Date: 20080222

Docket: T-53-08

Citation: 2008 FC 242

Ottawa, Ontario, February 22, 2008

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

CANADIAN BOAT WORKS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] By bringing the present Motion for injunctive relief, the Applicant, Canadian Boat Works (CBW), seeks to stop a tendering process ongoing since 2005 under the authority of the Minister of Public Works and Government Services Canada (PWGSC). CBW argues that the tendering process to date has produced an unfair result, and the injunction is necessary to allow the completion of a judicial review of the decision-making within the process. In my opinion the Motion must be dismissed because CBW has failed to establish that it will suffer irreparable harm if the process continues.

I. Factual Background

[2] The tendering process concerns a contract for the construction, testing, and delivery of several Mid-Shore Patrol Vessels (MSPVs) for the Department of Fisheries and Oceans.

[3] The first step in the tendering process was the pre-qualification of bidders, which was commenced by PWGSC by the issuance of a Letter of Interest (LOI), dated October 7, 2005. The LOI specified that a requirement of the bid was that the MSPVs were to be of a "proven parent design".

[4] To clarify the "proven parent design" requirement, additional information was provided to all of the bidders at an Industry Day Conference in October of 2005. PWGSC clarified that bidders would be able to modify the "proven parent design" for the hull as long as the underwater portion of the hull was not modified and the overall length restrictions for the hull were respected.

[5] The result of the LOI process was that five parties, including CBW, were qualified to submit a bid. A First Request for Proposals (First RFP) was issued on November 17, 2006 and four of the five parties submitted proposals. In spite of the information given at the Industry Day Conference, the First RFP required that the bidders propose a "proven parent design" and, in the Technical Statement of Requirements (TSOR), this was stated to mean that there shall be "no change in hull form or in the demonstrable performance of that hull form" and that "there shall be no modification of the parent hull form".

[6] After the First RFP was issued there was a question and answer process in which PWGSC had the opportunity to comment further on the TSOR:

> The TSOR Part 1 Section 1.1.3 specifies a proven design shall be one in which there has been "…no change in hull form or in the demonstrable performance of that hull form." Accordingly, a design in which the length overall of the proven design has been increased shall no longer be considered to be a proven design.
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> (Dewar Affidavit, paras. 89 and 90)

[7] CBW submitted a bid based on its rights to an existing proven parent design with no hull modifications, thus complying with the requirements for a "proven parent design" contained in either the LOI or the First RFP.

[8] On April 4, 2007, PWGSC informed the Canadian Coast Guard (CCG), which was involved in the technical assessment of the bids, that it was going to cancel the First RFP because, in PWGSC's view, there were no complaint bidders. On April 27, 2007, the CCG responded to PWGSC, stating that, according to its technical analysis, there were two compliant and two non-compliant bids; of the former, one was submitted with modifications to the above water portion of the hull and the other, being CBW's, was submitted with a "proven parent design" hull with no modifications.

[9] CBW was informed of PWGSC's decision to cancel the First RFP by letter dated July 13, 2007, which stated that there had been no responsive bids. PWGSC did not provide reasons for the determination that CBW's bid was unresponsive, but simply stated that "bidders were

misinterpreting some of the requirements of the TSOR and the [Statement of Work]" contained in the First RFP.

[10] Throughout the summer and fall of 2007, CBW took steps to obtain an individualized debriefing from PWGSC. These steps included making a request under the *Access to Information Act* as well as making a complaint to the Canadian International Trade Tribunal (CITT). However, the access to information request provided no meaningful information and CITT found that it had no jurisdiction to hear the complaint as the First RFP had been cancelled.

[11] Despite CBW's active efforts to gain clarification as to why its bid was non-compliant, PWGSC refused to provide clarification. As a result, it appears that CBW formed the opinion that its bid was complaint and was, in fact, the only complaint bid.

[12] On December 13, 2007, PWGSC issued a further Request for Proposal (Second RFP). According to CBW, PWGSC's action had the effect of removing CBW's privileged status as the only compliant bidder under the First RFP. That is, PWGSC:

i. Changed the definition of proven parent design to one that allows a change to the above water portion of the hall;
ii. Changed the terms on which financial security can be provided;
iii. Changed the experience requirements to the favour of another bidder;
iv. Removed the Procurement form the jurisdiction of the CITT through the use of the national security exemption.

[13] It is the closing of this Second RFP that CBW seeks to stay by the present Motion.

II. The Issues on the Motion

[14] The present Notice of Application requests three declarations which set out the essential grounds for challenging the decision-making in the tendering process:

> 1. A declaration that the manner in which the Procurement has been conducted gives rise to a reasonable apprehension of bias on the part of the Minister.
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> 2. A declaration that the Minister carried out the Procurement and structures the Second RFP in a manner that was intended to and has discriminated against and caused prejudice to the applicant in the Procurement in violation of the principles of natural justice and procedural fairness.
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> 3. A declaration that the Minister has conducted the Procurement in violation of his duties and obligations under the *Department of Public Works and Government Services Act* and the *Financial Administration Act* and in violation of the law, policies and principles applicable to procurements carried out for and on behalf of the Government of Canada.
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> [Emphasis added]

Therefore, to succeed on the Motion, CBW has the burden to establish on the evidence on the Motion record that: a serious question exists with respect to one or more of the essential grounds; it will suffer irreparable harm if the tendering process is not stopped before the closing date for the Second RFP; and the balance of convenience in stopping the process rests with it.

A. *Arguable case*

1. *Reasonable apprehension of bias*

[15] The CBW relies on the test stated by the Federal Court of Appeal in *Cougar Aviation Ltd*:

> It was not disputed that the duty of fairness applies to the tendering process for federal government procurement contracts: see, for example, Thomas C. Assaly Corp. v. R. (1990), 34 F.T.R. 156 (F.C.T.D.). The elaborate statutory framework regulating their award, not to mention the obvious public interests implicated in these decisions, has added a public law aspect to a process that remains in part governed by the private law of contract.
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> In the absence of an express or necessarily implied statutory modification, if the duty of fairness applies to the exercise of a particular decision-making power, both of its branches will be engaged: the duty of the decision-maker to hear those liable to be affected by an adverse decision, and the duty to be impartial.
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> The duty of impartiality is normally not limited to actual bias. Thus, in order to prove a breach of the duty to be impartial a litigant need not show that the decision-maker in fact allowed the decision to be influenced by an extraneous factor, such as friendship with, or personal hostility towards, a participant in the process. Of course, since it will normally be extremely difficult to prove whether a decision-maker was indeed improperly so influenced, it would be extremely difficult to impugn successfully a decision on the ground of actual bias.
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> Accordingly, in order to permit decisions to be set aside that might have been influenced by improper considerations the law normally only requires a litigant to establish a reasonable apprehension of bias in order to impugn the validity of administrative action to which the duty of fairness applies. An insistence on this more demanding standard serves to enhance public confidence in, and thus the legitimacy of, public decision-making.
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> [Emphasis added]
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> *(Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)* [2000] F.C.J. No 1946 at para. 27-30)

[16] The accepted test for reasonable apprehension of bias was set out by de Grandpre J. of the Supreme Court of Canada in his dissenting reasons in *Committee for Justice and Liberty v. Canada (National Energy Board)* [1978] 1 S.C.R. 369 at p. 394:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude."

[17] In the present Motion, CBW makes the following statements that it apprehends that bias is operating in the tendering process and it will suffer thereby:

> The unfairness, lack of transparency and apprehension of bias result from PWGSC termination one bidding process, after evaluating bids, only then to commence another bidding process that does not appear to address any of the issue that allegedly led PWGSC to cancel the first one. Further, the Second RFP is substantively the same as the request for proposal that was issued on November 17, 2006 (the "First RFP", except in ways that would adversely affect CBW's bid and in ways that would allow other bidders to repair their bids.
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> […]
>
> Furthermore, I question whether damages are an appropriate remedy. CBW commenced this proceeding in order to ensure that Procurement will be decided in a fair and transparent manner. CBW recognizes that participating in a competitive procurement process in no ways guarantees it a contract. However, it is clear that the process now underway is not one that CBW can win and appears to be designed for some other bidder to win the contract. If the Second RFP is not fair, CBW cannot justify submitting a bid. As such, the judicial review must be determined prior to the acceptance of bids.
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> (Dewar Affidavit, paras. 4 and 125)

In my opinion, viewing the evidence of the tendering process contained in the Motion record realistically and practically, and having thought the matter through, CWB's apprehension that bias is operating is not reasonable. CWB's apprehension of bias is based on its opinion that in the First RFP it had the only compliant bid, and, therefore, it cannot reconcile this fact with the collapse of

the First RFP and the generation of the Second RFP. This inability to reconcile apparently caused it to form the conclusion that "it is clear that the process now underway is not one that CBW can win and appears to be designed for some other bidder to win the contract". In my opinion, CBW's belief is unfounded. In fact, CBW was not compliant in the First RFP (see: Respondent's Confidential Motion Record, Volume I of II at p.50 and pp.60-61), and, in fact, there is no evidence to found the belief that the Second RFP is designed to ensure a bidder other than CBW will win. Indeed, there is no evidence to conclude that CBW cannot win the Second RFP. Therefore, for the purposes of the present Motion, I dismiss CBW's apprehension of bias concern.

2. *Intention to discriminate, discriminate and cause prejudice*

[18] CBW also alleges an active intention on the part of PWGSC to harm it. This allegation is based on the same belief it held as described in the analysis of apprehension of bias. In my opinion, there is no evidence on the Motion record of an intention to discriminate against CBW, or that discrimination or prejudice has occurred.

[19] Therefore, I find that since CBW was not in a privileged position in the First RFP, it is in no position to complain about the revised security conditions imposed on the Second RFP. With respect to the decision to invoke the National Security Exemption that removed the Second RFP from the provisions of the CITT, there is no evidence on the Motion record to support the argument that the exemption decision is for a purpose other than Canada's legitimate security concerns.

[20] In my opinion, the problems experienced with the tendering process were an attempt by PWGSC to address the "misinterpretation" issue arising from the First RFP. As stated, there is no evidence that any of its actions were taken with intent to prejudice CBW and, indeed, CBW has not been discriminated against or prejudiced in any way as of the date of the present Motion.

3. *Violation of duties, obligations, the law, policies, and principles*

[21] Because of what I find to be the irregular conduct of the tendering process, I accept CBW's position that it does give rise to an arguable case that there has been a violation.

B. *Irreparable harm*

[22] In my opinion, as of the date of the present Motion, CBW has not suffered harm, and will not suffer harm by the Second RFP going forward. As already stated, there is no evidence to found the belief that the Second RFP is designed to ensure a bidder other than CBW will win, and, indeed, there is no evidence to conclude that CBW cannot win the Second RFP. I accept Counsel for the Respondent's argument that it is only after the selection process is completed, and CBW is determined not to be the successful bidder, that it can found a claim to being harmed.

C. *Balance of convenience*

[23] The evidence on the Motion record tendered by the Respondent is that time is of essence in the tendering process moving forward and, therefore, the Respondent argues that the injunction should not be granted. While CBW's evidence includes opinion that no harm will come from a

delay, I find that the Respondent's evidence is not refuted. As a result, I find that the balance of convenience lies with the Respondent.

III. Conclusion

[24] As I find no irreparable harm, CBW has not discharged its evidentiary burden of proof on the present Motion.

ORDER

THIS COURT ORDERS that the stay motion is dismissed.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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