Federal Court  Cour fédérale

Date: 20140206

Docket: T-1856-10

Citation: 2014 FC 68

Ottawa, Ontario, February 6, 2014

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

RAPISCAN SYSTEMS, INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

PUBLIC REASONS FOR JUDGMENT AND JUDGMENT

(Confidential Reasons for Judgment and Judgment issued January 21, 2014)

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PARA.

I. Introduction

[1] This is an application by Rapiscan Systems Inc [Rapiscan] pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of a procurement decision made by the Canadian Air Transport Security Authority [CATSA] on October 4, 2010 [the 2010 procurement process].

[2] Rapiscan originally sought to set aside and declare invalid or unlawful the decision of the Board of CATSA authorizing the award of a contract for the provision of Checkpoint Multi-View X-Ray Screening Equipment and related services [Equipment] to Smiths Detection Montreal Inc [Smiths].

[3] In its final written submissions, Rapiscan requests an order (i) declaring CATSA's decision unlawful and unfair, and (ii) directing CATSA to refresh its procurement process in respect of the Equipment for the years 2012/13 through 2014/15 in compliance with its statutory obligations and Contracting Procedures so as to allow Rapiscan and other suppliers a fair and equal opportunity to supply the Equipment to CATSA.

[4] The case ultimately turns on whether there are sufficiently significant issues pertaining to the good governance of CATSA to permit a public law remedy in respect of those issues in a matter that is based on a commercial procurement contract. These questions arise from circumstances of CATSA's Board being misled by management's advice. The Board authorized an award of a contract that resulted from an unfair and non-competitive procurement process. The Board was unaware of these circumstances. Given its mandate and policies, it would seem unlikely that CATSA's Board would have authorized the contract had the proper information been presented.

[5] I conclude that the reviewing court has jurisdiction, firstly because the issues relate mostly to the integrity of government procurement processes and secondly because the design of the procurement process was intended to prevent resort to alternative contract remedies that otherwise normally would be available to the applicants.

[6] For the reasons that follow, the application is allowed. However, no final order is made at this time so as to permit parties to make further submissions to clarify the remedy sought by the applicant and to ensure that CATSA's operational requirements are not interfered with by the Court's order.

II. Statement of Facts

A. *CATSA*

[7] CATSA was created in 2002 by the *Canadian Air Transport Security Authority Act*, SC 2002, c 9, s 2 [the Act]. Its mandate includes screening passengers and their carry-on and checked baggage:

6. (1) The mandate of the Authority is to take actions, either directly or through a screening contractor, for the effective and efficient screening of persons who access aircraft or restricted areas through screening points, the property in their possession or control and the belongings or baggage that they give to an air carrier for transport. Restricted areas are those established under the *Aeronautics Act* at an aerodrome designated by the regulations or at any other place that the Minister may designate.

6. (1) L'Administration a pour mission de prendre, soit directement, soit par l'entremise d'un fournisseur de services de contrôle, des mesures en vue de fournir un contrôle efficace des personnes — ainsi que des biens en leur possession ou sous leur contrôle, ou des effets personnels ou des bagages qu'elles confient à une compagnie aérienne en vue de leur transport — qui ont accès, par des points de contrôle, à un aéronef ou à une zone réglementée désignée sous le régime de la *Loi sur l'aéronautique* dans un aérodrome désigné par règlement ou dans tout autre endroit désigné par le ministre.

(2) The Authority is responsible for ensuring consistency in the delivery of screening across Canada and for any other air transport security function provided for in this Act. It is also responsible for air transport security functions that the Minister may assign to it, subject to any terms and conditions that the Minister may establish.

(2) L'Administration veille à ce que le niveau de contrôle soit uniforme partout au Canada et exécute également les autres fonctions liées à la sûreté du transport aérien que prévoit la présente loi et celles que le ministre, sous réserve des modalités qu'il détermine, lui confère.

(3) The Authority must carry out its responsibilities under this section in the public interest, having due regard to the interest of the travelling public. Those responsibilities are a governmental function.

(3) L'Administration exerce les attributions qui lui sont confiées sous le régime du présent article dans l'intérêt public et en tenant compte des intérêts des voyageurs; ces attributions sont exercées à titre de fonctions administratives.

[8] CATSA is also responsible for authorizing contracting with screening companies and for procuring screening equipment:

7. (1) The Authority may authorize the operator of an aerodrome designated by the regulations to deliver screening on its behalf at that aerodrome, either directly or through a screening contractor, subject to any terms and conditions that the Authority may establish.	7. (1) L'Administration peut autoriser l'exploitant d'un aérodrome désigné par règlement à fournir, en son nom, soit directement, soit par l'entremise d'un fournisseur de services de contrôle, les services de contrôle à l'aérodrome qu'il exploite, sous réserve des modalités qu'elle peut fixer.
[…]	[…]
8. (1) The Authority must establish criteria respecting the qualifications, training and performance of screening contractors and screening officers, that are as stringent as or more stringent than the standards established in the aviation security regulations made under the *Aeronautics Act*.	8. (1) L'Administration établit des critères de qualification, de formation et de rendement, applicables aux fournisseurs de services de contrôle et aux agents de contrôle, qui sont au moins aussi sévères que les normes qui sont établies dans les règlements sur la sûreté aérienne pris sous le régime de la *Loi sur l'aéronautique*.
[…]	[…]
(4) The Authority may establish contracting policies specifying minimum requirements respecting wages and terms and conditions of employment that persons must meet in order to be awarded a contract by or on behalf of the Authority for the delivery of screening. The Authority must establish such policies if required to do so by the	(4) L'Administration peut — mais est tenue de le faire si le ministre le lui ordonne — établir une politique contractuelle qui précise les normes minimales que la personne qui souhaite conclure un contrat de fourniture de services de contrôle doit respecter quant aux salaires et conditions de travail applicables aux agents de

Minister.	contrôle embauchés.
(5) The Authority must establish policies and procedures for contracts for services and for procurement that ensure that the Authority's operational requirements are always met and that promote transparency, openness, fairness and value for money in purchasing.	(5) L'Administration établit les règles et méthodes à suivre concernant les contrats de fourniture de biens et de services qui garantissent l'importance primordiale de ses besoins opérationnels et qui favorisent la transparence, l'ouverture, l'équité et l'achat au meilleur prix.
[…]	[…]
27. The provision of screening at an aerodrome is conclusively deemed for all purposes to be a service that is necessary to prevent immediate and serious danger to the safety of the public.	27. La fourniture des services de contrôle à un aérodrome est réputée, de façon concluante et à toutes fins, être un service nécessaire pour prévenir des risques imminents et graves pour la sécurité du public.
28. (1) The Authority may enter into contracts, agreements or other arrangements with Her Majesty as if it were not an agent of Her Majesty.	28. (1) L'Administration peut conclure des contrats, des ententes ou d'autres accords avec Sa Majesté comme si elle n'en était pas mandataire.
[…]	[…]

[9] However, the Act provides that CATSA is not subject to the Treasury Board contracting policy established under section 7(1) of the *Financial Administration Act*, RSC 1985, c F-11 or that statute's *Government Contracts Regulations*, SOR/87-402. The Act states:

3. (3) In the event of any inconsistency between the provisions of this Act and the provisions of Part X of the *Financial Administration Act*, the provisions of this Act prevail.	3. (3) Les dispositions de la présente loi l'emportent sur les dispositions incompatibles de la partie X de la *Loi sur la gestion des finances publiques*.
4. (1) The Minister is the appropriate minister for the Authority for the purposes of Part X of the *Financial Administration Act*.	4. (1) Le ministre est le ministre de tutelle de l'Administration pour l'application de la partie X de la *Loi sur la gestion des finances publiques*.
(2) The Minister may issue a written direction to the Authority, addressed to the Chairperson, on any matter related to air transport security.	(2) Le ministre peut donner des directives écrites à l'Administration sur toute question liée à la sûreté du transport aérien; les directives sont adressées au président du conseil.
(3) The Authority and its directors, officers and employees of the Authority must comply with a direction issued under this section.	(3) L'Administration et ses administrateurs, dirigeants et employés sont tenus de se conformer aux directives.
(4) Compliance with the direction is deemed to be in the best interests of the Authority.	(4) Toute personne qui se conforme aux directives est réputée agir au mieux des intérêts de l'Administration.
(5) A direction is not a statutory instrument for the purposes of the *Statutory Instruments Act*.	(5) Les directives ne sont pas des textes réglementaires pour l'application de la *Loi sur les textes réglementaires*.

[10] The Act provides that CATSA shall have a Board of Directors which has a chairperson and ten other directors, and a chief executive officer. The Board is empowered to hire staff and

constitute committees, and it is responsible for managing CATSA's affairs and passing by-laws concerning contracting policies.

10. (1) There shall be a board of directors of the Authority consisting of eleven directors, including the Chairperson, appointed by the Governor in Council on the recommendation of the Minister.	10. (1) Est constitué le conseil d'administration de l'Administration composé de onze administrateurs, dont son président, nommés par le gouverneur en conseil sur la recommandation du ministre.
[…]	[…]
16. The Chairperson must preside at meetings of the board and exercise any powers and perform any duties and functions that are assigned by the by-laws of the Authority.	16. Le président du conseil en dirige les réunions et exerce les autres attributions que lui confèrent les règlements administratifs de l'Administration.
17. The chief executive officer of the Authority is to be appointed by the Governor in Council to hold office during pleasure for any term that the Governor in Council considers appropriate.	17. Le premier dirigeant de l'Administration est nommé à titre amovible par le gouverneur en conseil pour le mandat que celui-ci estime indiqué.
[…]	[…]
23. The board is responsible for the management of the activities and affairs of the Authority.	23. Le conseil est chargé de la gestion des activités de l'Administration.
24. The board may make by-laws respecting the management and conduct of the activities and affairs of the Authority and the carrying out of the duties and functions of the board, including by-laws establishing	24. Le conseil peut prendre des règlements administratifs sur la gestion des activités de l'Administration et l'exercice des attributions que la présente loi confère au conseil, notamment en ce qui concerne:
(*a*) a code of ethics for the	*a*) l'établissement d'un code

directors, officers and employees of the Authority;	de déontologie pour les administrateurs, les dirigeants et les employés de l'Administration;
(*b*) committees of the board, including a human resources committee and an audit committee; and	*b*) la constitution de ses comités, y compris un comité des ressources humaines et un comité de vérification;
(*c*) contracting policies for the Authority.	*c*) la formulation de la politique contractuelle de l'Administration.
25. The Authority may employ any officers, employees or agents and retain the services of any technical or professional advisers that it considers necessary for the proper conduct of its activities and affairs and may fix the terms and conditions of their engagement.	25. L'Administration peut engager le personnel et les mandataires et retenir les services des conseillers professionnels et techniques qu'elle estime nécessaires à l'exercice de ses activités et peut fixer les conditions d'emploi.

[11] At present, the Board's website indicates that it maintains four committees (see CATSA, *Board of Directors* (30 September 2013), online: http://www.catsa-acsta.gc.ca/Page.aspx?ID=30&pname=BoardDirectors_ConseilAdministration&lang=en), an Audit Committee, a Corporate Governance and Human Resources Committee, a Strategy Committee, and a Pension Committee. CATSA notes on its website (http://www.catsa-acsta.gc.ca/Page.aspx?ID=30&pname=BoardDirectors_ConseilAdministration&lang=en) that:

> The Board has responsibility for the overall stewardship of CATSA. It has a duty to protect the long-term interests of the corporation, safeguard CATSA's assets and to practice due diligence in its decision-making. The Board's key functions and responsibilities are to provide strategic direction, financial oversight, corporate oversight and good governance.
>
> [Emphasis added]

[12] In regard to legislation governing the Authority's procurement processes, subparagraph 8(5) of the Act requires CATSA to establish policies and procedures that promote transparency, openness, fairness and value for money in purchasing:

8. (5) The Authority must establish policies and procedures for contracts for services and for procurement that ensure that the Authority's operational requirements are always met and that promote transparency, openness, fairness and value for money in purchasing.	8. (5) L'Administration établit les règles et méthodes à suivre concernant les contrats de fourniture de biens et de services qui garantissent l'importance primordiale de ses besoins opérationnels et qui favorisent la transparence, l'ouverture, l'équité et l'achat au meilleur prix.
[Emphasis added]	[Je souligne]

B. *Rapiscan and Smiths Rivalry*

[13] CATSA is familiar with the manufacturers of x-ray screening equipment which includes Rapiscan. Rapiscan's products are used to inspect baggage, cargo, vehicles, and other objects for weapons, explosives, drugs, and other contraband, and to screen people. In the global x-ray systems market, Rapiscan is, at any given time, either the largest or the second-largest provider (Smiths being its main competition).

[14] Since its creation in 2002, CATSA has purchased baggage screening equipment exclusively from Smiths. Rapiscan claims that Canada is the only major country with a single supplier of airport x-ray screening equipment. On December 15, 2006, an Office of the Auditor General's *Special Examination Report* on CATSA criticized sole-sourcing and the award of contracts before selection procedures are put into place. Nonetheless, on June 2, 2009, CATSA requested approval to sole-

source a screening equipment contract with Smiths. On June 18, 2009, a sole-source procurement was duly made from Smiths. Testimony from Mr. Corrigan indicates that in September 2009, funding approval would have been requested for regular 2010 procurement. In November 2009, Smiths publicly announced the sole-source contract and the Smiths equipment arrived. On December 22, 2009**,** CATSA put new contracting procedures into place. Mr. Corrigan's testimony indicated that in May or June 2010, funding would have been approved for 2010 procurement.

C. *2009 Procurement Process*

[15] In 2009 CATSA took steps to replace its first-generation Smiths equipment with new advanced technology multi-view screening equipment. Management's briefing note to the Board describes the background to the process as follows:

> Both the TSA [U.S. Transportation Safety Authority] and the European Union (E.U.) initiated steps in 2007 to replace current single view x-rays with multiview x-rays. Multiview technology provides additional enhancements for the detection of weapons, knifes [*sic*], explosives and provides future capabilities for the detection of liquids and gels.
>
> In 2007, the TSA conducted testing of 3 x-ray vendor's [*sic*] multiview equipment and approved 2: Rapiscan and Smiths. This resulted in a subsequent procurement of 700 units divided between the two companies. Similarly, the UK DFT approved both the Rapiscan and Smiths multiview x-rays which resulted in the BAA procuring Smiths' multiview x-ray and Manchester Airport Authority procuring Rapiscan's multiview x-ray.
>
> [Emphasis added]

[16] It should be noted that the term "views" is confusing in the documentation. Screening equipment has one or more view generators and provides one or more views to the screening operator. "Multiview" x-ray equipment describes systems which generate and provide more than

one view, not those which have more than one view generator. For instance, the Smiths checkpoint equipment (7555 aTIX) used for carry-on baggage referred to in these procurement processes has four generators which are capable of producing four views for machine operators. However, the equipment only provides two views to operators, as beyond that number of views, the efficiency of the screening process by staff decreases (as noted in an internal study, Canadian Air Transport Security Authority, *Relation of X-ray screening performance to number of views*, NTA report 07072010 (7 July 2010) [the White Paper]). The Rapiscan equipment (620 DV) referred to in this proceeding has two generators and similarly provides two views for operators. Therefore, in most instances when comparing Rapiscan and Smiths equipment, where the term "views" is used the reference is to the number of generators of views, as opposed to actual views for physical screening purposes.

[17] Another factor in CATSA procurement is that Transport Canada, which is responsible for the security of the Canadian transportation system, requires equipment for use in Canada to be certified by the U.S. Transportation Security Agency. Among Transport Canada's responsibilities is that of establishing equipment performance standards and establishing and maintaining a list of systems and equipment that have demonstrated a capacity to meet performance standards for screening to ensure harmonization to international standards.

[18] CATSA awarded Smiths the initial $30 million contract in 2009 for the replacement of Smiths single view screeners with multiview advanced technology ["AT"] equipment. For that purpose it used a closed, non-competitive sole-source process. Rapiscan was not asked to provide

information on its equipment and states that it was unaware of the details of the 2009 process until provided with the certified record in these proceedings.

[19] Despite holding a closed non-competitive process, CATSA management carried out a comparative analysis of Smiths 7555 aTIX checkpoint equipment and the 620 DV Rapiscan model. The main difference between the equipment of the two manufacturers is that the Smiths screener has four view generators, while that of Rapiscan has only two. Rapiscan's equipment is significantly less expensive than Smiths'. The same two models of equipment were submitted by these companies in the subsequent 2010 procurement process.

[20] The 2009 sole source procurement process is significant to that in 2010 because in 2009 a minimum requirement was established that the equipment provide three or more views. The same "minimum requirement" rationale would be applied to eliminate Rapiscan from consideration in the 2010 procurement process.

D. *Board's 2009 Decision*

[21] On June 18, 2009, the Board of Directors awarded the sole-source contract to Smiths despite its higher cost based on Smiths equipment's capability of being upgraded to achieve greater detection performance, stating as follows:

> AND WHEREAS, while the Smiths product is higher in cost than the Rapiscan product, only the Smiths product has the built-in technology capable of being upgraded to achieve greater detection capabilities, with the potential to detect prohibited liquids and gels and therefore the potential to achieve future improved security effectiveness and cost efficiencies for CATSA;

> AND WHEREAS it is believed that the incremental cost of the Smiths product represents value for money given the added capabilities and cost effectiveness that may be realized by the Smiths product,
>
> [Emphasis added]

E. *CATSA Contracting Policy and Procedures*

[22] A few days later, on July 1, 2009, CATSA implemented a Contracting Policy, in accordance with section 8 (5) of the Act. On December 22, 2009, CATSA adopted detailed mandatory Contracting Procedures to implement the policy. Among relevant provisions in the Contracting Procedures are the following definitions and provisions with my emphasis:

> 1.1 These procedures apply to all Contracts and contracting activities conducted by CATSA. They are created in furtherance of the CATSA Contracting Policy approved by the Board.
>
> […]
>
> 2.1 Definitions
>
> […]
>
> "**Evaluation Criteria**" means the specifications and other factors that have been established by CATSA prior to an Open Procurement Process and which are used to evaluate quotes, bids and proposals made by potential contractors in response to an Open Procurement Process.
>
> […]
>
> "**Non-competitive Contract**" means a Contract which is or will be established under one of the exceptions in Section Section [*sic*] 5.6 (Exceptions Approvable By Other Approval Authorities) which will not be or has not been preceded by an Open Procurement Process.
>
> […]
>
> "**Open Procurement Process**" means a contracting process involving any of an RFI, RFQ, RFP, RFSO, tender, Third Party

Standing Offer, or a procurement process in which an ACAN is used and not validly challenged.

[…]

"**Request for Information**" and "**RFI**" mean an Open Procurement Process under which CATSA requests information from the market in accordance with these procedures.

[…]

"**Request for Standing Offer**" and "**RFSO**" mean an Open Procurement Process under which CATSA requests the provision of an offer that would form the basis of a Standing Offer.

[…]

5.1 Openness in Contracting

CATSA uses Open Procurement Processes to promote openness, transparency and fairness and to assist in obtaining and demonstrating that it obtains value for money in Procurement Contracts. Open Procurement Processes should be used in accordance with these procedures unless excepted in accordance with these procedures.

5.2 Open Procurement Processes

[…]

5.2.1 Requests for Information may be used in advance of initiating a procurement process to understand:

5.2.1.1 The number of potential or likely suppliers of the goods or services; and

5.2.1.2 The availability of goods or services to address a need of CATSA.

[…]

5.2.3 Requests for Standing Offer may be used where CATSA foresees purchasing quantities of goods and services repeatedly over a period of time but the likely quantity cannot be determined at the time of Effective Date of the Contract.

[…]

5.3 Evaluation Criteria in Open Procurements

Evaluation Criteria in any procurement shall be established prior to seeking the applicable approval to proceed with a procurement and the results of that evaluation shall be made available to the applicable Approval Authority as part of any approval request. Evaluation Criteria shall not knowingly be drafted where the effect of the Evaluation Criteria would unreasonably give preference to potential bidders. Evaluation Criteria should typically not be limited to only price but should be drafted to determine overall value for money and the ability for CATSA to meet its operational objectives.

[…]

5.6 Exceptions Approvable By Other Approval Authorities

[…]

5.6.1 Public Interest. The nature of the work or the circumstances surrounding the requirement is such that it may be prejudicial to the public interest or national security to solicit open submissions. This exception is normally reserved for dealing with security, safety or other considerations potentially prejudicial to passengers;

[…]

5.7 Transparency, Fairness and Value for Money Not Excepted

Subject to section 5.6.1 exceptions to an Open Procurement Process shall not limit CATSA's statutory and policy obligations of transparency, fairness or value for money. […]

[…]

6.2 Standing Offer

A Standing Offer is a Contract which commits a Contractor to supply goods, services or both, at the prices specified in the Contract and subject to the other terms and conditions stated in the Standing Offer. […] The SO is generally established using a Request for Standing Offer. […]

> […]
>
> 7.1 Open Procurement Contract Process
>
> […] The Open Procurement Process may be established in either of two ways:
>
> […]
>
> 7.1.2 Traditional Competitive. […] where the market participants for the applicable good or service are known to CATSA, CATSA may issue an Open Procurement Process to a limited number of Contractors. […] Generally, this list shall identify a minimum of three (3) potential Contractors.
>
> 7.2 Open Procurement
>
> Generally accepted practices will be adopted in CATSA's Open Procurement Process, generally described below:
>
> 7.2.1 Preparation of Documentation Procurement and Contracting will work with the Project Authority to prepare the applicable Statement of Work/Terms of Reference and Evaluation Criteria […]
>
> [Emphasis added]

F. *The White Paper*

[23] On July 7, 2010, CATSA's internal Technology Group produced a "White Paper" entitled "Relation of X-ray Screening Performance to Number of Views". The relevant conclusion of the paper is as follows:

> Scanners with more than two views
>
> Multi-view scanners with three and four views will be able to increase accuracy of density measurements by 2.25 times and 4 times, respectively, as seen from Figure 3. This helps in automated detection of explosives from unique measurements of density and Z_{eff}. […] So the potential accuracy of a three or four view scanner is higher than that of a dual view scanner, and the advantages rapidly

> increase since the dependence is on the square of the number of views.
>
> [Emphasis added]

[24] It should be noted that the front page of the White Paper states as follows:

> It is shown that the accuracy of a multi-view system increases with the number of views, which in turn improves the performance of automated explosives and liquids detection software.
>
> [Emphasis added]

[25] In referring to multiview luggage scanners the report notes: "The image processing algorithms in these systems are critical in maximizing the capability of the systems."

G. *2010 Procurement Process – Strategy Document*

[26] On July 14, 2010, CATSA prepared a Procurement Strategy Document for the purchase of further multiview PBS [Pre-board screening] and HBS [Hold baggage screening] x-ray machines for an estimated contract dollar value of $40,508,829. The contract period was described as follows: "5 year Standing offer with renewal options for up to five additional years" [emphasis added]. The strategy further indicated that the intent was to establish standing offers with one or more suppliers of multiview x-ray machines for equipment, spare parts, etc. No non-competitive exception was designated.

[27] The Procurement Strategy Document indicated that the Technology Branch had performed an informal survey of the functionality of the three market participants (Rapiscan, Smiths and L-3 Communications Security and Detection Systems, Inc [L-3]) in multiview manufactures available at

the time. It further indicated that CATSA would be relying on information disclosed to it by the U.S. TSA.

H. *Contract Review Committee*

[28] On July 14, 2010, the Contract Review Committee met to consider the procurement process for the additional equipment. The minutes included the following excerpt with respect to a decision not to follow the "generally accepted practices" specified at paragraph 7.2.1 in the Contracting Procedures described above, which called for an open procurement process based upon a pre-defined statement of work/requirements and weighted evaluation criteria:

> A discussion took place regarding the proposed procurement strategy where CATSA does not publish rated requirements, but rather explains that the evaluation would be done based on specified factors, with no weighting. It was noted by one of the Committee Members in this case, it will be very important that CATSA document and develop its evaluation practices to demonstrate that the Committee has done its review fairly.
>
> [Emphasis added]

[29] The minutes also contained the statement that "The Contract Review Committee approved to have an RFI (which is somewhat in the nature of an RFP) posted on MERX for this project" [emphasis added]. The Contracting Procedures indicate that an RFI may be used in advance of initiating a procurement process to understand the availability of goods and services to address the needs of CATSA.

[30] On August 16, 2010, a "Request For Submissions" (RFS) was issued. The RFS invited suppliers to submit information related to the technical capabilities and pricing of their equipment and related services. Based on a series of questions and information requirements, it was intended to

be used to determine whether the participating suppliers could "meet or exceed CATSA's business requirements". These requirements were unspecified.

[31] Mr. Martin Corrigan, Director of Screening Technologies at CATSA, and a participant at the 2010 Board meeting authorizing the contract award to Smiths, was cross-examined on his affidavit in unsuccessful proceedings by Rapiscan to obtain an interlocutory injunction. He testified that he had no knowledge of how the proposal came to be described as an RFS, or what was meant by the designation. Counsel for the applicant at the time suggested that the document was intended to be a Request For Standing Offer (RFSO).

I. *Contents of the RFS*

[32] The RFS contained the following exemption clause in the body of its contract and the disclaimer:

> This RFS does not constitute an offer by CATSA, nor is it intended to give rise to any legally binding obligations (sometimes referred to as a Contract "A" under Canadian law) on the part of CATSA. It is not a tender, request for tenders or a request for proposals.
>
> [Emphasis added]

[33] The RFS further described Phase I of the process as follows:

> During Phase I of the Process […] following a review of the Submissions […], if CATSA determines that one (1) or more Suppliers are able to provide the required Equipment and related goods and services at a price which offers the best value to CATSA, in CATSA's sole discretion, then CATSA may create a short list of Suppliers with whom to enter into further discussions regarding the Supplier's Submission and/or negotiate a Standing Offer Agreement.
>
> [Emphasis added]

[34] The RFS further reserved the right not to proceed to a competitive bid in respect of the award of contract in the following terms:

> CATSA reserves the right not to proceed to a competitive bid or other form of selection process and may select one (1) or more Suppliers to establish a Standing Offer Agreement with (in the form attached at Schedule "C" as may or may not be negotiated with a Supplier) based on their respective Submission, other information provided by the Supplier under this RFS, and other information obtained by CATSA from third parties, including without limitation, other agencies.
>
> [Emphasis added]

[35] Even though the contract contained no requirements, the RFS contained a further exception not requiring it to comply with requirements, stated as follows:

> 3.5 TERMS. Notwithstanding anything to the contrary in this RFS, CATSA reserves the right in its sole and absolute discretion, without any liability whatsoever to any Supplier to:
> (i) Accept submissions which fail in any respect to comply with the requirements of the RFS; […]
>
> [Emphasis added]

[36] The Schedule "A" Statement of Requirements in the RFS consisted of a series of requests to provide information on available checkpoint multiview advanced technology x-ray products, including product technical information and information on accessories, maintenance, training and documentation. It did not contain any requirements, mandatory or otherwise, that CATSA demanded be met by the RFS. It also did not include any selection criteria, weighted or otherwise.

J. *Rapiscan Invited to Participate*

[37] Having posted a summary of the RFS on the electronic tendering service MERX, Ron McAdam, the General Manager of New Technology at CATSA, noticed that Rapiscan was not

among the list of suppliers on MERX. After some internal discussion, CATSA decided to contact Rapiscan and notify it of the RFS. CATSA accordingly contacted Rapiscan and drew Rapiscan's attention to the 2010 RFS, inviting it to participate in the procurement process. Rapiscan subsequently responded to the RFS along with Smiths, L-3 Communications, and Reveal. Rapiscan was the only party submitting a bid that was not an existing supplier of CATSA.

K. *Briefing Note for Board*

[38] Shortly after, on October 1, 2010, a Contract Approval Request with an attached Briefing Note was provided to the CATSA Board, recommending that a standing offer be awarded to Smiths. The purpose of the note was given as being to describe "the process CATSA used to obtain competitiveness, openness, fairness, transparency and value for money" in the selection of Smiths.

[39] The 2010 briefing note made reference to the 2009 purchase of multiview x-ray equipment, stating as follows:

> […] It was also decided that CATSA's preference was to invest in multi-view X-ray technology that had a built in technology capable of being upgraded to provide better detection. For this requirement, the multi-view X-ray machines required 3 or more views which is again a factor in this year's evaluation.
>
> In June 2009, only the Smiths multi-view X-ray machine satisfied that criteria and it was felt that the benefits to be gained by investing in Smith's multi-view X-ray machine with 3 views was worth the incremental cost to CATSA over the second-best machine. While the approach in 2009 was made necessary in order to meet the timelines for the Olympics, Management did reassure the Board that it was a one-time exception and that future purchases would be done under an open procurement process.
>
> Procurement Requirement and Process for Selection of Multi-view X-ray Supplier(s)

> For current and future requirements for multi-view X-ray machines (based on the 5 year plan as set out in the Contract Approval Request) CATSA recently undertook an open process to obtain competitiveness, openness, fairness, transparency and value for money in the selection of multi-view X-rays by publishing a Request for Submissions on MERX, requesting technical, operational and pricing information.

[40] The briefing note indicated that Rapiscan had not met the requirements of having three views or a large tunnel size, although it was TSA certified and had good reliability and throughput. The Note further indicated:

> - Only the Smiths multi-view X-ray satisfied all the criteria above and Smiths rated highest in each category;
>
> - Of the 4 vendors, only Smiths and L3 offered 3 views and were TSA approved for use, the latter of which CATSA considers a precondition to be acceptable for use in Canada.
>
> […]

[41] The note then explained that as Rapiscan had been eliminated for not meeting the minimum requirement of three views, its pricing was not placed before the Board for consideration. Reveal was also eliminated because its equipment was not TSA certified.

> Pricing of all vendors [*sic*] submissions were analyzed. The [1] price comparison attached as Schedule 'B' addresses [2] only pricing for L-3 and Smiths since only those vendors would meet the [3] minimum requirements [4] set out in CATSA's requirements ([5] 3 views, [6] TSA certified).
>
> [Emphasis and numbering in square brackets added]

L. *Board Decision*

[42] On October 4, 2010, the Board held a meeting by conference call. It adopted a resolution authorizing management to award a standing officer to Smiths for the purchase of x-ray machines

and related equipment and services for an initial five-year period, with a renewal option for up to five additional years. The entirety of the Board's reasoning supporting its decision is as follows:

> In response to Board members [*sic*] questions, the CEO indicated that Smiths technology was currently the only technology that could meet the needs required now. He noted that it is the highest performing technology that exists today with the most potential for improvement.
>
> [Emphasis added]

[43] The Certified Record produced by the Attorney General included a document originating from the European Civil Aviation Conference ["ECAC"], dated after the Board's decision. It was apparently included by the defendant to demonstrate that Smiths had participated in a common evaluation process for security equipment in which the Rapiscan equipment was not included amongst the list and that Smiths had met ECAC's performance standard for screening for LAG [Liquids, Aerosols, and Gels] containers removed from cabin baggage.

III. Issues

[44] The following are the issues for consideration in this matter:

a) Is the matter coloured with a public element, flavour or character sufficient to bring it within the purview of public law and therefore review by this Court on the rationale that:

(i) it involves a breach of a statutory duty, or

(ii) it involves the integrity of government procurement processes?

b) If the matter is reviewable, what is the applicable standard of review?

c) In the circumstances, did the Board's decision meet the standards of legality, reasonableness and fairness required for good governance?

IV. Analysis

A. *Standard of Review*

[45] I come to the conclusion that this matter is reviewable and therefore I set out here the standard of review analysis.

[46] In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 26, the Supreme Court pointed out that judicial review can concern either the merits or the process of a decision. In *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*], the Supreme Court said:

> 28 In my view, the interpretation of s. 18.1 of the *Federal Courts Act* must be sufficiently elastic to apply to the decisions of hundreds of different "types" of administrators, from Cabinet members to entry-level *fonctionnaires*, who operate in different decision-making environments under different statutes with distinct grants of decision-making powers. Some of these statutory grants have privative clauses; others do not. Some provide for a statutory right of appeal to the courts; others do not. It cannot have been Parliament's intent to create by s. 18.1 of the *Federal Courts Act* a single, rigid Procrustean standard of decontextualized review for all "federal board[s], commission[s] or other tribunal[s]", an expression which is defined (in s. 2) to include generally all federal administrative decision-makers. A flexible and contextual approach to s. 18.1 obviates the need for Parliament to set customized standards of review for each and every federal decision-maker.
>
> […]
>
> 33 Resort to the general law of judicial review is all the more essential in the case of a provision like s. 18.1 of the *Federal Courts Act* which, unlike s. 672 of the *Criminal Code*, is not limited to particular issues before a particular adjudicative tribunal but covers the full galaxy of federal decision-makers. Section 18.1 must retain the flexibility to deal with an immense variety of circumstances.
>
> […]

> 36 In my view, the language of s. 18.1 generally sets out threshold grounds which permit but do not require the court to grant relief. Whether or not the court should exercise its discretion in favour of the application will depend on the court's appreciation of the respective roles of the courts and the [page367] administration as well as the "circumstances of each case": see *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at p. 575. Further, "[i]n one sense, whenever the court exercises its discretion to deny relief, balance of convenience considerations are involved" (D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at p. 3-99). Of course, the discretion must be exercised judicially, but the general principles of judicial review dealt with in *Dunsmuir* provide elements of the appropriate judicial basis for its exercise.

[47] In review of procurement cases, deference is owed to the decision-maker other than on questions of jurisdiction; the appropriate standard of review is thus reasonableness. Mr. Justice Barnes in *GDC Gatineau Development Corp v Canada (Public Works and Government Services)*, 2009 FC 1295 [*GDC Gatineau Development*] set out the reasoning in a similar situation at paras 23-24 of his decision:

> 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.

B. *Is the matter coloured with a public element, flavour or character sufficient to bring it within the purview of public law?*

[48] As the Federal Court of Appeal noted in the first sentence of *Irving Shipbuilding Inc v Canada (Attorney General)*, 2009 FCA 116, [2010] 2 FCR 488 [*Irving Shipbuilding*] at para 1, "Public contracts lie at the intersection of public law and private law." It is common ground that a procurement contract, being commercial in nature, does not normally permit recourse to administrative law remedies. *Irving Shipbuilding* at para 46:

> 46 The context of the present dispute is essentially commercial, despite the fact that the Government is the purchaser. PWGSC has made the contract pursuant to a statutory power and the goods and services purchased are related to national defence. In my view, it will normally be inappropriate to import into a predominantly commercial relationship, governed by contract, a public law duty developed in the context of the performance of governmental functions pursuant to powers derived solely from statute.

[49] In *Irving Shipbuilding*, the Court went further in its remarks at paras 61 and 62 concerning exceptions to allow a subcontractor to rely on a public law duty. It limited deviations from the rule to situations where the integrity of the procurement process was at risk, which at least by the examples cited would occur only in situations of crimes.

[50] I discuss below whether the high threshold to exceptions was intended to apply only to subcontractors, whose right to seek public law remedies was rejected on a number of bases relating to various other limitations on their rights to sue owners in contract and negligence. The Court also cited with approval the text of Paul Emanuelli, *Government Procurement*, 2d ed (Markham, Ontario: LexisNexis, 2008), which (at page 698) formulates a more generalized threshold to determine whether judicial review is permitted in a contractual context:

> **24** This view of the Court's jurisdiction is consistent with that generally adopted by other courts in Canada: see Paul Emanuelli, *Government Procurement*, 2nd ed. (Markham, Ontario: LEXISNEXIS, 2008) at 697-706, who concludes (at 698):
>
> > As a general rule, the closer the connection between a procurement process and the exercise of a statutory power, the greater the likelihood that the activity can be subject to judicial review. Conversely, to the extent that the procurement falls outside the scope of a statutory power and within the exercise of government's residual executive power, the less likely that the procurement will be subject to judicial review.
>
> English authorities on public contracts and judicial review are considered in Harry Woolf, Jeffrey Jowell and Andrew Le Sueur, *de Smith's Judicial Review*, 6th ed. (London: Sweet & Maxwell Ltd., 2007), 138-45, where courts generally require an "additional public element" before concluding that the exercise by a public authority of its contractual power is subject to judicial review, even when the power is statutory.

[51] The Federal Court of Appeal has provided additional content to "an additional public element" in its recent decision *Air Canada v Toronto Port Authority*, 2011 FCA 347 [*Toronto Port Authority*]. Justice Stratas summarized the jurisprudence generally applicable to assist courts to determine whether "a matter is coloured with a public element, flavour or character sufficient to bring it within the purview of public law" at paragraph 60 as follows:

> [60] In determining the public-private issue, all of the circumstances must be weighed: *Cairns v. Farm Credit Corp.*, [1992] 2 F.C. 115 (T.D.); *Jackson v. Canada (Attorney General)* (1997), 141 F.T.R. 1 (T.D.). There are a number of relevant factors relevant to the determination whether a matter is coloured with a public element, flavour or character sufficient to bring it within the purview of public law. Whether or not any one factor or a combination of particular factors tips the balance and makes a matter "public" depends on the facts of the case and the overall impression registered upon the Court. Some of the relevant factors disclosed by the cases are as follows:

- The character of the matter for which review is sought. Is it a private, commercial matter, or is it of broader import to members of the public? See DRL v. Halifax Port Authority, supra; Peace Hills Trust Co. v. Moccasin, 2005 FC 1364 (CanLII), 2005 FC 1364 at paragraph 61, 281 F.T.R. 201 (T.D.) ("[a]dministrative law principles should not be applied to the resolution of what is, essentially, a matter of private commercial law…").

- The nature of the decision-maker and its responsibilities. Is the decision-maker public in nature, such as a Crown agent or a statutorily-recognized administrative body, and charged with public responsibilities? Is the matter under review closely related to those responsibilities?

- The extent to which a decision is founded in and shaped by law as opposed to private discretion. If the particular decision is authorized by or emanates directly from a public source of law such as statute, regulation or order, a court will be more willing to find that the matter is public: Mavi, supra; Scheerer v. Waldbillig 2006 CanLII 6460 (ON SCDC), (2006), 208 O.A.C. 29, 265 D.L.R. (4th) 749 (Div. Ct.); Aeric, Inc. v. Canada Post Corp., reflex, [1985] 1 F.C. 127 (T.D.). This is all the more the case if that public source of law supplies the criteria upon which the decision is made: Scheerer v. Waldbillig, supra at paragraph 19; R. v. Hampshire Farmer's Markets Ltd., [2004] 1 W.L.R. 233 at page 240 (C.A.), cited with approval in MacDonald v. Anishinabek Police Service 2006 CanLII 37598 (ON SCDC), (2006), 83 O.R. (3d) 132 (Div. Ct.). Matters based on a power to act that is founded upon something other than legislation, such as general contract law or business considerations, are more likely to be viewed as outside of the ambit of judicial review: Irving Shipbuilding Inc, supra; Devil's Gap Cottager (1982) Ltd. v. Rat Portage Band No. 38B, 2008 FC 812 (CanLII), 2008 FC 812 at paragraphs 45-46, 2008 FC 812 (CanLII), [2009] 2 F.C.R. 276.

- The body's relationship to other statutory schemes or other parts of government. If the body is woven into the network of government and is exercising a power as part of that network, its actions are more likely to be seen as a public matter: Onuschuk v. Canadian Society of Immigration, 2009 FC 1135 (CanLII), 2009 FC 1135 at paragraph 23, 357 F.T.R. 22; Certified General Accountants Association of Canada v. Canadian Public Accountability Board 2008 CanLII 1536

(ON SCDC), (2008), 233 O.A.C. 129 (Div. Ct.); R. v. Panel on Take-overs and Mergers; Ex Parte Datafin plc., [1987] Q.B. 815 (C.A.); Volker Stevin N.W.T. ('92) Ltd. v. Northwest Territories (Commissioner), 1994 CanLII 5246 (NWT CA), [1994] N.W.T.R. 97, 22 Admin. L.R. (2d) 251 (C.A.); R. v. Disciplinary Committee of the Jockey Club, ex parte Aga Khan, [1993] 2 All E.R. 853 at page 874 (C.A.); R. v. Hampshire Farmer's Markets Ltd., supra at page 240 (C.A.). Mere mention in a statute, without more, may not be enough: Ripley v. Pommier reflex, (1990), 99 N.S.R. (2d) 338, [1990] N.S.J. No. 295 (S.C.).

- The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity. For example, private persons retained by government to conduct an investigation into whether a public official misconducted himself may be regarded as exercising an authority that is public in nature: Masters v. Ontario 1993 CanLII 8530 (ON SC), (1993), 16 O.R. (3d) 439, [1993] O.J. No. 3091 (Div. Ct.). A requirement that policies, by-laws or other matters be approved or reviewed by government may be relevant: Aeric, supra; Canadian Centre for Ethics in Sport v. Russell, [2007] O.J. No. 2234 (S.C.J.).

- The suitability of public law remedies. If the nature of the matter is such that public law remedies would be useful, courts are more inclined to regard it as public in nature: Dunsmuir, supra; Irving Shipbuilding, supra at paragraphs 51-54.

- The existence of compulsory power. The existence of compulsory power over the public at large or over a defined group, such as a profession, may be an indicator that the decision is public in nature. This is to be contrasted with situations where parties consensually submit to jurisdiction. See Chyz v. Appraisal Institute of Canada reflex, (1984), 36 Sask. R. 266 (Q.B.); Volker Stevin, supra; Datafin, supra.

- An "exceptional" category of cases where the conduct has attained a serious public dimension. Where a matter has a very serious, exceptional effect on the rights or interests of a broad segment of the public, it may be reviewable: Aga Khan, supra at pages 867 and 873; see also Paul Craig, "Public Law and Control Over Private Power" in Michael Taggart, ed., The Province of Administrative Law (Oxford: Hart

> Publishing, 1997) 196. This may include cases where the existence of fraud, bribery, corruption or a human rights violation transforms the matter from one of private significance to one of great public moment: Irving Shipbuilding, supra at paragraphs 61-62.
>
> [Emphasis added]

[52] Most of these factors apply to colour the present matter with a public element. The procurement of screening equipment for airports Canada-wide is clearly of broader import to the public. The decision-maker is a federally-created agency with public responsibilities. The decision was guided by statutory constraints on CATSA's Contracting Policies. CATSA is seen as exercising its power as part of and as an agent of the federal government. Finally, in these particular circumstances, a public law remedy would be useful.

[53] I conclude that Rapiscan's submissions that best respond to its right to pursue administrative law remedies are twofold. First, it argues that the necessary "public element" arises from a statutory duty which it claims arises from section 8(5) of the Act, imposing on CATSA the requirement to conduct its procurement processes so as to achieve transparency, openness, fairness and value for money.

[54] Second, Rapiscan submits that CATSA's staff significantly misled the Board, resulting in it unintentionally authorizing an unfair and uncompetitive award of a contract, in addition to eliminating Rapiscan's contractual remedies of fair and equal treatment. It argues that such conduct is only addressable by administrative law remedies and that if such conduct is not subject to public law remedies the integrity of the governmental procurement process would be undermined.

(1) Breach of Statutory Duty

[55] The Court in *Irving Shipbuilding* also had occasion to comment on an argument similar to that of Rapiscan's, namely that section 40.1 of the *Financial Administration Act*, RSC 1985, c F-11 [FAA] created a statutory duty in a procurement process. In rejecting this argument the Court's comments at paragraphs 42 and 43 are set out below:

> [42] In the course of oral argument, counsel for the appellants submitted that legislation conferred on them rights to procedural fairness. Counsel relied on the following provisions:
>
> Financial Administration Act, R.S.C., 1985, c. F-11 [s. 40.1 (as enacted by S.C. 2006, c. 9, s. 310)]
>
> | | |
> |---|---|
> | 40.1 The Government of Canada is committed to taking appropriate measures to promote fairness, openness and transparency in the bidding process for contracts with Her Majesty for the performance of work, the supply of goods or the rendering of services. | 40.1 Le gouvernement fédéral s'engage à prendre les mesures indiquées pour favoriser l'équité, l'ouverture et la transparence du processus d'appel d'offres en vue de la passation avec Sa Majesté de marchés de fournitures, de marchés de services ou de marchés de travaux. |
> | [Emphasis added] | [Je souligne] |
>
> [43] Legislation may, of course, impose a duty of fairness on PWGSC in its conduct of the procurement process, and specify its content. However, I am not persuaded that the above provision assists the appellants. The phrase "The Government of Canada is committed to taking appropriate measures to promote the fairness . . . in the bidding process…" is not sufficiently precise to impose an immediate legal duty of procedural fairness enforceable by a bidder, let alone by a subcontractor. Rather, it sets a goal and only commits the Government to take future, unspecified steps to ensure that the procurement process is fair.

[Emphasis added]

[56] The applicant attempts to distinguish *Irving Shipbuilding* based upon the more mandatory wording of section 8(5) of the Act which is repeated below for ease of reference:

8. (5) The Authority must establish policies and procedures for contracts for services and for procurement that ensure that the Authority's operational requirements are always met and that promote transparency, openness, fairness and value for money in purchasing.	8. (5) L'Administration établit les règles et méthodes à suivre concernant les contrats de fourniture de biens et de services qui garantissent l'importance primordiale de ses besoins opérationnels et qui favorisent la transparence, l'ouverture, l'équité et l'achat au meilleur prix.
[Emphasis added]	[Je souligne]

[57] The applicant argues that this provision satisfies the requirement in *Irving Shipbuilding* requiring the immediate imposition of legal duties: "Thus, this [section 8(5)] is no future commitment to do something, but rather commitments imposed and undertaken by CATSA to follow the law".

[58] I would add to Rapiscan's argument that the CATSA Contracting Procedures at section 5.7 entitled "Transparency, Fairness and Value for Money Not Excepted" would suggest that CATSA considered section 8(5) to be mandatory, stating that "… subject to Section 5.6.1 exceptions to an Open Procurement Process shall not limit CATSA's statutory and policy obligations of transparency, fairness or value for money." [Emphasis added]

[59] Nevertheless, I disagree with the applicant's submission. Although by section 8(5) there is an immediate duty to enact policies and procedures governing procurement contracts, the provision remains directory at best in its outcome, in the same manner as section 40.1 of the FAA. CATSA is only required to put in place measures "that promote transparency, openness, fairness and value for money in purchasing". The inclusion of the term "promote" in section 8 (5) has much the same effect as when used in section 40.1 of the FAA, where I find it was at the source of the Court of Appeal's decision.

[60] Moreover, the term "promote" when used in section 8(5) of the Act stands in stark contrast to the very definite legal obligation imposed on CATSA in the same sentence to "ensure that the Authority's operational requirements are always met". The dissimilarity of terms used in the same provision is a clear statement that the two words are not to be given the same meaning. See for instance Ruth Sullivan, *Statutory Interpretation*, 2d ed (Toronto: Irwin Law, 2007) at 185 under the heading "Same Words, Same Meaning – Different Words, Different Meaning" and remarks by Justice Zinn in *Hernandez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1417, at para 59:

> **59** [. . .] it remains a canon of interpretation that different words appearing in the same statute should be given a different meaning: See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5d ed (Toronto: LexisNexis Canada, 2008) [Sullivan on Construction] at 216-218. This principle was expressed by Justice Malone in *Peach Hill Management Ltd v Canada*, [2000] FCJ 894 (CA), at para 12, as follows:
>
> > When an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning.

[61] Had CATSA been required to ensure transparency, openness, fairness and value for money in purchasing by its policies and procedures, I would agree that a legal duty would arise enforceable by a public law remedy. However, promoting an objective is not the same as ensuring that the objective is met.

[62] Nor does the argument gain traction from CATSA carrying out its statutory obligation to enact policies and procedures to promote transparency, openness, fairness and value for money and subsequently referring to them as "statutory… obligations" in its Contracting Procedures. Administrative action does not change and nor can it be used as an aid to the interpretation of a statutory provision. Ruth Sullivan, *Statutory Interpretation*, 2d ed (Toronto: Irwin Law, 2007) at 301:

> The basic rule governing judicial use of administrative materials was stated by Dickson J. in R. v. Nowegijick: "Administrative policy and interpretation are not determinative but are entitled to weight and can be an 'important factor' in case of doubt about the meaning of legislation." In other words, these materials are admissible to resolved interpretative doubt, but their weight is dependent on the circumstances. [. . .] However, as LeBel J. points out in Imperial Oil Ltd. v. Canada, "If an [administrative] interpretation is wrong, it does not make law."

(2) Undermining the Integrity of the Government Procurement Process

[63] Analysis of this issue must be carried out in two steps. The first is to determine whether the Board was unknowingly misled on significant issues, while the second step is to determine whether the circumstances sufficiently color the characteristic of the matter to admit its review by public law remedies.

(a) *Misleading the Board*

(i) Failure to Adhere to the Contracting Procedures

[64] The overall failure of management was in not advising the Board that it had derogated drastically from the Contracting Procedures during the procurement process. The two areas of significant deviation from the Contracting Procedures in terms of outcomes are firstly, the drafting of an "RFS" procedure that was not a fair or competitive process; and secondly, the concealment of minimum requirements and performance standards with the result of unfairly favouring Smiths.

[65] The RFS did not comply from its very conception with any authorized procurement process under the Contracting Procedures. An "RFS" was not included among the several authorized procurement processes in the list of Open Procurement Processes. It was, as the applicant described it, an "ad hoc" or concocted process to which the misdescriptive label of RFS was attached. No explanation is found in the certified record explaining why the management chose to craft its own process having no relation to any of those authorized by the Contracting Procedures. The respondent argues that it complied with the procedures throughout.

[66] The RFS consisted of two distinct steps. The first was a Request For Information (RFI). The purpose stated in the Contracting Procedures for an RFI was to obtain information to be used in advance of initiating a procurement process. A CATSA RFI therefore contemplates a further procurement process for the purpose of awarding a procurement contract. It does not contemplate that the contract would be awarded on the basis of the information supplied to an RFI.

[67] The second step in the RFS procedure was an un-documented process to evaluate information and award the contract. Given the arbitrariness of the procedure, the RFS contained numerous disclaimers to authorize its conduct. These included specifying that no Contract A would arise from presenting a submission to the RFS, that CATSA could ignore any requirement in the RFS (in fact there were none), and that CATSA was not to be held to any limitations that would prevent it from conducting the second step as a non-competitive selection processes including obtaining information from undisclosed third parties. It was clearly therefore an arbitrary, unbounded process whereby the CATSA could select the supplier on the basis of requirements and evaluation criteria known only by its officers.

[68] The endgame of the second process was to award a Standing Offer Contract, a copy of which was attached to the RFS. The Contracting Procedures contain a procurement process entitled Request For Standing Offer (RFSO) which is defined as an Open Procurement Process. An RFSO is a process that is subject to the requirements of transparency, fairness and value for money, in addition to the obligation to follow the generally accepted practices set out in the procedures for open procurement processes.

(ii) Board's Lack of Knowledge that Contracting Procedures Not Followed

[69] The only evidence before the Court describing the information provided to the Board upon which it based its decision is contained in management's briefing note dated October 4, 2010. While CATSA was not required to file an affidavit describing the documents presented to the Board and what discussions occurred at the telephone conference meeting, the consequence of not doing so is

that the Court is limited to what it can consider in the way of information upon which the contested decision was based.

[70] The respondent at one point appeared to attempt to argue that all materials in the certified record were before the Board. I do not accept this. To begin with, this contradicts a statement made in counsel's covering letter dated July 22, 2011 providing the amended certified record, as to what documents were specifically circulated to the Board, which reads as follows:

> Finally, Mr. Monaghan advises that the only documents specifically circulated to Board Members for the Board review of the Contract Approval Request for the RFS in issue were the documents found at pages 3-9/10 and p. 23 of the Certified Record [*the Contract Approval Request and Briefing Note, Board of Directors' Resolution, and cost comparison chart of Smiths and L3t*]. The remaining documents in the Certified Record were identified by Mr. Monaghan as documents that had previously been made available to the Board in respect of a 2009 procurement of multi-view equipment and/or that he anticipated that the Board might request to see as support for the contract approval recommendation being made.

[71] In addition, the certified record contains a document not in existence at the time of the Board meeting, intended to demonstrate that Smiths' equipment had superior detection capabilities than Rapiscan's equipment. This obviously should not have been included in the certified record, and I conclude that it could not achieve its intended objective for any number of reasons.

[72] The Court's information underlying the Board's decision is therefore limited to management's briefing note, comments of Mr. Martin Corrigan who was a participant in the Board meeting made during cross examination on his affidavit in the interlocutory injunction proceedings, and the written decision and resolution that emanated from the Board meeting. To the extent that the

information provided to the Board was incorrect or that information was omitted and not drawn to its attention, such errors or shortcomings are attributed to the Board's decision.

[73] The respondent submits that it was clear that the Board knew that the procurement process did not fall specifically within the procedures described in the Contracting Policy by the fact that management mentioned in its note that a Request For Submissions was the procurement process. I find no basis to arrive at this conclusion merely because the term RFS was used in the briefing note. There was no additional explanatory commentary that might have elicited questions similar to that added in the minutes of the Contract Review Committee stating that the Committee "approved to have an RFI (which is somewhat in the nature of an RFP)". Moreover, in the Procurement Strategy Document the process was described as a Request for Information. The approval of the Contract Review Committee of an RFI was confirmed in a formal resolution adopted on the same date.

[74] The cross-examination of Mr. Corrigan on his affidavit at pages 218 to 224 of the transcript in the interlocutory injunction proceedings is revelatory in respect of the confusion as to what manner of procurement the RFS actually was. Not only did Mr. Corrigan not know how the RFI came to be changed to an RFS, but counsel for the respondent intervened to suggest that the process was an RFSO and pointed out that the RFS contained a standing offer agreement. As an acknowledgment that the RFS was not part of CATSA's documented mandatory Contracting Procedures, Mr. Corrigan stated that the contracting group did not review all of their policies and procedures and update those on an annual basis.

[75] More importantly, as to what was before the Board, Mr. Corrigan indicated that he did not know how the process came to carry the RFS label, nor how a contract for a standing offer came to be incorporated into it. I am satisfied that none of this was drawn to the attention of the Board, particularly as the Contracting Procedures require an express exception if not followed.

[76] There is no indication that the Board was aware that management had conducted a procurement process that did not fall within the definition of an open procurement process or come close to replicating the detailed procedures for an open, transparent, competitive and fair procurement process which are described in the Procedures. There is similarly no indication that the Board was aware that the process had provided no statement of requirements or evaluation criteria that related to the factors used to award the contract, or that the RFS contained provisions exempting CATSA from any duty of fair and equal treatment of suppliers and that it advised suppliers that it would not be required to follow a competitive process and could award the contract on any basis without limitation of its acquisition of information from undisclosed sources.

[77] Not having any of this information before it, the Board was unable to exercise its oversight function. It was thereby placed in a position where unknowingly it failed to consider relevant factors relating to the procurement process. I conclude that the Board of Directors, mandated to implement approved Contracting Policies and Procedures, upon considering these factors would not have authorized the award of the contract to Smiths without management having conducted a proper process in line with the Contracting Procedures.

[78] I set out in detail management's failure to adhere to the mandatory Contracting Procedures.

(iii) No Duty of Fair and Equal Treatment

[79] It has already been pointed out that the RFS contained an exemption stating that no Contract A would be formed by any submission response to the RFS. The contractual effect of this exemption would be to eliminate any duty of fair and equal treatment owed to suppliers responding to the RFS.

[80] The elimination of any duty of fairness toward suppliers bidding on the RFS is an indication of CATSA's intention not to conduct a truly competitive process. Competitive processes are by definition ones that are conducted fairly, i.e. an unfair competition process is not competitive. By exempting CATSA from any duty of fairness and the requirement to conduct a competitive process, management violated its statutory and policy obligations to promote fairness and competitiveness in CATSA's procurement contracts.

(iv) Failure to state requirements or provide evaluation criteria

[81] In general terms of its failure to conduct a fair and transparent competitive process, the main deficiency of the RFS was its absence of requirements and selection criteria such that the suppliers would know what they were bidding on or how they would be evaluated.

[82] Paragraph 7.2 of Open Procurement requires that "generally accepted practices" must be adopted. These include preparing a statement of work [requirements] and evaluation criteria. Paragraph 5.3 requires evaluation criteria to be established prior to seeking the applicable contract approval. In this regard, the comments of the unidentified member of the Contract Review

Committee at the committee's July 14, 2010 meeting were prescient in pointing out that if they were not publishing rated requirements, there would be a heavy onus to demonstrate that the process was conducted fairly.

[83] Significant breaches of ordinary contracting fairness rules arose from the failure to include requirements or evaluation criteria, as well as with respect to the application of concealed minimum requirements and undeclared performance standards for the equipment. These failures are described below.

(v) Undisclosed Minimum Requirements

[84] Management acknowledged that it applied minimum requirements to eliminate tendering parties. This is evident from the passage of the briefing note already quoted above which for purposes of analysis I set out again below:

> Pricing of all vendors [*sic*] submissions were analyzed. The price comparison attached as Schedule 'B' addresses only pricing for L3 and Smiths since only those vendors would meet the minimum requirements set out in CATSA's requirements (three views, TSA certified).
>
> [Emphasis added]

[85] As a starting point, I find that management misled the Board when it stated that the minimum requirements were "set out" in CATSA's requirements. As already pointed out there were no requirements in the RFS and certainly not any minimum requirement of three views.

[86] The respondent attempted to argue that no minimum requirements were established in the procurement process. Certainly none were stated in the RFS. But it is clear from the briefing note

quoted above that minimum requirements were applied to eliminate suppliers from being considered. Reveal was eliminated on the basis that its equipment was not TSA certified. Rapiscan was eliminated on the basis that its equipment did not have the minimum required three views.

[87] I also conclude that the minimum requirement of three views had been established in 2009. The briefing note to the Board for that procurement process stated: "The x-ray [Smiths' equipment] meets the minimum requirement of at least 3 x-ray views …" This was also acknowledged by the respondent's counsel during cross-examination of Mr. Corrigan, where it was agreed that Rapiscan could rely upon the 2009 briefing note. In any event, with management having requested and received the White Paper just before the start of the procurement process, and this report confirming in the minds of CATSA that more views provided greater potential for enhanced detection capabilities, it is obvious that the minimum requirement of three views had been established prior to publishing the RFS.

[88] It is also clear that management was aware that Rapiscan would be tendering its 620DV-AT two-view model in the 2010 procurement process. In the 2009 closed procurement process, management selected and compared Rapiscan's 620DV screener against Smiths' aTIX equipment. Thus, without Rapiscan even being aware that a comparison was being made of its equipment with that of Smiths, CATSA fully expected that Rapiscan would be offering to supply the same 620DV that its management had used for the concealed comparison a year earlier. In addition, Mr. Corrigan acknowledged that CATSA was aware of what equipment was available from the limited number of suppliers that made pre-boarding scanning machines.

(vi) Three Views Was Not a Proper Minimum Requirement

[89] A minimum requirement cannot be a weighted requirement. By definition, if a requirement must be weighed against another criterion to determine its application, it cannot be a pass/fail requirement used to eliminate a tendering party from further evaluation of its proposal.

[90] The evidence indicates that the requirement of three views was a weighted requirement and not a minimum requirement. Its application could only be determined on the basis of comparing the possible savings to be obtained from future upgrading of Smiths' equipment against the initial savings achieved by the less expensive Rapiscan equipment. This is apparent from the rationale adopted by the Board justifying the purchase of Smiths' more expensive equipment in 2009:

> AND WHEREAS, while the Smiths product is higher in cost than the Rapiscan product, only the Smiths product has the built-in technology capable of being upgraded to achieve greater detection capabilities, with the potential to detect prohibited liquids and gels and therefore the potential to achieve future improved security effectiveness and cost efficiencies for CATSA;

[91] Thus, not only was management not aware that the minimum requirement had been concealed from Rapiscan, it was also not aware that it was not a true minimum requirement and had been used improperly to eliminate consideration of Rapiscan's lower financial prices. Accordingly, the decision of the Board was unreasonable because it was prevented from considering whether it would achieve value for money in awarding Smiths the contract for the screening equipment, thereby violating the direction of its statutory mandate of section 8(5), as restated in the Contracting Policy and Contracting Procedures, to promote value for money in contracting.

(vii) Bad Faith of CATSA

[92] I accept Rapiscan's submission that it would not have bid against a requirement that it knew in advance it could not meet. By concealing the minimum requirement of three views, in combination with offering a specific invitation to Rapiscan to participate despite knowing that it would bid the same product as was compared with Smiths equipment a year earlier, without giving any warning that its equipment would not meet requirements, CATSA knowingly induced Rapiscan to participate in a process in which it had no fair chance of its submission being considered. Thus the process had the appearance that all industry leaders had participated in a competitive procurement, when management knew in advance that Rapiscan would be eliminated. In my view this conduct constitutes bad faith on the part of CATSA.

[93] Secondly, Rapiscan points out that because it was eliminated at the minimum requirement stage, the Board was not provided with an opportunity to consider the cost advantage from its bid. If the pricing differential had been known to the Board it would have been required to seriously consider the immediate cost advantage versus the future savings argument of management. This would have entailed a diligent review of the evidence supporting the position that Smiths was the highest performer and the likelihood or not that Smiths' equipment could be successfully upgraded in the future.

[94] In the circumstances, including CATSA's tendering history, it would appear to be a reasonable inference that the minimum requirement was adopted to prevent the Board from carrying out a fair and a proper evaluation by limiting its access to information on the significant cost

advantage offered by Rapiscan's equipment. Whether or not that was the intention, that was the result.

(viii) Unreasonable Dispensation of Smiths from TSA Certification

[95] The internal Evaluation Chart used by CATSA offices summarizing the results of the RFS indicates that Smiths' oversized equipment (large tunnel) did not have TSA certification. This information was not drawn to the attention of the Board. Additionally, the table of requirements in the briefing note indicated "Yes" under the Smiths column relating to being TSA certified. The briefing note furthermore stated that: "Only the Smiths multi-view X-ray satisfied all the criteria above and Smiths rated highest in each category". This was obviously not true as Smiths' large tunnel equipment was not TSA certified.

[96] In addition, no explanation was provided in the certified record as to why Reveal was eliminated because its equipment was not TSA certified and yet Smiths' equipment was accepted. On its face, therefore, the decision awarding the contract to Smiths is unreasonable for its lack of justification and obvious preferential treatment of Smiths in being exempted from a minimum requirement applied to eliminate another supplier. It would appear that no bidder met the minimum requirement for large tunnel scanners.

[97] In addition, Rapiscan complains quite rightly that it had no idea of the quantities of the different types of equipment being purchased, particularly the large tunnel scanners. As it turns out the latter comprised a major portion of the RFS.

(ix) "Highest Performing Technology that Exists Today"

[98] The minutes of the Board of Directors meeting of October 4, 2010 describe the rationale for awarding the contract to Smiths in the following paragraph:

> In response to Board members [*sic*] questions, the CEO indicated that Smiths technology was currently the only technology that could meet the needs required now. He noted that it is the highest performing technology that exists today with the most potential for improvement.
>
> [Emphasis added]

[99] The RFS set no requirements for performance of any kind, nor did it seek information on performance capabilities apart from throughput and reliability, upon which Rapiscan and Smiths were both assessed as "good". In terms of detection or other capabilities, the equipment of both suppliers for checkpoint screeners was TSA certified. As noted, the large tunnel x-ray screeners were not TSA certified, which I would understand to mean that this equipment did not meet performance requirements.

[100] There is no evidence in the certified record, including the RFS, indicating what the "highest performing technology that existed today" refers to. One can only assume that the reference is to threat detection. But if that is the case, there is no evidence in the certified record to support this conclusion. The 2010 briefing note did not repeat the undocumented statements in the 2009 briefing note to the Board that "Technical representatives of both the TSA and the U.K. DFT have confirmed the minimum number of x-ray views required to obtain high levels of detection while maintaining low false alarm rates is three" [my emphasis], which seems highly unlikely given that the two-view Rapiscan equipment was TSA certified. The 2009 contract was in any event awarded on the basis of potential upgrading only.

[101] Management made a statement in the 2010 briefing note that "Smiths rated highest in each category", for the five categories stated above. None of the five categories in question relate to threat detection, unless reference was to TSA certification, in which case for checkpoint equipment three of the four bidders met that requirement, and it was not rated on a lowest to highest scale, the ratings allocated being "yes" or "no".

[102] As mentioned, the respondent attempted to include a document produced subsequent to the decision in the certification record, giving the results of a European testing process on machines of the two suppliers, as circulated to Member States on October 13, 2010, to support its conclusions that Smiths equipment had a higher detection capability than that of Rapiscan. I am critical of the respondent for including the document in the Certified Record. This tends to confirm the applicant's argument that the respondent did not have evidence at the time the award decision was made which confirmed that Smiths' equipment was the highest performing technology that existed and that the respondent is inappropriately attempting to bolster its case.

[103] The only other source for the claim that Smiths technology was the highest performing technology that existed appears to be a statement appearing on the front page of the internal White Paper dated July 7, 2010. The relevant portion reads as follows:

> It is shown that the accuracy of a multi-view system increases with the number of views, which in turn improves the performance of automated explosives and liquids detection software.
>
> [Emphasis added]

[104] This is not however, an accurate statement of the report's conclusions on the advantages of scanners with three and four views as the state omits the word "potential" to which the report's analysis was entirely committed. Respondent's counsel properly cited the conclusion of the report in its memorandum, which is as follows:

> Multi-view scanners with three or four views will be able to increase accuracy of density measurements by 2.25 times and 4 times, respectively … This helps in automated detection of explosives from unique measurements … So the potential accuracy of a three or four view scanner is higher than that of a dual view scanner, and the advantages rapidly increase since the dependence is on the square of the number of views.
>
> [Emphasis added]

[105] The report acknowledged that algorithms needed to be developed to realize on this potential. This explains why it could only speak to potential increases in accuracy in the future.

[106] The conclusions of the report are based on mathematical calculations; no actual performance evaluations of any screening equipment was carried out or reported on in the report. While Rapiscan challenges the report on a number of bases, the validity of the report is not reviewable in this setting. Accordingly, there is sufficient justification to support CATSA's statement that greater potential for improvement may be obtained with Smiths' equipment. However, there is no information contained in the certified record to support management's advice to the Board that Smiths was the "highest performing technology that exists today".

[107] This is an important conclusion because the Board's decision was justified by the two very short factual representations from management on existing and future highest performance of Smiths' equipment. While I am satisfied that the justification relating to potential performance is

reasonable, I find no basis in the RFS or the materials upon which the decision was said to be made that could support a conclusion that Smiths was the highest performing technology that existed at the time of the Board's decision. I therefore conclude that the Board based its decision on an erroneous finding of fact made by management in a perverse or capricious manner and without regard to the material in front of it.

(b) *Should Public Law Remedies Apply?*

[108] I am of the opinion that there are three significant factors in this matter, which to use Justice Stratas' words in *Toronto Port Authority*, *supra*, at para 60, register an overall impression on the Court to tip the balance to make this a public matter. They are, in order: first, the need to protect the integrity of CATSA's procurement process; second, that there appears to be no alternative process to a public law remedy which can achieve that end; and third, the fact that Rapiscan's right to fair and equal treatment in contract court has been eliminated or seriously impaired by the RFS.

(i) Maintaining the Integrity of the Government Procurement Process

[109] I think that it is a matter of importance to the public if a governmental decision-making body is misled or misinformed by its staff on a significant factor or group of factors likely affecting the outcome in a procurement process. To do so undermines the integrity of the government's tendering processes. Specifically in this matter, the oversight function of the Board of CATSA was undermined and rendered ineffectual. This resulted in the Board making a decision that I determined violated its statutorily mandated and mandatory Contracting Procedures while inflicting obvious unfairness on the bidding parties.

[110] Just as maintaining the integrity of the procurement process has led Canadian courts to create contract remedies using the legal fiction of the Contract "A", public law remedies may be necessary to uphold the public interest and maintain good governance.

[111] These principles were most aptly stated by Binnie J in *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62, [2010] 3 SCR 585, at paragraph 24 as follows::

> [24] The Attorney General correctly points to "the substantive differences between public law and private law principles" (Factum, at para. 6). Judicial review is directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by government decision makers. It is designed to enforce the rule of law and adherence to the Constitution. Its overall objective is good governance. These public purposes are fundamentally different from those underlying contract and tort cases or causes of action under the Civil Code of Québec, R.S.Q., c. C-1991, and their adjunct remedies, which are primarily designed to right private wrongs with compensation or other relief.
>
> [Emphasis added]

[112] Good governance requires remedies to ensure that public officers who provide advice and information to decision-makers, upon which decisions are made authorizing the award of procurement contracts, provide accurate and complete information in order to ensure that their processes are fair, open and transparent while providing value for money all in accordance with the objectives of maintaining good government contracting practices.

[113] I do not understand that there is any argument that undermining the integrity of the government's procurement processes may raise a valid public element to support resort to public law remedies, depending on the circumstances. The Court in *Irving Shipbuilding* at paragraph 61

cited above, called for an exception permitting public law remedies for the purpose of "maintaining the essential integrity of the [government] procurement process".

[114] However, the Court restricted this exception in the circumstances of the facts before it involving subcontractors seeking access to public law remedies, reserving it for situations involving "egregious" misconduct of government officials. The Court provided examples of such misconduct which were tantamount to criminal or quasi-criminal activities of "fraud, bribery, corruption or other kinds of grave misconduct" (*Irving Shipbuilding* at para 62).

[115] Because any conduct that significantly undermines the integrity of the procurement process should normally give rise to public law remedies where needed to address the problem, I conclude that the very high threshold of misconduct referred to in *Irving Shipbuilding* must have been directed at the particular situation involving subcontractors' rights. I say this, not only because the importance of maintaining the integrity of the process is an overriding precept of good government, but because there were various other policy grounds cited by the Court to deny subcontractors access to public law rights against public institutions.

[116] These included concerns that recognizing independent rights of contractors would have deleterious effects on the contracting process itself which included: undermining the rights of bidders for a procurement contract; the alarming possibility of a cascading array of potential procedural rights holders; discouraging bidders from tendering; undermining the efficiency of the tendering process; and frustrating the parties' expectations.

[117] Inserting a public law remedy into Rapiscan's circumstances would not have any adverse effect on the contract process as described in *Irving Shipbuilding*. Indeed, the purpose of the public law remedy is to supplement these processes where contract remedies cannot do the job in maintaining the integrity of governmental procurement processing.

[118] Moreover, where both remedies are available, the Supreme Court has indicated that it should not interfere with the litigant's choice of the procedure that best suits its purposes. See *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62, [2010] 3 SCR 585 [*TeleZone Inc*] at paragraph 19 as follows:

> [19] If a claimant seeks to set aside the order of a federal decision maker, it will have to proceed by judicial review, as the *Grenier* court held. However, if the claimant is content to let the order stand and instead seeks compensation for alleged losses (as here), there is no principled reason why it should be forced to detour to the Federal Court for the extra step of a judicial review application (itself sometimes a costly undertaking) when that is not the relief it seeks. Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours.

(ii) *No Effective Alternative Remedy*

[119] The second factor supporting a public law remedy in this matter is that contract remedies are not able, or are not as effective, to deter the inappropriate conduct leading to improper decision-making. Contract litigation generally fails to provide the same degree of transparency and accountability to the internal processes that will ensure that decision-makers are making fully informed decisions. It is axiomatic that contract remedies work at the level of contract terms, which in turn determine the relevance of issues before the contract court. This means that the legality and propriety of the decision-making process, the focus of public law remedies, are generally secondary

concerns. Contract courts are not generally interested in the internal machinations such as considering the circumstances that led to the exemption terms being imposed on Rapiscan by CATSA's request, although I am not saying that this information could not come out in a contract dispute.

[120] By focusing on the internal decision-making process, the necessary transparency and informed analysis may be brought to bear to deter improprieties such as management misleading the Board on the nature of the procurement process and its outcomes. There is no suitable alternate remedy in contract litigation to deal with an issue which is essentially about governance and the conduct of public officials.

[121] Moreover, the normally quick strike process of judicial review meets the needs of the litigant who does not want to engage in recovering damages, but as in this case, in setting the requirements for a fair process in the future. To that extent, it is my view that *TeleZone Inc* adds another factor to those enumerated in the *Toronto Port Authority* decision as to the suitability of the different procedures to the claimant's litigation needs.

(iii) Contracting Out of the Contract "A" Duty of Fair and Equal Treatment

[122] A unique aspect in this case involving the absence of an alternative remedy arises where the misconduct of public officials has had the effect of eliminating, or putting at an unnecessary litigation risk, a contractual remedy based on fairness. This refers to the RFS stipulating that no Contract A arises in the bidding process and thereby denying any duty of fair and equal treatment

owed to the bidding parties. The Board, by unknowingly accepting a decision which had contractually hobbled any duty of fair and equal treatment in the administration of its contracts, contravened one of CATSA's and the Canadian Government's fundamental rules for procurement processes, that of treating fairly and equally those with whom they are purchasing goods and services.

[123] The primary rationale advanced over the years to exclude public law remedies in matters involving commercial procurement contracts was the existence of an alternate contract remedy to the public law duty of fairness, found in the implied terms of Contract A. This point is made in a review of jurisprudence under the title of "The Adequate Alternative Remedy Bar" in Anne C. McNeely, *Canadian Law of Competitive Bidding and Procurement*, (Aurora, Ontario: Canada Law Book, 2010) at 83 *et seq*. The author's opening remarks on the subject are as follows: "Of the various grounds for denying [public law] review or relief, an argument that the applicant for review has an adequate alternative remedy is the one which is most commonly litigated."

[124] Because the Board was misled by management to believe that fairness was a component of the RFS, Rapiscan is caught in a Catch-22 of unfairness. If it seeks redress in the courts on the basis of contract, its arguments based on a breach of the duty of fair and equal treatment are met with the submission that by responding to the RFS Rapiscan has agreed that no duty is owed. Conversely, when it shows up seeking a judicial review of CATSA's actions, it is told it must look to its contract remedies because of the commercial context of a procurement contract.

[125] I conclude that if the court is satisfied that management significantly misled the Board, resulting in it unknowingly making decisions that undermined the integrity of CATSA's procurement process and conflicted with its mandate, where no satisfactory remedy may be achieved, or is at risk, under contract law, the matter is coloured with a public element sufficient to bring it within the purview of public law.

[126] Although not necessary, I further am of the view that even were a satisfactory remedy for the applicant available in contract law, a sufficient public law element exists whenever a statutory decision-maker is significantly misled by those responsible for advising it, resulting in the suborning and misalignment of the decision with the institution's mandate and objectives.

(iv) Did the Board's decision meet the standards of legality, reasonableness and fairness required to meet the overall objective of good governance?

[127] Having accepted that public law remedies are available to allow the court to rule on this matter, as stated above I consider that the appropriate standard that I should apply is similar to that stated in *GDC Gatineau Development Corp v Canada (Minister of Public Works and Government Services)*, 2009 FC 1295 at para 24; 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."

[128] On the basis of the foregoing review of the Board's decision-making process, I conclude that its decision was unfair, unreasonable, made without proper consideration of relevant factors and in bad faith. I point out that the factor of basing a decision on irrelevant factors includes the converse

situation where the decision-maker fails to consider relevant factors in deciding the matter. See for instance Donald JM Brown and John M Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Canvasback Publishing, 2009-) at 15-27: "Failure to take a relevant consideration into account is as erroneous as the improper consideration of an irrelevant one."

[129] My conclusion is, however, layered. The finding that the decision by the Board was unfair, unreasonable, arbitrary or made in bad faith is dependent upon the primary conclusion that management did not provide the Board with accurate information upon which to base its decision. By that circumstance, the Board failed to consider relevant factors. This in turn resulted in a decision that was unfair, unreasonable, arbitrary and, in respect of Rapiscan, taken in bad faith in respect of it being invited to participate in the RFS.

[130] Failing to consider relevant factors remains however the essential basis for this order. It is related to the failure by management to properly advise the Board, which in turn gives rise to the essential public element that I conclude provides jurisdiction to the reviewing Court despite the commercial contractual context of the procurement process. While the Contracting Procedures do not provide the statutory context, they are evidence due to their mandatory nature, which meant that the failure to bring significant relevant factors to the attention of the Board was a matter that should have altered the outcome of the decision.

[131] To the extent that management's conduct is subsumed in the Board's decision, the decision can be characterized as unfair, unreasonable, arbitrary and made in bad faith. I believe this to be the case, because management is ultimately accountable to the Board. But if not, the Board's decision is

procedurally illegal for its failure to consider relevant factors, on account of whatever reason and whether intentional or not. On that basis it should be set aside or declared unlawful, as the case may be.

V. Remedy

[132] Before issuing my order in this matter, so as to ensure that my decision does not jeopardize CATSA's operational requirements and bearing in mind the applicant's more limited remedy sought in its final arguments, I will provide the parties with an opportunity to make further submissions on the appropriate remedy.

[133] In this regard, the parties are invited to determine whether an appropriate remedy and a draft order may be prepared to assist the Court in finalizing this matter.

[134] The parties are also invited to make submissions on costs. Given the outcome, the applicant may file written submissions on costs not to exceed seven pages, plus limited relevant attachments where necessary, within 20 days of issuance of these preliminary reasons, with the respondent to file its submissions within 20 days thereafter, and a right of reply by the applicant within 10 days thereafter.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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