

Federal Court



Cour fédérale

Date: 20110831

Docket: 11-T-35

Citation: 2011 FC 1033

Ottawa, Ontario, August 31, 2011

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

DR. DIALA CHAABAN

Applicant

and

CORRECTIONAL SERVICE CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a motion for an extension of time to file a Notice of Application for judicial review.

Dr. Diala Chaaban seeks to bring an application to review a decision of Correctional Service Canada (“CSC”), which disqualified her proposal for the provision of essential dental services to offenders incarcerated in five Federal Institutions (Solicitation No. 21807-0002, hereinafter the “RFP”) as being non-compliant.

[2] Having reviewed the relevant factors to be taken into account in the context of such a request, I have come to the conclusion that it would be in the interest of justice to grant the extension sought by the Applicant.

1. Background

[3] On December 30, 2010, CSC issued the RFP, which had a closing date of February 7, 2011. The RFP requested proposals for the provision of essential dental services to offenders in five Federal Institutions in British Columbia. Bidders were advised to specify which location they were bidding for and to submit a separate Finance Proposal for each location.

[4] Section 9.1 of the RFP, entitled “Mandatory Requirements”, set out various evaluation factors and mandatory compliance requirements that bidders had to meet. Under this section, bidders were required to “include the completed and signed certifications enclosed as Appendix “B”, with their proposal”.

[5] On February 1, 2011, Dr. Chaaban submitted proposals for all five Federal Institutions in accordance with the terms of the RFP. As part of the proposals, Dr. Chaaban submitted completed Appendix “B” Certifications. Appendix “B” contained five Certifications, which were prefaced by the following Note to Bidders:

THE FOLLOWING CERTIFICATION REQUIREMENTS APPLY TO THIS REQUEST FOR PROPOSAL (RFP). IT IS MANDATORY ALL BIDDERS COMPLETE THESE CERTIFICATIONS BY FILLING IN THE APPROPRIATE SPACES BELOW AND INCLUDE THEM WITH THEIR PROPOSAL.

No additional information was provided by CSC for completing the Certifications.

[6] The Appendix "B" Certifications submitted by Dr. Chaaban included her handwritten name above the line stating "Name of Bidder". In each proposal under Certification 5, Dr. Chaaban also provided her signature above the line stating "Signature". There were no boxes nor lines indicating a signature was required for any other Certification contained in Appendix "B".

[7] On March 7, 2011, Dr. Chaaban received correspondence from CSC advising that the work set out in the RFP would be awarded to other bidders commencing on April 1, 2011. Dr. Chaaban was advised by CSC that her proposals did not meet the mandatory requirements of the RFP on the basis that they did not include the signed Certifications, enclosed as Appendix "B" to her proposal.

[8] After receiving that correspondence, Dr. Chaaban attempted to contact CSC by telephone to obtain clarification as to why CSC determined her proposals to be non-compliant with the mandatory requirements of Appendix "B", but to no avail. She also sent two emails and a letter to CSC on March 14, 15 and 16, 2011.

[9] On March 17, 2011, Dr. Chaaban spoke to Ms. Collet, the Regional Director, Contracting and Material Services at CSC, and was advised that the decision to disqualify her proposals was based on CSC's interpretation that the RFP required each and every Certification in Appendix "B" to contain a signature. Dr. Chaaban was told that her proposal was non-compliant as only one Certification contained a signature. This interpretation was confirmed in writing by email dated March 23, 2011, at the request of Dr. Chaaban. On the same day, Dr. Chaaban responded by email to Ms. Collett and took issue with the clarification provided by CSC. She also raised issues with the

lack of instructions and clarity in the RFP requiring each page of the Certifications in Appendix “B” to contain a signature.

[10] On April 18, 2011, an email was sent on Dr. Chaaban’s behalf to Sheila Collet stating that Dr. Chaaban did not accept CSC’s decision to render her proposals non-compliant. The email also requested a formal investigation by CSC into this matter and requested detailed instructions on how to proceed with a formal complaint.

[11] On May 3, 2011, through the advice of previous legal counsel, Dr. Chaaban submitted a complaint to the Canadian International Trade Tribunal (“CITT”) in relation to the contract. On May 20, 2011, the CITT advised Dr. Chaaban that it would not initiate an inquiry into her complaint and held that it lacked jurisdiction to initiate an inquiry into a procurement for health services.

[12] On May 25, 2011, Dr. Chaaban sent an email to Ms. Collett requesting a response to her April 18, 2011 email. Dr. Chaaban requested instructions from CSC on how to seek a formal review/investigation into the manner in which the RFP was processed. Dr. Chaaban’s email also re-stated her request for detailed instructions on how to proceed with a formal complaint. She stated that she continued to take this matter seriously and wished to pursue all legal means necessary to ensure that the tendering process for the RFP was fair, unbiased and lawful.

[13] On June 23, 2011, Dr. Chaaban received a response from Ms. Collett advising of direction from CSC’s legal department that Dr. Chaaban’s complaint could be made to either the CITT, the Office of the Procurement Ombudsman or the Federal Court.

2. The issue

[14] Pursuant to ss 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7, a Notice of Application for judicial review is due within 30 days from “the time the decision or order was first communicated” to the party directly affected by it. In the present case, the decision was first communicated to the Applicant on March 7, 2011, and the deadline for commencing the application for judicial review was therefore April 6, 2011.

[15] The only issue in this motion is whether the Applicant has met the test for an extension of time.

3. Analysis

[16] The 30 days within which an application for judicial review must be brought may be extended by a judge of the Federal Court before or after the expiration of that period. This is provided for both by ss 18.1(2) of the *Federal Courts Act* and by Rule 8(1) of the *Federal Courts Rules*, SOR/98-106.

[17] To grant or refuse a request for an extension of time to launch a judicial review application is a matter of discretion which must be exercised on proper principles. The case law has enumerated a number of factors that must be taken into account in the exercise of that discretion:

- (a) a continuing intention to bring the application;
- (b) any prejudice to the opposing parties;
- (c) a reasonable explanation for the delay; and

(d) whether the application discloses an arguable case.

See: *Leighton v Canada*, 2007 FC 553, [2007] F.C.J. No. 782 at para. 34; *Grewal v Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263 (FCA); *Canada (A.G.) v Hennelly*, [1999] F.C.J. No. 846 (FCA), 89 ACWS (3d) 376 at para. 3.

[18] Turning to the first factor, counsel for the Respondent argued that the Applicant did not demonstrate a continuing intention to bring the application throughout the delay. More particularly, counsel suggests that the Applicant took no action between May 25, 2011, when she sent an email to Ms. Collett requesting a response to her previous email on how to seek a formal review/investigation, and August 2, 2011, when she filed this motion for an extension of time.

[19] On a full review of the evidence before me, I think that Dr. Chaaban has shown that she always had the intention to proceed with her application for judicial review. First of all, it was perfectly legitimate for her to wait until she received, on June 23, 2011, CSC's response to her May 25th email. As for the six week delay between June 23rd and August 2nd, the Applicant explained that she assessed her options and sought to find and retain counsel. It cannot be contended that this is an inordinate delay. I also note that a Notice of Application has been prepared, filed in draft form with this motion and is ready to be filed with the Court, should an extension be granted. Dr. Chaaban has repeatedly maintained her intention to seek review of the CSC's decision. She has been in constant communication with the Respondent since being informed of that decision. There is no doubt in my mind, looking at the totality of the circumstances, that Dr. Chaaban has demonstrated throughout this whole process, her intention to challenge what she regards as an unacceptable and improper decision.

[20] As for the second factor, the Attorney General has not forcefully argued that the Crown would suffer any real prejudice. Time limits set down for judicial review proceedings obviously exist to bring finality to administrative decisions and to ensure their effective implementation. As recently confirmed by my colleague, Justice Pinard, the public has an interest in ensuring judicial reviews move forward expeditiously: see *Collins v Canada (Attorney General)*, 2010 FC 949, [2010] F.C.J. No. 1183 at para. 6. That being said, the penultimate consideration in an application to extend time is to ensure that justice is done between the parties.

[21] In the case at bar, Dr. Chaaban's objective is to be treated fairly and, eventually, to be awarded the contract relating to the RFP by CSC. If she were to be successful, any prejudice could be addressed by an award of damages. She is not seeking to have the contracts with the other bidders cancelled and the delivery of dental services will not be interrupted. As a result, I fail to see how CSC could be said to suffer any prejudice if an extension of time is granted.

[22] The third factor (a reasonable explanation for the delay) is closely linked to the first. On this count, counsel for the Respondent argues that the Applicant's failure to understand the proper remedies does not justify a delay, nor does the mistake of her former counsel. Moreover, the Respondent submitted that the Applicant has no explanation for the delay after May 20, 2011, since CSC had no obligation to provide instructions to the Applicant.

[23] Once again, I believe counsel for the Respondent is taking too rigid a position with respect to that factor. The Applicant did not commence an application for judicial review immediately after

receiving the decision because she did not know what recourses were available to her. She was nevertheless diligent and pursued a two prong approach, first enquiring as to how she could proceed with a formal complaint, and hiring counsel to act on her behalf. The fact that her former counsel erred in bringing her complaint to the CITT cannot be held against Dr. Chaaban, particularly since CSC's own legal department was also of the view that this was an avenue open to her.

[24] The Respondent is correct in stating that CSC was not required to provide instructions to a disqualified bidder on how to proceed with her complaint; however this must be put into context. Not only was Dr. Chaaban (and, it appears, her own lawyer) at a loss to figure out the proper recourse against the decision made by CSC, but she had also been communicating on a regular basis with Ms. Collett, and it was not unreasonable to expect an answer to her query. Moreover, Dr. Chaaban claims that she was informed by Business Access Canada that CSC was required by law to provide her with the means necessary to have this matter reviewed by an independent body (see her May 25, 2011 email, Applicant's Record, Tab 2(M)). In those circumstances, I believe the Applicant had a reasonable explanation for the delay up until at least June 23, 2011 when she finally received an email from Ms. Collett advising her as to her recourses.

[25] The only period for which no justification has been established is the period between June 23 and August 2, 2011. The Applicant has indicated that she had to weigh her options and to find appropriate counsel, but she has not provided any evidence in that respect. I do not think, however, that this is fatal. While a period of six weeks to retain a lawyer may be considered somewhat long, there may well be credible explanations for such a delay, especially in the middle of the summer. Assuming that Dr. Chaaban could have been more diligent, only a small proportion of the delay (no

more than one month out of four) can be unaccounted for. Furthermore, one must not lose sight of the fact that this is only one of the four criteria to consider, and that the weight to be given to each of them will vary according to the circumstances of each case.

[26] The strongest factor in favour of the Applicant is the fourth one, the merit of the case. The jurisprudence is clear that considerable weight must be accorded on a motion to extend time where the Applicant in the underlying judicial review application, which is out of time, has a strong case: see *Metlakatla Indian Band v Canada (Attorney General)*, 2007 FC 553, [2007] F.C.J. No. 782 at para. 49. In this case, CSC decided Dr. Chaaban's proposals were non-compliant. This was based on their interpretation of wording of the RFP as constituting a mandatory requirement that bidders had to sign each and every page of the Appendix "B" Certifications. As previously mentioned, there is a discrepancy between the wording of s 9.1 of the RFP itself and the language found on the cover page of Appendix "B". Moreover, there were no lines indicating a signature was required for any of the five Certifications to be filled out for each proposal, save for Certification 5. On that basis, I am prepared to accept that Dr. Chaaban's application for judicial review discloses at the very least an arguable case, if not a strong one. At a minimum, the requirements were ambiguous, and at best, there was no clear requirement to sign each and every one of the five Certifications for each proposal.

[27] In light of the foregoing, I find that it is in the interest of justice that this motion for an extension of time be granted. Balancing all the appropriate factors, and assigning particular weight to the merit of the underlying application for judicial review, I am of the view that the Applicant ought to be able to challenge the disqualification of her proposal as non-compliant.

ORDER

THIS COURT ORDERS that the Applicant's motion to extend the time within which to serve and file a judicial review application against the March 7, 2011 decision of CSC to disqualify her proposal for the provision of essential dental services, is granted. The Applicant shall have leave to do so within 15 days from the date of this Order.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: 11-T-35

STYLE OF CAUSE: DR. DIALA CHAABAN v CORRECTIONAL
SERVICE CANADA

PLACE OF HEARING: Ottawa, ON

DATE OF HEARING: August 25, 2011

**REASONS FOR ORDER
AND ORDER:** de MONTIGNY J.

DATED: August 31, 2011

APPEARANCES:

Graham Ragan FOR THE APPLICANT

Orlagh O'Kelly FOR THE RESPONDENT

SOLICITORS OF RECORD:

Gowling Lafleur Henderson LLP FOR THE APPLICANT
Ottawa, ON

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada
Ottawa, ON