

Federal Court



Cour fédérale

Date: 20140319

Docket: T-809-13

Citation: 2014 FC 263

Ottawa, Ontario, March 19, 2014

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

SELEX SISTEMI INTEGRATI S.P.A.

Applicant

and

**ATTORNEY GENERAL OF CANADA
EADS DEUTSCHLAND GMBH**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

Overview

[1] The applicant Selex Sistemi Integrati S.p.A [Selex] seeks judicial review of a decision by Public Works and Government Services Canada [Public Works] to declare its bid in response to the Request for Proposal number W8475-115110/B [RFP] non-compliant and to instead award the contract to respondent EADS Deutschland GmbH [EADS]. Public Works found that the sale of virtually all of Selex's assets to a newly created sister company, during the bidding process, was contrary to the non-assignment clause contained in the RFP.

[2] Selex argues that since Public Works failed to provide it with reasons, Public Works' decision should be reviewed under the correctness standard. On the merit, it basically argues that the transfer of its assets had, under Italian law, the same practical effect and operational consequence as a merger and that, as such, it should not have been considered as having breached the non-assignment clause.

[3] Selex seeks various orders, notably an order declaring the Public Works' decision invalid or unlawful, an order to terminate the contract awarded to EADS, and an order that the contract should be awarded to Selex, or alternatively, an order directing Public Works to re-evaluate Selex's bid.

[4] For the reasons that follow, the application for judicial review will be dismissed.

Background

[5] Selex is an Italian aerospace, defence and security-related electronics manufacturing company with its headquarters in Rome, Italy. It is one of a number of related companies owned by Finmeccanica S.p.A [Finmeccanica], Italy's largest hi-tech industrial group.

[6] EADS is a Dutch registered company, specializing in military transport and fighter aircrafts, defence electronics and security systems, and space systems. As of January 2, 2014, it has been rebranded as the "Airbus Group." For the purposes of this judicial review, it will be called EADS.

[7] Public Works is the Federal Government Department responsible for the RFP.

[8] In November 2010, Public Works issued a Solicitation of Interest and Qualification [SIQ] for the procurement of integrated Area Surveillance Radar and Secondary Surveillance Radar [the “Radars”] for six Royal Canadian Air Force [the “Air Force”] military bases and one training site. These Radars support the Air Force’s general operations in Canada, by providing its air traffic controllers with accurate data on the position of aircraft.

[9] The purpose of the SIQ was to pre-qualify vendors who met specified criteria. Through this process, only five companies, including Selex and EADS, were determined to be qualified to bid on the contract.

[10] Public Works issued the RFP on January 26, 2012. The RFP incorporated by way of reference certain of Public Works’ Standard Acquisition Clauses and Conditions. The particular clauses which were incorporated into it, and which bidders expressly agreed to be bound by, were identified as the “2003 (2011-05-16) Standard Instructions – Goods or Services – Competitive Requirements.” These Standard Instructions expressly provided at section 05.8 that “[a] bid cannot be assigned or transferred in whole or in part.”

[11] Selex and the other pre-qualified bidders submitted tenders prior to the closing of the solicitation on May 2, 2012. Pursuant to the RFP, the bids were to remain open for acceptance until December 28, 2012.

[12] Upon the completion of Public Works’ evaluation of the bids in October 2012, only those submitted by Selex and EADS were found to be compliant with the terms of the RFP. Public Works evaluated the bids in accordance with its bid evaluation matrix and on the combined technical and financial scoring system. It found that Selex had submitted a lower price, but

EADS had scored higher on the technical components. As a result, Public Works scored Selex's bid at 86.50, while it scored EADS' bid at 85.74.

[13] After Public Works had proceeded with this evaluation, but before it let the bidders know their results, it sought their approval to extend the bid validity period to March 21, 2013. Selex agreed to the extension, at the same time asking whether the contract would be awarded in or after 2012. It did not advise Public Works as to why the timing of the bid selection mattered.

[14] On January 1, 2013, Selex underwent a corporate reorganization, as did a number of its sister companies, all of whom were owned by Finmeccanica.

[15] Prior to the corporate reorganization, Finmeccanica operated its defence and security electronics system business operations through three Italian companies: Selex, Selex Elsag S.p.A [Elsag] and Selex Galileo S.p.A. [Galileo]. All three companies were wholly owned by Finmeccanica and had at least one wholly-owned non-Italian subsidiary. In the case of Selex, its wholly-owned subsidiary was Selex Systems Integrations Inc., a U.S. corporation.

[16] Finmeccanica consolidated all of its defence and security electronics companies, with the intention of creating one European entity, Selex ES S.p.A [Selex ES]. In the case of Elsag and Galileo, they merged into Selex ES and their respective subsidiaries became subsidiaries of Selex ES.

[17] However, the manner by which Finmeccanica proceeded in its corporate reorganization with regard to Selex forms the crux of this dispute. Selex contends that its business was "transferred as a going concern and integrated into Selex ES." The entirety of the business complex, including its assets, operations, and personnel and administrative infrastructure, were

transferred to, and integrated into, Selex ES. In the case of its U.S. subsidiary, it became a wholly owned subsidiary of Selex ES. According to Selex, the next step will be for it to be wound up. This has yet to occur.

[18] By way of letter dated January 9, 2013, Selex advised Public Works of this corporate reorganization, writing that it had “transferred its business into” Selex ES effective January 1, 2013, and that Selex ES had “succeeded” Selex in its bid in response to the RFP. Following receipt of that letter, Public Works contacted Selex, seeking additional information regarding the corporate reorganization. There followed a number of communications between the parties, as Public Works sought to determine whether the corporate reorganization was a merger or had the practical effect under Italian law of a merger. The communications were initially between Donna Kovalsky, the designated Contracting Authority at Public Works for the procurement, and Selex representative Daniel Tavano. Subsequently, communications between the parties were primarily through David Holmes, Department of Justice, counsel to Public Works, and Stefano Pineschi, Selex’s in-house legal counsel.

[19] Notably, Selex provided Public Works with a copy of an agreement made between itself and Selex ES entitled “Sale of Business Complex,” dated December 13, 2012. The agreement purported to document the sale of Selex’s “business complex,” made up of, among other assets, the “elements” identified as being on a “list of commercial bids submitted,” as shown in Appendix AD. Selex and Selex ES are known in this document as the “Assignor” and “Assignee” respectively.

[20] On February 13, 2013, Mr. Holmes advised Mr. Pineschi that the corporate changes had caused Public Works to “carefully consider Selex’s status within the bidding process,” and

towards that end, he requested further information, which he broke down into six main questions. Notably, he asked: “Under Italian law, does the emptying of assets out of [Selex] and transferring of those assets into [Selex ES] have the same effect as if [Selex] had merged with [Selex ES]?” and whether Selex’s bid for the contract was included in Appendix AD to the Sale of Business Complex Agreement “or otherwise sold or transferred” to Selex ES.

[21] On February 15, 2013, Mr. Pineschi responded to Mr. Holmes’ questions, confirming that:

- a. All of Selex’s assets and personnel had been transferred to Selex ES, but it had been decided, for “a mere technicality,” to keep Selex “only for the limited purposes to handle some administrative and legal proceedings. However, [they would] shortly proceed with its winding up”;
- b. “Since there had been the sale of the whole business complex of [Selex], [they] have substantially the same effects as if [Selex] had merged with [Selex ES] (the only difference is that [Selex] remains as legal entity with no assets nor staff). As a matter of fact, from a legal point of view, [Selex ES] became the ‘natural’ and unique interlocutor of Public Works, as any and all assets, personnel and liabilities of [Selex] (including those relevant to the bid to the [RFP]) have been assigned to [Selex ES]”;
- c. Selex’s bid for the contract was included in two appendices to the Sale of Business Complex Agreement (Appendices AD and AE);
- d. Selex no longer had the ability to perform production activities or fulfil the obligations contemplated by the RFP as all its industrial and technical capabilities had been transferred to Selex ES.

[22] Mr. Holmes also obtained corporate search results concerning the status of Selex, Elsag and Galileo, which showed:

- a. As of January 28, 2013, Selex was still “active”;
- b. As of February 1, 2013, Elsag and Galileo “ceased” to exist, as they had been incorporated into Selex ES.

[23] Mr. Holmes then provided to Public Works a legal opinion on the effect of Selex’s corporate reorganization on the procurement process - by an order dated September 9, 2013, this Court ruled that this legal opinion was a solicitor-client privileged document and that, as such, it would not be communicated to the applicant. Public Works subsequently determined that Selex’s bid was no longer compliant with the RFP.

[24] On March 21, 2013, Public Works awarded the contract to EADS and so advised Selex without providing any further details. Upon receipt of Public Works’ letter, Selex requested a debriefing from Public Works, which was scheduled for April 17, 2013. On April 15, 2013, Public Works advised Selex by way of letter of the results of the bid evaluation, and that its bid had been determined to be non-compliant “as a result of enquiries stemming from its January 9, 2013 letter advising Public Works of its corporate restructuring.”

[25] On April 17, 2013, the debriefing occurred as scheduled. Selex’s Vice-President, Antoine Cortezi, took notes, which show:

- a. Selex was the highest ranked bidder, and would have been awarded the contract.
However, as a result of the corporate restructuring, its bid was determined to be non-compliant;

- b. As a result of the corporate reorganization, Selex was no longer capable of meeting the Industrial Regional Benefits (IRB), which were the technical and management requirements of the solicitation (as it no longer had any assets);
- c. Holmes explained that “Legal” had conducted its own due diligence, and that the transfer of Selex into Selex ES did not constitute a “true merger.” Had this situation been discovered after the award, then “PUBLIC WORKS would have been forced to redo their due diligence and it would have likely terminated the contract for default”;
- d. Holmes stated that the change in the company was “never put to us as a merger. It did not look like a merger and there were no signs of a merger.” A “true merger” is when “two entities were brought together to become one new entity while in our case [Selex] was not truly merged but ‘sold’ its assets and remained as a shell company which was to be wound down in the near future”;
- e. Holmes further stated that “you cannot change bidders in the middle of a competition for legal reasons.” In doing so, he “refused to point to any regulation or provision in the RFP.”

[26] Selex filed a Notice of Objection with Public Works in relation to its decision that Selex’s bid was non-compliant. By letter dated June 4, 2013, Public Works advised that its decision would stand since:

- a. Selex had transferred its business, including its industrial and technical capabilities and the bid itself, and was therefore not able to perform the necessary work contemplated by the solicitation; and
- b. Selex had contravened the explicit prohibition in the RFP on transfer or assignment of a bid.

The letter further stated:

It was and remains irrelevant whether the reorganization was a merger under either Canadian or Italian law. PUBLIC WORKS takes no position as to whether Selex's bid would have been rendered non-compliant if Selex had restructured its corporate affairs differently than it had, including by merger. [Emphasis added]

[27] Since the award of the contract in favour of EADS, details regarding contract administration, technical documentation and security requirement have been confirmed, site surveys and geotechnical assessments have been completed and the specific location for the Radars has been determined at each site. While the replacement of all the equipment at the seven locations is expected to take three or four years, it is anticipated that some of the Radars will be installed as early as 2014.

Issues and Standard of Review

[28] The questions raised by this application for judicial review are the following:

- a. Did Public Works err in its interpretation of the assignment clause found at section 05.8 of the Standard Acquisition Clauses and Conditions?
- b. Did Public Works err in determining that Selex had rendered its bid non-compliant by its corporate reorganization, and therefore had breached the anti-assignment clause in the RFP?
- c. Did Public Works breach its duty of procedural fairness to Selex?

[29] The parties agree that the standard of review for the duty of procedural fairness is correctness. However, they do not agree on the standard applicable to the interpretation of the assignment clause and the application of that interpretation to Selex's corporate reorganization.

[30] The applicant argues that the Decision for both questions a) and b) should be reviewed on a standard of correctness, as it is grounded in either an error of law in Public Works' assessment of what constitutes a merger and what constitutes a forbidden corporate reorganization under the terms of the RFP, or an error of law in Public Works' interpretation of the RFP's prohibition on assignments of bids.

[31] In relation to issue a), the applicant states that the correctness standard applies when interpreting the terms of an RFP. For this point, it cites *IMP Group Ltd v Canada (Minister of Public Works and Government Services)*, 2006 FC 1223 at para 24 (aff'd 2007 FCA 318) [*IMP Group*] where Justice Harrington, discussing the three standards of review, which were applicable prior to *Dunsmuir v New Brunswick*, 2008 SCC 9, held that the correctness standard applied to the interpretation of the RFP but that the patent unreasonableness standard applied to the assessment of the bids submitted. The appellant acknowledges that a determination as to whether a bid complies with the terms of an RFP is a mixed question of law and fact, which normally attracts a reasonableness standard. However, it argues that it would be impossible for it to meet that standard given the absence of contemporaneous reasons. A decision must be "transparent and intelligible" in order for the reviewing Court to review it. This requires that there be reasons for the decision, and that they are not opaque or otherwise indiscernible. For this point, Selex refers the Court to *Leahy v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 227 at paras 119-121.

[32] Selex further submits that Public Works' *post-facto* explanation for its decision changed from the time of the debriefing to the present and that it has since attempted to bolster its decision through the filing of additional reasons by way of the affidavits of Ms. Kovalsky and Mr. Revitt. Such an approach is not permissible as "[i]n those circumstances, an applicant for

judicial review is being asked to hit a moving target” (*Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255 [*Sellathurai*] at paras 46-47).

[33] As for the respondent, he suggested that issues a) and b) be combined into a single issue which is whether Public Works had erred in determining that Selex had rendered its bid non-compliant by its corporate reorganization and by breaching the non-assignment clause. As a mixed question of law and fact, it should attract the standard of reasonableness. For this argument, the respondent mainly relies on *Bot Construction Limited v Ontario (Ministry of Transportation)*, 2009 ONCA 879 [*Bot*], *St-Lawrence College of Applied Arts and Technology v Canada*, 2009 FC 545 [*St-Lawrence*] and *Halifax Shipyard v Canada (Minister of Public Works)*, [1996] FCJ No 682 [*Halifax Shipyard*].

[34] I am reticent to apply the correctness standard to issue a), as Public Works has been given express authority for overseeing the procurement process. It drafted the RFP, and regularly interprets it during the course of its procurement processes. The Department of Justice was specifically called in to provide guidance. Deference then should likely be owed to Public Works’ interpretation of its Standard Acquisition Clauses and Conditions. However, the standard of correctness was applied in *IMP Group* (2006), which confirmed the standard’s application by the Federal Court of Appeal in *HB Lynch* (2005). It was also the standard used in a 2012 case heard by this Court, which was not cited by either party (*Robert v Canada (Attorney General)*, 2012 FC 1227). There, Justice Pinard said:

[15] This case raises the following three issues:

1. Did the applicant’s initial bid meet the requirements of the bid solicitation?

2. Did the Correctional Service of Canada’s bid solicitation invite only natural persons to submit proposals?

3. Did the bid submitted by Multi Options comply with the relevant legislation and standards governing the practice of dentistry in the province of Quebec?

[16] The applicant argues that the standard of correctness applies to the respondent's decision because the issues involve compliance with the legislative framework for the awarding of contracts and with Quebec's statutes and regulations governing dentists.

[17] The respondents, on the other hand, argue that the standard of reasonableness applies to all three issues. Relying on *I.M.P. Group Limited v. The Minister of Public Works and Government Services et al.*, 2006 FC 1223 (CanLII), 2006 FC 1223 at paragraph 24 [*I.M.P. Group Ltd.*] (aff'd 2007 FCA 318 (CanLII), 2007 FCA 318), they submit that considerable deference is owed when reviewing proposals or bids in the government procurement process. Below is an excerpt from *I.M.P. Group Ltd.*: [Cite omitted].

[18] The Supreme Court of Canada has since held in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, at paragraph 47, that "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[19] In my view, reasonableness is the standard applicable to the first and third issues. However, as the second issue involves the interpretation of the bid solicitation as such, I am of the opinion that correctness is the applicable standard.

[35] Therefore, the standard of correctness will be applied to issue a) although, as will be seen below, that finding has no impact on the final outcome since I find that Public Works correctly interpreted the assignment clause.

[36] With respect to issue b), I do not agree with Selex that there was a need to provide reasons for Public Works' decision, nor that the reasons given evolved over time. To say that i) as a result of the corporate reorganization, Selex is no longer capable of meeting the technical and management requirements of the RFP (as it no longer had assets); ii) that the corporate

reorganization was a sale of assets not a merger, or iii) that it is not permitted to change bidders in the course of a bidding process, all amount to the same reality: the bidders were not permitted to assign or transfer the bid in whole or in part. Selex had sufficient information and knew very well that it was its corporate reorganization that rendered its bid non-compliant. It knew of the terms and conditions of the RFP as it had accepted them by submitting its bid. Therefore, the standard of review for the question pertaining to the application of the non-assignment clause to the facts at hand will be that of reasonableness.

Analysis

a. Did Public Works err in its interpretation of the assignment clause found at section 05.8 of the Standard Acquisition Clauses and Conditions?

[37] Although the question as to what is a transfer or an assignment for the purpose of section 05.8 of the RFP is a pure question of law, it is certainly not a complex one. There are a number of different ways to undertake a corporate reorganization in order to join two or more business concerns. However, each possible form of corporate reorganization may affect the rights and obligations of the entities involved in different ways.

[38] In brief, in order to transfer or assign assets, the transferor/assignor and transferee/assignee must be separate identities (see *Envision Credit Union v Canada*, 2013 SCC 48 at para 50). The transferred or assigned assets pass from the hands of the transferor/assignor to the hands of the transferee/assignee.

[39] A transfer or assignment of a bid, in whole or in part, has the practical effect of changing the bidder during the bidding process. Moreover, a transfer or assignment of virtually all of the

bidder's assets has the practical effect of rendering the bidder no longer capable of meeting the technical and management requirements of the RFP.

[40] In analyzing both the plain and legal meanings of section 05.8 of the RFP, I am of the opinion that Public Works' interpretation was therefore correct.

b. Did Public Works err in determining that Selex had rendered its bid non-compliant by its corporate reorganization, and therefore had breached the anti-assignment clause in the RFP?

[41] Selex maintains that for all intents and purposes, the "transfer and integration" of its business complex to Selex ES had the "practical effect and operational consequence" of a merger by operation of Italian law, as Selex ES succeeded Selex in all of the rights, obligations, contracts, tenders, proposals and offers (including Selex's bid in relation to the RFP).

[42] It further notes that the corporate reorganization had no impact on its ability to perform the contract since all of its manufacturing facilities, products, staff, experience, and technical knowledge remained within the Finmeccanica group of companies and, more specifically, were in fact located within Selex ES. Selex also raises the point that, in September of 2012, Finmeccanica had been required, in accordance with section 06.2 of the RFP, to provide a comfort letter affirming that it guaranteed the financial capacity of its subsidiaries to fulfill all obligations arising from any of their contracts for their entire term, and that the subsidiaries could draw on the credit lines available to Finmeccanica, which included at that time over 2.4 billion Euros in cash and over 8.5 billion Euros for guarantees. Public Works thus had no reason to doubt Selex ES' ability to fulfill the contract.

[43] For its part, Public Works maintains that it did consider the nature of the reorganization, and specifically the question of whether it was a merger, but that it ultimately concluded it was irrelevant whether the reorganization in question could be considered one. What did matter were the facts, documents and information, which demonstrated that Selex had transferred its business and assigned its bid to Selex ES. As such, Selex could no longer be awarded the contract, as it had become a shell company when it divested itself of all of its relevant assets and personnel. Nor could Public Works award the contract to Selex ES, as it had no standing in the bidding process.

[44] All of the information and documents available to Public Works when it had decided to declare Selex's bid non-compliant, notably the answers to Mr. Holmes' questions and the December 13, 2013 Sale of Business Complex Agreement, confirmed that Selex had transferred or assigned its bid to Selex ES. The assignment or transfer was the result of an agreement between Selex and Selex ES, and not simply by operation of the law. The assignment or transfer had the practical effect of emptying Selex of virtually all of its assets. Meanwhile, Selex ES is a separate entity from Selex and it had not been pre-qualified as a potential vendor for the Radars nor did it continue the existence of Selex, as the latter still exists until it is finally wound up.

[45] Although I agree with the respondent that the question as to whether a merger should have been considered compliant with the non-assignment clause is not relevant, I note that Selex and/or Finmeccanica were fully aware of the difference between a merger and a sale of assets. They made a business decision to merge Elsag and Galileo into Selex ES, but not to do so in the case of Selex. As is always the case, they must have had good reasons for proceeding in this fashion, although it is not my role to speculate as to what those reasons may have been. However, Selex failed to properly consider the consequences of that decision, as it related to the

bid in question, before signing off on the corporate reorganization. As a result, Public Works was bound by the RFP to consider Selex's bid non-compliant (*The Queen in Right of Ontario v Ron Engineering & Construction (Eastern) Ltd*, [1981] 1 SCR 111). The failure by Public Works to have proceeded in this way could very well be considered unfair toward the other bidders.

[46] Although Public Works probably would have wished Selex's bid to be compliant, as its price was substantively lower than that of EADS, it could not, in all fairness to EADS, find that to be so. That decision is not only reasonable, it is, in my opinion, the only one that could have been taken in the circumstances.

c. Did Public Work breach its duty of procedural fairness to Selex?

[47] Selex lastly argues that it should have been told, prior to Public Works awarding the contract to EADS, that its bid was considered non-compliant. That failure breached its procedural rights as it prevented Selex from obtaining an injunction or a stay order prohibiting the award.

[48] For the reasons set forth above, the fact that Selex could have been advised earlier of the decision would not have changed the course of events, as Public Works' decision was compliant with the RFP and fair to all bidders.

[49] In addition, Public Works followed its own published standard practices by not advising bidders of non-compliance before the contract was awarded. As explained in the affidavit of Mr. William J. Rivett, contracting officer at Public Works, that standard practice "is intended to be fair to all bidders" and "to prevent attempts at 'bid repair.'"

[50] Accordingly, Public Works did not breach its duty of procedural fairness in not advising Selex that its bid was non-compliant before the award of the contract in favour of EADS.

Conclusion

[51] For all of these reasons, the application for judicial review will be dismissed. As respondent, EADS did not take a position in these proceedings and chose not to make representations before the Court, costs will only be awarded in favour of the Attorney General of Canada.

JUDGMENT

THIS COURT'S JUDGMENT is that :

1. The Application for judicial review is dismissed;
2. Costs are awarded in favour of the respondent, the Attorney General of Canada.

"Jocelyne Gagné"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-809-13

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GENERAL OF CANADA, EADS DEUTSCHLAND
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DATED: MARCH 19, 2014

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