

Federal Court



Cour fédérale

Date: 20130726

Docket: T-1097-13

Citation: 2013 FC 814

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Montréal, Quebec, July 26, 2013

PRESENT: Richard Morneau, Prothonotary

BETWEEN:

EUROCOPTER CANADA LIMITED

Applicant

and

**THE ATTORNEY GENERAL OF CANADA
and
THE MINISTER OF PUBLIC WORKS AND
GOVERNMENT SERVICES**

Respondents

REASONS FOR ORDER AND ORDER

[1] This is a motion by Bell Helicopter Textron Canada Limited (BHTC or Bell Helicopter) under paragraphs 104(1)(b) and 303(1)(a) of the *Federal Courts Rules* (the Rules) for an order to have itself added as a respondent to the application for judicial review filed on June 20, 2013, (the application for review) by the applicant Eurocopter Canada Limited (Eurocopter).

Background

[2] In its application for review, Eurocopter claims that in seeking to purchase helicopters, the Minister of Public Works and Government Services (the Minister) established technical requirements in a request for proposals that were tailored in favour of Bell Helicopter.

[3] The application for review includes the following principal allegations:

[TRANSLATION]

1. This is an application for judicial review under section 18.1 of the *Federal Courts Act* (R.S.C. 1985, c. F-7), as amended. It involves the refusal of the Minister of Public Works and Government Services (the Minister or PWGSC) to reconsider and modify the technical requirements of Request for Proposals No. F7013-120014/C (the Request for Proposals) for the procurement of light-lift helicopters for the Canadian Coast Guard, despite the fact that the requirements are tailored in favour of third party Bell Helicopter Textron Canada Ltd. (Bell Helicopter or the Third Party).
2. The impugned decision (the Decision) materialized at solicitation closing, which occurred at 2:00 p.m. on June 4, 2013.
- ...
17. Eurocopter Canada participated in the consultation process and the Request for Proposals, but it was prevented from submitting a proposal. The mandatory technical requirements in the Request for Proposals made it impossible for Eurocopter Canada to submit a compliant bid.
18. Eurocopter Canada submits that the Request for Proposals was tailored to favour Bell Helicopter. More specifically, the technical requirements were based on the technical specifications of the Bell 429 aircraft, thereby excluding from the outset any other helicopter manufacturer from the solicitation and eliminating any competition for Bell Helicopter.

[My emphasis.]

[4] Paragraphs 3 to 5 of the application for review indicate the principal remedies sought by Eurocopter:

[TRANSLATION]

3. An Order declaring invalid and illegal or an Order quashing, in whole or in part, the Decision and Request for Proposals.
4. An interim interlocutory Order enjoining the Minister or PWGSC or both to suspend the Request for Proposals and prohibiting the awarding of a contract following the Request for Proposals pending a judgment of this Court in these proceedings.
5. An Order enjoining the Minister or PWGSC or both to start again with a new request for proposals that respects and is fully compliant with the principles of fairness, openness and transparency.

[5] Moreover, page 18 of the application for review contains a request pursuant to Rule 317 that the Minister deliver to Eurocopter any documents that the Minister may possess relating to an exemption granted to Bell Helicopter in the past with respect to the excess weight of its Bell 429 aircraft.

Analysis

[6] Section 104 and paragraph 303(1)(a) of the Rules read as follows:

104. (1) At any time, the Court may

(a) order that a person who is not a proper or necessary party shall cease to be a party; or

104. (1) La Cour peut, à tout moment, ordonner :

a) qu'une personne constituée erronément comme partie ou une partie dont la présence n'est pas nécessaire au règlement des

questions en litige soit mise hors de cause;

(b) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order.

b) que soit constituée comme partie à l'instance toute personne qui aurait dû l'être ou dont la présence devant la Cour est nécessaire pour assurer une instruction complète et le règlement des questions en litige dans l'instance; toutefois, nul ne peut être constitué codemandeur sans son consentement, lequel est notifié par écrit ou de telle autre manière que la Cour ordonne.

(2) An order made under subsection (1) shall contain directions as to amendment of the originating document and any other pleadings.

(2) L'ordonnance rendue en vertu du paragraphe (1) contient des directives quant aux modifications à apporter à l'acte introductif d'instance et aux autres actes de procédure.

...

[...]

303. (1) Subject to subsection (2), an applicant shall name as a respondent every person

303. (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :

(a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; ...

a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;

[My emphasis.]

[Je souligne.]

[7] It appears to the Court that paragraph 303(1)(a) of the Rules is the most appropriate provision on which to rely in the context of an application for judicial review to determine who

shall be named as a respondent in such a dispute, as that provision contains the test to apply in precisely this situation.

[8] With that in mind, having additional recourse to paragraph 104(1)(b) of the Rules adds little beyond providing a procedural vehicle for the motion of a respondent who wishes to be designated as such in an application for judicial review.

[9] In this respect, as I indicated at paragraph 13 of *Richards Packaging Inc. v Canada (Attorney General)*, 2006 FC 257:

13. By prescribing that a person who ought to have been joined as a party may be added as a party by the Court, rule 104(1)(b) really brings our attention forward to rule 303(1)(a) where a mandatory duty is imposed on an applicant in a judicial review application to name as respondent every person directly affected by the order sought in the application. In other words, a person who will be directly affected by the outcome of the decision to be rendered on an application shall be named as a respondent.

[My emphasis.]

[10] It therefore appears to be of little use for this Court to consider the necessity test also described at paragraph 104(1)(b) of the Rules, which may be more useful in the case of an application to add a party to an action.

[11] In the circumstances, then, is it reasonable to conclude that BHTC will be directly affected by the orders or remedies sought by Eurocopter in its application for review? The Court considers this reasonable for the following reasons.

[12] First, despite the fact that, at paragraph 9 of its written representations attached to its reply record regarding this motion, Eurocopter described [TRANSLATION] “BHTC as a potentially interested party in this case, without, however, being directly affected by the orders sought”, therefore making it appropriate simply to send BHTC a courtesy copy of the application for review, Eurocopter itself, at paragraph 14 of its application for review, was of the view in June 2013 that BHTC’s rights [TRANSLATION] “could be affected by the orders sought” in the application for review.

[13] It is worthy of note that in *Reddy-Cheminor, Inc. v Canada (Attorney General)* (2001), 15 CPR (4th) 215 at para 30, the phrase “directly affected by the order sought” found at paragraph 303(1)(a) of the Rules was qualified as follows:

In order to be directly affected by the orders Chemicor seeks in the judicial proceeding, Astra Zeneca must point to how a sufficient interest in terms of legal rights or otherwise would be adversely impacted or prejudiced by them.

[My emphasis.]

[14] Such prejudice or impact is certainly present in terms of the central dynamic that Eurocopter itself has established to obtain the remedial orders sought, which are identified above at paragraph 4.

[15] While the orders sought by Eurocopter could be viewed, as Eurocopter claims, as being directed against the Minister, the fact remains that Eurocopter identifies and targets BHTC and that the primary victim in the event that the Request for Proposals is quashed and the award of the contract suspended can only be BHTC because, according to Eurocopter, BHTC is the entity

that will benefit from the process being followed by the Minister. Therefore, BHTC is directly affected by the orders sought.

[16] The fact that the Request for Proposals contains a provision to the effect that, ultimately, the Minister reserves the right to reject any or all submissions or cancel the Request for Proposals is an argument that should not and must not distract us in the context of this dispute. There is no evidence of the potential for or likelihood of use of this power by the Minister.

[17] Moreover, the fact that Eurocopter and the current respondents have agreed upon a timetable is not sufficient to eliminate the possibility that Eurocopter will seek the interim orders it mentions in its application for review through a separate motion brought under section 18.2 of the *Federal Courts Act*.

[18] Finally, BHTC is directly affected by the request to the Minister for documents regarding its Bell 429 aircraft. That is the subject of an order that the Court could potentially be called upon to render under Rules 317 and 318, and the fact that BHTC must be consulted in any event at the end of the process does nothing to change the fact that it is directly affected by the request to obtain these documents.

[19] Furthermore, the Attorney General of Canada and the Minister do not oppose the motion in question.

[20] Therefore, for the reasons provided, BHTC's motion will be allowed in accordance with the order that follows, with costs, which the Court sets at \$2,000.00.

ORDER

1. Bell Helicopter Textron Canada Limited is added to this file as a respondent and the style of cause will now read as follows:

EUROCOPTER CANADA LIMITED

Applicant

and

**THE ATTORNEY GENERAL OF CANADA
and
THE MINISTER OF PUBLIC WORKS AND
GOVERNMENT SERVICES
and
BELL HELICOPTER TEXTRON
CANADA LIMITED**

Respondents

2. Bell Helicopter Textron Canada Limited must serve and file its notice of appearance on or before August 2, 2013.
3. Bell Helicopter Textron Canada Limited must follow the timetable already agreed upon by the existing parties.
4. Costs in the amount of \$2,000.00 are awarded to Bell Helicopter Textron Canada Limited.

5. This proceeding will continue as a specially managed proceeding.

“Richard Morneau”

Prothonotary

Certified true translation
Francie Gow, BLC, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1097-13

STYLE OF CAUSE: EUROCOPTER CANADA LIMITED
and
THE ATTORNEY GENERAL OF CANADA
and
THE MINISTER OF PUBLIC WORKS AND
GOVERNMENT SERVICES
and
BELL HELICOPTER TEXTRON CANADA LIMITED

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: July 23, 2013

REASONS FOR ORDER: PROTHONOTARY MORNEAU

DATED: July 26, 2013

APPEARANCES:

Dominique Gibbens FOR THE APPLICANT

Judith Robinson FOR BELL HELICOPTER TEXTRON
Rémi Weiss CANADA LIMITED

SOLICITORS OF RECORD:

Fasken Martineau DuMoulin LLP FOR THE APPLICANT
Montréal, Quebec

Norton Rose Fulbright Canada LLP FOR BELL HELICOPTER TEXTRON
Montréal, Quebec CANADA LIMITED

William F. Pentney FOR THE RESPONDENTS
Deputy Attorney General of Canada THE ATTORNEY GENERAL OF CANADA
Ottawa, Ontario and
THE MINISTER OF PUBLIC WORKS AND
GOVERNMENT SERVICES