefits.

[9] The penultimate paragraph of the prothonotary's order reads:

> As a result, I find that the question of whether a person who is specifically identified by a bidder in its proposal as a necessary and contractually bound prime sub-contractor and whose contractual rights vis-à-vis the bidder are specifically tied to whether the contract awarded to the bidder or to a third party has sufficient interest to challenge the award of the contract is an important and complex issue of fact and law, which has not been conclusively determined by this Court. I therefore find that it is not plain or obvious that the [a]pplicants have no standing to pursue this judicial review application. The Attorney General's motion to strike is accordingly dismissed.

[10] Contrary to the submissions of the Attorney General and CMSG, the prothonotary did not conclude that ISI and Fleetway have standing. Rather, she determined that the issue was arguable.

[11] Subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the *Federal Courts Act*) provides:

Federal Courts Act, R.S.C. 1985, c. F-7	*Loi sur les Cours fédérales* L.R. (1985), ch. F-7
18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande

[12] The Attorney General and CSMG contend that ISI and Fleetway are not directly affected because they were not parties to the bid contract and are therefore only indirectly affected. Despite the fact that they may have, in conjunction with BAE, coined the term "Team Victoria", the

response to the RFP was signed by BAE alone. ISI and Fleetway were listed only as proposed subcontractors. Consequently, it is to BAE (and BAE alone) that PWGSC has any potential obligation or liability.

[13] ISI and Fleetway assert that they are directly affected by the PWGSC decision because of their extensive roles in the preparation and submission of the BAE bid, their participation with PWGCS and the specific provisions of the Teaming Agreement with BAE, the specifics of which were known to PWGSC.

[14] The *Federal Court Rules*, SOR/98-106 (the *Rules*) do not provide for the striking of an application for judicial review. In *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (F.C.A.) (*David Bull*), the Federal Court of Appeal stated that only those matters which are so "clearly improper as to be bereft of any possibility of success" ought to be dismissed in a summary manner. Such cases must be "very exceptional" and cannot include those where there is a "debatable issue". It is common ground that the *David Bull* threshold is high and it applies to the issue of standing.

[15] In *Moresby Explorers Ltd. v. Canada (Attorney General)* (2006), 350 N.R. 101 (F.C.A.), Mr. Justice Pelletier, writing for a unanimous court in the context of an application for judicial review, described standing as a device used by the courts to "discourage litigation by officious inter-meddlers". He stated, at paragraph 17, "[i]t is not intended to be a pre-emptive determination…there is a distinction to be drawn between one's entitlement to a remedy and one's right to raise a justiciable issue".

[16] The Attorney General and CSMG raise various arguments relating to contingent interests, economic consequences and crystallized contracts. However, the pivot around which their arguments turn is that ISI and Fleetway are not in a direct relationship with PWGSC. By necessary implication, they cannot be directly affected and are therefore beyond the parameters of subsection 18.1 of the *Federal Courts Act*. In my view, the prothonotary fully appreciated this position, as do I. Notably, ISI and Fleetway do not suggest that they are in a direct contractual relationship with PWGSC. Rather, they claim to be directly affected by its decision.

[17] The problem, in my view, is that the law is not as settled as the Attorney General and CSMG present it to be. In this respect, see: Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at pages 161-164 where section 28 (the precursor to subsection 18.1 of the *Federal Courts Act*) is discussed. See also: *Ferring Inc. v. The Minister of Health, Apotex Inc. and Novopharm Limited*, 2007 FCA 276 at para. 5 and *Ogden*.

[18] There is no authority that is directly on point. The prothonotary was unable to conclude that the issue of standing was “plain and obvious”. In the exercise of her discretion, she determined that the notice of application should not be summarily dismissed. Notwithstanding the forceful arguments of the Attorney General and CSMG, I conclude that the issue of standing is at least debatable. ISI and Fleetway may not necessarily succeed in this respect, but the issue is arguable. Consequently, it cannot be said, at this stage, that the application is so clearly improper as to be bereft of any possibility of success.

[19] I reiterate that the focus in judicial review is on "moving the application along to the hearing stage as quickly as possible" thereby ensuring that "objections to the [application] can be dealt with promptly in the context of consideration of the merits of the case": *David Bull* at para. 11. The ultimate adequacy of the allegations and evidence must be addressed by the judge hearing the application on its merits.

[20] This brings me to the Attorney General's objection to the affidavit of Brent Holden sworn in support of the motion before the prothonotary. Specific exception was taken by the Attorney General to paragraphs 53 and 54 of the affidavit. I ruled, at the hearing, that the impugned paragraphs were improper and inadmissible. More importantly, I have had no regard to the affidavit in arriving at my conclusion. In my view, evidence is a matter for an applications judge, not a motions judge on a motion to strike.

[21] Finally, I find no fault with the prothonotary's directions as to the method of proceeding.

[22] The motion will be dismissed. All parties requested costs. In the exercise of my discretion, costs will be costs in the cause.

ORDER

IT IS HEREBY ORDERED THAT the motion is dismissed. Costs will be costs in the cause.

"Carolyn Layden-Stevenson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-277-07
STYLE OF CAUSE:	IRVING SHIPBUILDING INC. and FLEETWAY INC. AND THE ATTORNEY GENERAL OF CANADA and CSMG INC.
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