Date: 20091221

Docket: T-1995-08

Citation: 2009 FC 1295

Ottawa, Ontario, December 21, 2009

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

GDC GATINEAU DEVELOPMENT CORPORATION /
CORPORATION DÉVELOPPEMENT GDC GATINEAU

Applicant

and

MINISTER OF PUBLIC WORKS AND
GOVERNMENT SERVICES CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought by GDC Gatineau Development Corporation (GDC) seeking an Order quashing the decision of the Minister of Public Works and Government Services Canada (Minister) to cancel the tendering process in connection with the construction, lease and management of a proposed office building in Gatineau, Quebec (the project). GDC asserts that the Minister's decision to cancel the tender in the face of its irrevocable offer to lease was unreasonable, contrary to applicable procurement policies, in breach of the duty of fairness, and non-compliant with international trade obligations. GDC asks that the Minister be

ordered to reconsider the decision in a process that would allow GDC to address the issues of concern that motivated the Minister to cancel the tender including the issue of price.

[2] The Minister takes the position that the impugned decision was made reasonably and in conformity with the rights and privileges that apply to the cancellation of tenders of procurement.

I. GDC's Motion for a Temporary Stay

[3] When this matter came before me, GDC argued, over the objections of the Minister, that its application should be temporarily stayed in the face of a collateral application for judicial review pending in the Federal Court of Appeal. That proceeding was taken by GDC from a decision by the Canadian International Trade Tribunal (C.I.T.T.) refusing to conduct an inquiry into the Minister's decision. GDC's complaint to the C.I.T.T. raised several issues that are common to this application for judicial review. GDC sought a stay under ss. 50(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 on the grounds that the C.I.T.T. is the preferred forum for resolving these common issues and that this process should be seen through to a final conclusion to avoid the risk of an inconsistent outcome. I dismissed GDC's motion for a stay and indicated that I would provide my reasons for that decision in my reasons on the application.

[4] For the purpose of identifying the general principles that apply to a motion for a stay, I am guided by the decision of Justice Michel Beaudry in *Laliberté v. Canada*, 2004 FC 1524, [2004]

F.C.J. No. 1844 (QL), and in particular, para. 17:

> [17] A stay of proceedings should only be granted in the most obvious cases (*Compulife Software Inc. v. Compuoffice Software Inc.*, [1997] F.C.J. 1772 (T.D.) (QL), paragraphs 15 and 16):
>
> > It is well established that a stay of proceedings should not be granted unless it can be shown that (1) the continuation of the action would cause prejudice or injustice, not merely inconvenience or additional expense, to the defendant, and (2) that the stay would not be unjust to the plaintiff. The onus is on the party requesting the stay to prove that these conditions exist: *Discreet Logic Inc. v. Canada (Registrar of Copyrights)* (1993), 51 C.P.R. (3d) 191 (F.C.T.D.) at 191…
> >
> > The Court will exercise its discretion to grant a stay, under s. 50(1) of the *Federal Court Act*, only in the clearest of cases. In consideration of whether granting a stay would be unjust to the plaintiff or applicant, this Court will be reluctant to interfere with any right of access, **unless there is a risk of imminent adjudication in two different forums**: *Canadian Olympic Association v. Olympic Life Publishing Ltd.* (1986), 8 C.P.R. (3d) 405 (F.C.T.D.) at 407-408; *Discreet Logic, supra [and Association of Parents Support Groups v. York* (1987), 14 C.P.R. (3d) 263 (F.C.T.D.)]. (Emphasis added in original.)

[5] In most situations where a temporary stay is sought because of duplicative or overlapping proceedings it is the respondent which seeks the relief. On this motion, it is GDC that asks that its application for judicial review be held in abeyance while it prosecutes its challenge to the unfavourable C.I.T.T. decision. The Minister takes the opposite position and asserts that there is a need to bring a degree of finality to the issues advanced by GDC in this proceeding. The Minister

points out that the C.I.T.T. did not address the issues common to these proceedings on their merits and that this Court should be allowed to do so, and on a timely basis.

[6] I agree with the Minister that the interests of the Crown outweigh those of GDC and that it better serves the interests of justice that this Court resolve these issues now. The significance of the issue of possible inconsistent outcomes is substantially diminished in this situation because it depends on the success of the pending application to the Federal Court of Appeal and the return of GDC's complaint to the C.I.T.T. for redetermination on one or more of the common issues. Such an outcome is much too uncertain and remote to support a stay of this application, not to mention that there is little likelihood of the imminent adjudication of the other application.

[7] I would add to this that a favourable outcome for GDC before the C.I.T.T. on the merits will not necessarily be determinative of the outcome of this application. This is so because the C.I.T.T. complaint is concerned with possible breaches of international trade obligations, the resolution of which is unlikely to bind me in resolving the common law issue of procedural fairness. Although there do appear to be factual issues common to both cases, it does not seem to me that there is much likelihood of inconsistency with respect to the ultimate determination of these matters. Thus, if GDC is unsuccessful on its application to the Federal Court of Appeal there remains a likelihood that this application will still be necessary.

[8] GDC's claim that these issues should be resolved in a forum that it prefers is not a compelling argument, particularly where the Minister prefers an earlier determination in this Court.

[9] GDC relied upon the decision of Chief Justice Allan Lutfy in *NFC Canada Limited v. Canada (Attorney General)* (1999), 87 A.C.W.S. (3d) 686, [1999] F.C.J. No. 454 (QL) (F.C.T.D.), which involved a procedural history with some similarity to the situation GDC now faces. There are, however, important distinctions between the two cases. Chief Justice Lutfy was dealing with an apparently early motion for a stay brought by the Crown as a respondent where the applicant wished to prosecute both proceedings simultaneously. The motion brought here by GDC was initiated a mere two days before the scheduled hearing of its application for judicial review before this Court and where its pending application to the Federal Court of Appeal is at a very early stage. If GDC's complaint to the C.I.T.T. is ordered to be redetermined on the merits, the C.I.T.T. can decide the extent to which this Court's findings may be relevant or binding, if at all, to the exercise of its jurisdiction.

[10] It is for these reasons that the GDC's motion was dismissed.

II. Background

[11] On June 1, 2007 the Real Property Services Branch of Public Works and Government Services Canada (unless otherwise stated, referred to hereafter as "Public Works") published a request for information (RFI) concerning the construction of the project. GDC responded to the RFI on June 29, 2007.

[12] The RFI was followed by Public Works' publication of a Selection of Invitees to Tender (SOIT) on April 23, 2008. The SOIT was a request to interested parties to outline their competence to construct, deliver and manage the project in accordance with the terms outlined. Included within the SOIT was a specimen of an Invitation to Submit an Irrevocable Offer to Lease, a specimen lease, and a form of a Standby Letter of Credit. The SOIT also established the criteria for evaluating the responses or "Requests for Qualification" (RFQ). It stipulated that a proponent would not qualify to submit an irrevocable offer to lease unless it had achieved a minimum score of 70% under each category of experience and approach.

[13] In accordance with the terms of the SOIT, GDC and two other parties submitted RFQs to Public Works. On September 15, 2008, GDC was advised by letter that it had achieved an evaluation score of 83%. GDC was accordingly invited to submit an Irrevocable Offer to Lease (Invitation) by no later than September 30, 2008 subject to the following qualification:

> Finally, we wish to advise you that this project will not be able to go forward if the rental rate offered can not be supported by PWGSC.

[14] GDC submitted its executed Irrevocable Offer to Lease to Public Works on September 30, 2008 (Offer) supported by its corporate by-laws, an altered form of a letter of credit issued by the HSBC Bank, and a letter from the City of Gatineau confirming municipal approval for the project. The same day Derek Howe on behalf of GDC attended at the offices of Public Works for a public opening of GDC's Offer. Although GDC's bid was opened at that time, no third parties were present and its terms were not disclosed.

[15] On several occasions in October and November 2008, Mr. Howe contacted Public Works enquiring about the status of GDC's Offer. On November 13, 2008, Public Works advised Mr. Howe by email that GDC's Offer was still under examination. On November 28, 2008 the President of GDC was verbally advised by the Assistant Deputy Minister of Public Works that the tender process for the project was cancelled and that it would be later restarted. This was followed on the same day by a letter from Public Works advising GDC that the tendering process was cancelled because "no proposal has fully met the Crown's requirements".

[16] On December 2, 2008, Public Works wrote to GDC giving the following three reasons for rejecting its Offer:

i. Your Offer to lease submitted on September 30, 2008 could not be accepted since the annual rent for Leased Premises exceeded the rental range of the Market Survey Report of this project and was also above PWGSC's budget.

ii. Your Standby Letter of Credit was to be irrevocable until August 31st, 2012. However as indicated in the HSBC Irrevocable Standby Letter of Credit no: GTECHB080083 dated September 26, 2008, this is a year to year Letter of Credit that HSBC can elect to not renew. Please note also that your letter was not subject to the International Chamber of Commerce Uniform Customs and Practice for Documentary Credits, 2007 Revision, International Chamber of Commerce Publication No 600 as requested. Therefore your Letter of Credit does not meet the mandatory requirements set out in the Section 1, Schedule "B" of the SOIT.

iii. The Resolution of the Board of Directors of GDC Gatineau Development Corporation/Corporation Développement GDC Gatineau, as well as By-Law #1 that were submitted to PWGSC were not signed.

[17] GDC took exception to the reasons given by Public Works for the rejection of its Offer. GDC complained that Public Works had failed to disclose the existence of its Market Survey Report (the Altus report) which had set rental rate parameters and because it had also failed to discuss with GDC any deficiencies in its Offer. GDC also claimed that Public Works' objection to the HSBC Standby Letter of Credit and to its failure to submit fully executed corporate documentation establishing the authority to execute the Offer were unwarranted and unjustified technicalities. GDC asked for a meeting to discuss its concerns, but this request was refused.

[18] The Minister's decision to cancel the tender and to restart the tendering process is documented in a Memorandum to the Minister dated November 19, 2008 (Memorandum). That document indicated that GDC was the only proponent to have successfully advanced through the RFQ stage and to thereby be invited to submit an irrevocable offer to lease. Of the other two proponents, one had failed to achieve the minimum evaluation score of 70% and the other had failed to meet the mandatory requirements for the project. The Memorandum offered the following assessment of GDC's Offer:

> Proponent 3: Gatineau Development Corporation (Broccolini and Tempest) met all the project requirements and successfully passed the Experience, Approach and Construction category. A letter sent to them on September 15, 2008, invited them to submit an Irrevocable Offer to Lease by September 30, 2008. Their offer contained a rent quote of $12,578,070 per annum, or approximately $315 per square metre per year. This amount is considered unacceptable by our department, as it is approximately 20 per cent above the independent third party market analysis report dated September 14, 2008, which established a range of $260 to $275 per square metre (see Annex A). The Financial Analysis of the Offer is attached as Annex B. Two other issues of concern with their offer are the fact that their Letter of Credit is not completely

> irrevocable, and the fact that there are no signed by-laws authorizing the company to sign the Offer.

[19] The Memorandum also referenced the behind-the-scenes complaints of the two failed proponents, one of which alleged a lack of fairness, bias and unfair advantage. Both of the failed proponents had also initiated complaints against Public Works to the C.I.T.T. Although the Memorandum was redacted to remove any reference to privileged legal advice, it did note that one of the C.I.T.T. complaints had not yet been subjected to a full risk assessment by Legal Services. The other C.I.T.T. complaint had been dismissed on technical grounds, but was then subject to a judicial review proceeding in the Federal Court of Appeal.

[20] Notwithstanding the absence of a full legal assessment, the Memorandum contained the observation that "re-tendering will allow us to correct such a perception" – presumably meaning a perception of unfairness. The Memorandum concluded with a recommendation that the procurement be re-launched with a revised process and simplified tender package "offering greater clarity on the Department's specific needs". The simplified tender package was to involve, in part, the removal of the property management component of the project. It was also suggested that the new tender documents be reviewed by Legal Services to make the process less vulnerable to a procurement challenge to the C.I.T.T.

[21] On November 27, 2008, the Minister accepted the Department's recommendation. The tendering process for the project has since been re-launched, but it has yet to be concluded.

III. Issue

[22] Was the Minister's decision to reject GDC's Offer and to cancel the tender for the project unlawful?

IV. Analysis

[23] It is essential to understand that this challenge is not brought as an action for breach of contract. GDC maintains, though, that the duties of fairness it espouses are contractual albeit implied. It is, of course, well understood that a compliant irrevocable bid may give rise to contractual obligations on both parties including obligations of fairness, the breach of which may support a claim to damages: see *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860 at paras. 83 and 88. An application for judicial review on the other hand imposes jurisdictional limitations on the Court which were described by Justice Robert Décary in *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services Canada)*, [1995] 2 F.C. 694, [1995] F.C.J. No. 735 (QL) (F.C.A.) at paras. 17 and 20:

> 17 I cannot conceal the hesitation I would have had in categorically stating that in no circumstances could the Federal Court by way of judicial review determine the legality of a tender proceeding, as essentially that is what is meant when it is argued that the Court does not have jurisdiction. It is one thing to say that a remedy is more or less appropriate depending on the circumstances; it is another to say that a remedy is systematically prohibited in all circumstances. It seems to me that the respondents have confused these two ideas. It may be that in reality they will more often than not be right in that the courts will seek in vain for the illegality which alone could justify intervention. The fact remains that under the language conferring jurisdiction on the Court Parliament authorized challenges to such decisions and the fact that in practice they will seldom be successfully challenged does not mean that the Court lacks jurisdiction over them.

[…]

> 20 As by definition the focus of judicial review is on the legality of the federal government's actions, and the tendering procedure was not subject to any legislative or regulatory requirements as to form or substance, it will not be easy, in a situation where the bid documents do not impose strict limitations on the exercise by the Minister of his freedom of choice, to show the nature of the illegality committed by the Minister when in the normal course of events he compares the bids received, decides whether a bid is consistent with the documents or accepts one bid rather than another.

Care must, accordingly, be taken to avoid the risk of turning an application examining the lawfulness of a tendering decision into a breach of contract proceeding by any other name.

[24] Notwithstanding its obvious limitations, it is clear that judicial review is available to assess the lawfulness of a tendering decision of the type taken here and, in particular, a decision to disqualify a tender offer. Such decisions are entitled to deference and I concur with the standard set by Justice Paul Rouleau in *Halifax Shipyard Ltd. v. Canada (Minister of Public Works and Government Services)* (1996), 113 F.T.R. 58, 63 A.C.W.S. (3d) 627 (F.C.T.D.). Justice Rouleau held that an applicant must demonstrate that the tendering authority acted in an unfair, unreasonable or arbitrary manner, based its decision on irrelevant considerations, or acted in bad faith.

[25] GDC concedes that it was open to the Minister to conclude that the lease rate contained in its Offer was too high and above its budget. But GDC argues that such a decision must be reached in a fair and reasonable manner and without reliance on irrelevant or inaccurate information. GDC contends, further, that the Altus report was flawed and that the Minister’s reliance upon it, even if in

good faith, can be considered a breach of fairness. In the circumstances where only one Offer was on the table, GDC says that the Minister was obliged by fairness to disclose its pricing criteria and to then enter into negotiations as a means of reaching a mutually acceptable price. GDC's Memorandum of Fact and Law summarizes these concerns in the following way:

> 65. PWGSC must clearly identify in the SOIT what criteria will be used to determine whether prices represent fair value to the Crown and, indeed, whether fair value to the Crown is itself a criterion.
>
> […]
>
> 67. PWGSC breached its duty to act in good faith when it improperly rejected GDC's offer based on undisclosed criteria. By ignoring the SOIT's explicit evaluation criteria and embarking on an unannounced and inconsistent evaluation of GDC's Offer, PWGSC breached GDC's procedural right to know the requirements that it needed to address in order to have a chance at succeeding.
>
> […]
>
> 71. At the time PWGSC adopted the Altus Report, GDC was the sole compliant bidder remaining in the SOIT. As such, PWGSC should have entered into negotiations with GDC as a means of reaching a mutually acceptable price.
>
> […]
>
> 73. Reliance on incorrect information can be considered a breach [*sic*] fairness. Where an expert or consultant is retained by a purchaser to advise on a component of the bid(s) received in a tendering process, mere reliance on the information or advice obtained in good faith is not enough. A purchaser must treat the information in a way that does not unfairly prejudice a bidder. This may include performing a minimum of due diligence to verify expert advice, or disclosing the information and providing bidders with an opportunity to respond.
>
> […]
>
> 77. When there is only one compliant bidder, the rejection of that bid without consultation becomes appropriate only if it is apparent to

> the purchaser that it can not negotiate a price for the work with the bidder.
>
> […]
>
> 79. The Crown ought not to have decided to cancel the Project without having established proper grounds for doing so. The cancellation and re-issuance of a solicitation is a serious matter involving fairness to suppliers and fair value to taxpayers. Something more than a bare assertion that the price offered does not represent fair value is required.

[26] I do not agree with GDC that the Minister's reliance on supposedly "incorrect" information or advice constitutes a breach of an implied duty of fairness. It is not the role of the Court on judicial review to assess the wisdom of the decision rendered or the accuracy of the information relied upon to make it – except, perhaps, in the rare situation where it has been proven that the reasons given are merely a pretence for something else. The Court cannot, therefore, embark on a forensic analysis of the Altus report and, given the evidentiary limitations that are inherent in judicial review, the Court is ill-equipped to do so. There is also no evidence in this case to establish that the reasons for the Minister's decision are anything other than those outlined in the Memorandum. It is perhaps worth noting that the Altus report was dated September 14, 2008 which was more than two weeks before GDC submitted its Offer.

[27] This is not a case like *West Central Air Ltd. v. Saskatchewan* (2004), 2004 SKCA 79, 249 Sask. R. 1, which was an appeal from a trial decision and where one of the proponents was unfairly rejected as unqualified on the strength of "specious" evidence. The Court went on to note that the successful bidder had been permitted to remedy a deficiency in its tender.

[28] GDC's argument that Public Works had a duty to disclose the financial criteria by which its Offer would be considered has no merit. It is to be expected that Public Works will have a budget for any procurement and, particularly, for a project of this magnitude. It would also be anticipated that in creating a budget for a specialized real estate project of this size Public Works would seek the assistance of a professional, independent appraiser like the Altus Group. Indeed Public Works is required to by its policies to obtain an appraisal for a project of this type and to otherwise ensure that its tendering decisions are financially prudent. As an experienced developer, GDC knew that its Offer would be scrutinized to ensure that its pricing was competitive in the marketplace[1]. That was all GDC needed to know and was entitled to know when it submitted its Offer.

[29] The suggestion that Public Works had a duty at any time to disclose its budget or the Altus report analysis to GDC is also wrong in law. Such a disclosure would have placed Public Works in a position of marked disadvantage in obtaining a competitive offer and later, even more profoundly, in the negotiation that GDC claims it was entitled to have in the search for "a mutually acceptable price". Armed with that knowledge, a developer would never be expected to propose a price that was any lower than the high end of the range acceptable to the tendering authority. The acceptance of GDC's position would foster an anti-competitive environment of the sort that was of concern to the Court in *Martel Building Ltd.*, above, at paras. 66 and 67:

> 66 In many if not most commercial negotiations, an advantageous bargaining position is derived from the industrious generation of

[1] This is particularly important where there are no other comparative bids to consider. This was presumably the reason for advising GDC "that this project will not be able to go forward if the rental rate offered can not be supported by PWGSC".

> information not possessed by the opposite party as opposed to its market position as here. Helpful information is often a by-product of one party expending resources on due diligence, research or other information gathering activities. It is apparent that successful negotiating is the product of that kind of industry.
>
> 67 It would defeat the essence of negotiation and hobble the marketplace to extend a duty of care to the conduct of negotiations, and to label a party's failure to disclose its bottom line, its motives or its final position as negligent. Such a conclusion would of necessity force the disclosure of privately acquired information and the dissipation of any competitive advantage derived from it, all of which is incompatible with the activity of negotiating and bargaining.

[30] The idea that a tendering authority has a legal duty to disclose its budget in its invitation to tender was expressly rejected in *Colautti Brothers Marble Tile and Carpet v. Windsor (City)* (1996), 36 M.P.L.R. (2d) 258, 21 O.T.C. 68 (Ont. Ct. J. (Gen. Div.)) at para. 35. The withholding by a tendering authority of its budget or the evidence to support its budget does not give rise to an undisclosed term or create any unfairness: see *Wind Power Inc. v. Saskatchewan Power Corp.* (1999), 46 B.L.R. (2d) 116, 179 Sask. R. 95 (Sask. Q.B.) at para. 69, affirmed (2002), 2002 SKCA 61, 217 Sask. R. 193.

[31] GDC also asserts that the Minister took into account irrelevant evidence concerning the complaints of its two competitors over their respective disqualifications, including their challenges to the C.I.T.T. GDC says that the Minister ought not to have considered the frivolous threats and litigation of disgruntled third parties. While, in theory, it is to be hoped that wholly unmeritorious litigation (or the threat of it) ought not to be influential in a decision like this one, there is no evidence before me that these were matters unworthy of consideration or that they unduly

influenced the Minister. The Memorandum merely noted the existence of these third party concerns and advised, quite appropriately, that this was a factor to consider. Once again, it is not for the Court to substitute its views for those of the Minister about the weight that should be ascribed to such matters. It is simply not correct that third party complaints or litigation concerning the propriety of the tendering process are never worthy of consideration when the Minister is considering the cancellation of a tender[2]. And, as noted above, the Court is in no position on judicial review to determine whether such matters were, in some measure, meritorious. In short, the Minister, acting in good faith, is entitled to rely upon and to weigh any evidence that appears relevant to the decision and the Court will not embark upon a hindsight assessment of the quality or sufficiency of that evidence.

[32] GDC argues that as the sole qualified proponent its Offer could not be fairly rejected without a further negotiation of terms. It also says that its Offer was compliant with the Invitation and that the Minister's decision was unreasonable in holding otherwise. The Minister contends that the express terms of the Invitation allowed him to unilaterally cancel this tender and to reject GDC's Offer on the grounds that it was uneconomic and non-compliant.

[33] The Invitation contained privilege terms which, on their face, granted broad discretion to the

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[2] See *Glenview Corp. v. Canada (Minister of Public Works)* (1990), 34 F.T.R. 292, 44 Admin. L. R. 97 (F.C.T.D.) at para. 27 where reference is made to the avoidance of protracted litigation as a legitimate consideration for canceling a tender.

Minister to terminate the tendering process or to reject any or all Offers. Those provisions provided:

> 5. EVALUATION
>
> a) The evaluation of Offers received is an ongoing process, and the Lessee reserves the right to terminate any further consideration of Offers at any time.
>
> b) An Offer may not be subject to further evaluation if, in the sole opinion of the Lessee, the Offer fails to meet or comply with the provisions, requirements or standards set out in the documents entitled *Selection of Invitees to Tender*.
>
> […]
>
> 6. ACCEPTANCE
>
> The Lessee may accept any Offer, whether it is the lowest or not, or may reject any or all Offers.

[34] If GDC's Offer was compliant it may have been open to the Minister to negotiate around price. That possibility is recognized in some of the policy guidelines which deal with federal government tendering practises, but it is not expressed in imperative language. The Minister, though, owed no legal duty to GDC to discuss the perceived deficiencies in its Offer before the decision was taken to reject it. The obligation to negotiate advanced by GDC is entirely inconsistent with the contractual privilege clauses and, accordingly, there is no room for the recognition of such an implied duty. The imposition of fairness duties in the tendering process is, after all, intended to ensure that the reasonable commercial expectations of all interested parties are respected. In *Irving Shipbuilding Inc. v. Canada (Attorney General)* (2009), 2009 FCA 116, 389 N.R. 72, the Federal Court of Appeal recognized the danger of imposing public law duties of

fairness into a predominately commercial relationship because to do so would frustrate the parties' expectations: see paras. 45, 46 and 53. When such a process is reduced to the presence of only two interested parties involving a single compliant bid, there is no obvious rationale for imposing an overriding fairness obligation on one of them; indeed, to do so is to interfere with that party's freedom to contract which necessarily includes the freedom to reject an offer: see *Glenview Corp. v. Canada (Minister of Public Works)* (1990), 34 F.T.R. 292, 44 Admin. L. R. 97 (F.C.T.D.) at para. 22. In this situation Public Works' freedom to contract is unambiguously expressed in the privilege clauses and there is no justification for ignoring those terms. Except when the interests of third parties are clearly engaged, these types of provisions have been enforced in a manner consistent with the broad discretionary language used. For example, in *Rockwood v. Eastern Newfoundland and Labrador Regional Health and Community Services Board* (2004), 2004 NLSCTD 115, 238 Nfld. & P.E.I.R. 291, the Court considered a privilege clause which gave the tendering authority the right to "reject any and all Tender Offers". The Court interpreted the above provision in the following way:

> 42 The Board was quite entitled not to award any contract. Assuming that its reasons for cancelling the tender are reviewable by the Court, the Board's reason here - that the price was too high - is not assailable. The Board was under no legal obligation to any tenderer to pay more than it felt that it could afford, to investigate other sources of financing, or to in any way rework its objectives to give some contract to a particular tenderer.

See also *Aloia Bros. Concrete Contractors Ltd. v. Peel (Regional Municipality)* (2008), 92 O.R. (3d) 356, 51 B.L.R. (4th) 284 (Ont. Sup. C. J.) at para. 63 and *Wind Power Inc.*, above, at paras. 60-62.

[35] I do not agree that the decision in *Ottawa-Carleton Dialysis Services v. Ontario (Minister of Health)* (1996), 41 Admin. L.R. (2d) 211, 93 O.A.C. 82 (Ont. Ct. J. (Gen. Div.)) recognized a stand-alone duty to negotiate with a single tender proponent. That was a situation where the proponent was seeking a license from the Minister and where the applicable regulations called for pre-agreement negotiations. No negotiations were carried out before the Minister cancelled the tender. The Court merely observed that the Minister's ostensible concerns could very easily have been addressed in the anticipated negotiations which, in part, led the Court to conclude that the decision was politically motivated and made in bad faith. Here there is no evidence to support such a conclusion.

V. Was GDC's Bid Compliant?

[36] The Minister based his decision to reject GDC's Offer on the alternative ground that the required Standby Letter of Credit did not conform with the SOIT requirements. GDC argues that the inconsistency between the Letter of Credit it submitted and the form stipulated was a matter of form and not substance. GDC also says that the form of Letter of Credit stipulated by Public Works was described only as a "sample", thereby opening up the possibility that any substantially compliant version would be acceptable.

[37] On this issue I agree with the Minister's position. I do not accept that the reference to a "sample" in the Standby Letter of Credit set out in Schedule "B" to the SOIT opened the door to acceptable variations. Article 3 of the Specimen Invitation as set out in Section 2 makes it clear that

the intended Offer was to include an Irrevocable Standby Letter of Credit "as set out in Annex B of Section 1" of the SOIT. Article 7.1 of the SOIT stated that the letter of credit was required to be "in the exact form Schedule "B" hereof". This language does not contemplate variations to the form provided.

[38] This problem is indistinguishable from the one considered in *H. B. Lynch Investments Inc. v. Canada (Minister of Public Works and Government Services)* (2005), 2005 FCA 237, 140 A.C.W.S. (3d) 555 where Justice Décary observed that strict compliance with a contractual term may be required if the variation in question could lead to a dispute between the parties. The alteration made here by GDC to the letter of credit was, in my view, not an insignificant irregularity because it permitted the HSBC to decline to renew its security upon notice to the Minister. It is not entirely clear whether the Minister could then unconditionally draw upon this letter of credit or whether an act of default by GDC would first be required. But in either event, the Minister is correct that what was required was an unbroken four-year term which left no room for later argument and did not expose the Minister to the need to manage the bank's commitment. The fact that the HSBC subsequently provided a letter to GDC in an effort to qualify the express terms of its letter of credit and to describe the bank's usual commercial practices simply highlights the potential interpretive problem presented by this form of security. As in *H. B. Lynch Investments Inc.*, above, the Minister took pains to draft the terms of this important aspect of the tender and he was fully entitled to reject GDC's Offer as non-compliant when those terms were not followed.

[39] Having regard to the findings made above, it is unnecessary for me to determine whether GDC's Offer was also non-compliant because of perceived irregularities with respect to the necessary signing authority.

[40] In the result, this application for judicial review is dismissed with costs payable to the Respondent under Column III.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is dismissed with costs payable to the Respondent under Column III.

" R. L. Barnes "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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