

Federal Court



Cour fédérale

Date: 20121026

Docket: T-1033-11

Citation: 2012 FC 1227

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 26, 2012

Present: The Honourable Mr. Justice Pinard

BETWEEN:

SYLVAIN ROBERT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

MULTI OPTIONS NURSING INC.

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Correctional Service of Canada (the respondent) to award a service contract to Multi Options Nursing Inc. (Multi

Options) to provide dental services to the inmates of the Laval Complex. The applicant was the only other bidder for this contract.

[2] On April 26, 2011, the respondent issued a bid solicitation for the services of a dentist licensed to practise dentistry in Quebec to provide dental services to the inmates of the federal institutions of the Laval Complex.

[3] The bid solicitation required both the dentist and his proposed replacement to provide copies of their curricula vitae to demonstrate that they possessed the experience required by the respondent.

[4] The respondent received only two bids, one from the applicant and one from Multi Options. The applicant and his proposed replacement had provided dental services for several years under a service contract with the respondent. Multi Options offers recruitment services for health professionals, and, in its bid to Correctional Services Canada, it proposed the services of Dr. Kuzina and a replacement dentist.

[5] On May 12, 2011, the respondent, having noted that the curricula vitae of the applicant and his replacement were not sufficiently detailed, gave the applicant 14 days to demonstrate that they had the required experience. The next day, the applicant forwarded the requested information.

[6] On May 12, 2011, the respondent also gave Multi Options 14 days to submit a certificate authenticated by the Canadian Embassy in Russia demonstrating the professional experience that Dr. Kuzina, the dentist proposed by Multi Options, had acquired in her country of origin. The respondent also requested a curriculum vitae for her replacement to find out whether he met the requirements. On May 24, 2011, Multi Options provided the respondent with the curriculum vitae of the replacement as well as several other documents demonstrating Dr. Kuzina's work experience in Russia. The respondent was satisfied with the evidence provided by Dr. Kuzina, despite the fact that the documents had not been authenticated by the Canadian Embassy in Russia.

[7] On May 26, 2011, the Correctional Service of Canada awarded the contract to Multi Options on the basis that it met the bid requirements and offered its services at a lower price than that offered by the applicant. On May 31, 2011, the respondent advised the applicant that his bid had not been retained.

* * * * *

Preliminary issue

[8] The applicant's ground of attack that the respondent breached the rules of procedural fairness appears for the first time in his memorandum. The respondent and Multi Options argue that the applicant is barred from raising this ground as it was not included in his notice of application, as required by paragraph 301(e) of the *Federal Courts Rules*, SOR/98-106 (the Rules), which provides that the notice of application must set out "a complete and concise

statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on”. The respondent cites the following cases in support of its opposition: *The Ministry of Commerce and Industry of the Republic of Cyprus v. International Cheese Council of Canada*, 2011 FCA 201 at paragraphs 12–16 [Cyprus] and *AstraZeneca AB v. Apotex Inc.*, 2006 FC 7 at paragraphs 17–22 (aff’d 2007 FCA 327).

[9] Multi Options adds that it was on the basis of the notice of application that it planned its defence, prepared its representative’s affidavit, decided to produce only those exhibits that it filed in support of its affidavit and decided not to examine the other parties’ representatives. Multi Options also submits that it would suffer prejudice if the issue were authorized (a relevant consideration in *Cyprus*, above, at paragraph 15).

[10] I agree with the respondents. It does not suffice merely to invoke an error of law or a violation of the principles of natural justice without providing any specifics whatsoever. The applicant opted to set out the specific grounds of attack of his application for judicial review under the heading [TRANSLATION] “The grounds of the application are:”. The applicant did not set out, as required, the issue of procedural fairness among the grounds set out in his notice of application. Accordingly, this Court need not consider the applicant’s arguments relating to procedural fairness, in light of section 301 of the Rules and the case law cited above.

[11] In any case, I see nothing in the arguments contained in the applicant’s written submissions or raised before me constituting a violation of procedural fairness.

[12] The applicant has not persuaded me that the respondent imposed an excessive degree of precision by requiring the applicant to produce additional details to show that he and his replacement had the necessary experience for the contract. It is not excessive for the respondent to demand the evidence explicitly listed in the bid solicitation.

[13] As for the additional evidence that the respondent required of Multi Options, I am of the view that it did not err in accepting the documents relating to Dr. Kuzina's professional experience in Russia, as the documents were certified translations and/or true copies certified by a Quebec notary.

[14] The remaining arguments that the applicant has attempted to tie to the procedural fairness issue have nothing to do with procedure, but are essentially related to the reasonableness of the decision with respect to the requirements and the evaluation of the bids submitted by the bidders.

[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 at paragraph 24 [*I.M.P. Group Ltd.*] (aff'd 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.*:

[24] This approach was applied to the Government procurement process by the Federal Court of Appeal in *H B Lynch Investments Inc. v. Canada (Minister of Public Works)*, 2005 FCA 237, 339 N.R. 261. Generally speaking, no deference is owed in interpreting the RFP [Request for Proposal] itself. The correctness standard applies. However, considerable deference is owed when it comes to considering the proposals or bids submitted. The standard of patent unreasonableness applies. . . .

[18] The Supreme Court of Canada has since held in *Dunsmuir v. New Brunswick*, [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.

I. Did the applicant's initial bid meet the requirements of the bid solicitation?

[20] The applicant essentially submits that his bid met all of the obligatory requirements as of May 11, 2011, and that it was not necessary for the respondent to require that the applicant and his replacement submit more detailed curricula vitae to establish their experience in the area of minor surgery.

[21] However, the bid solicitation included a requirement that the contractor [TRANSLATION] "have at least one (1) year's experience in the area of minor surgery" and must provide complete information about this experience in his or her curriculum vitae.

[22] In my view, the Correctional Service of Canada was not limited to relying only on its knowledge of other contracts between it and the applicant and his replacement to satisfy itself that they met the experience requirement. It was entirely reasonable for the respondent to require, as it did, that the applicant and his replacement provide more details about their experience in the area of minor surgery, as this information, while required in the bid solicitation, was not included in the applicant's bid.

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

[23] The applicant submits that based on the terms of the bid solicitation, only natural persons, as opposed to legal persons, were invited to submit proposals. I do not agree with this claim.

[24] Based on a reading of the “mandatory requirements” in the bid solicitation, it is perfectly correct to conclude that only a natural person can possess a degree or experience or belong to a professional order. However, I share the respondent’s view that the Correctional Service of Canada is not interested in the legal entity. Its main concern is whether the dentist has the necessary qualifications and experience to perform the services.

[25] The Federal Court noted the following in *I.M.P. Group Ltd*, above:

[43] On balance, the RFP was not interested in the corporate vehicle used, but rather whether Cascade had the knowledge and experience to do the job; an experienced directing mind, arms and legs, Cascade was simply a reincarnation of the Conair division which had been engaged in the business for years.

[44] As Mr. Justice Robertson said in *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services) et al.*, (2000), 260 N.R. 367, [2000] F.C.J. No. 999 (F.C.A.)(QL) at paragraph 18:

My conclusions hinge on the proper construction of “Section C - Evaluation Criteria” of the Request for Proposal. Like the Tribunal, this court recognizes that ensuring compliance by potential suppliers with all mandatory requirements of solicitation documents is one of the cornerstones of the integrity of any tendering system: see *IBM Canada Ltd., Re*, [1999] C.I.T.T. No. 87 (F.C.A.), at paras. 34-35. I also accept that procuring entities must evaluate a bidder’s conformance with mandatory requirements thoroughly and strictly. But this is not to suggest that mandatory requirements should be construed in an isolated and disjunctive manner. As was held in *R.E.D. Elections Inc., Re*, [1995] C.I.T.T. No. 44 (F.C.A.), at para. 13, they should “be interpreted as a whole with consideration of the overall purpose and objectives of the [Request for Proposal]” . . .

[26] There is no provision in the bid solicitation expressly excluding companies from submitting a bid. A reading of the bid solicitation as a whole certainly does not indicate that this was the respondent's intention. In fact, the respondent also expressly stated therein that a bidder may propose a person capable of providing dental services. The respondent uses the following wording under article 4.1, which includes the following parenthetical information:

[TRANSLATION]

The supplier must submit with the bid a sufficiently detailed curriculum vitae indicating the work history and any other relevant details to show clearly that the proposed resource who would perform the work meets the mandatory requirements.

(Emphasis added.)

[27] Similarly, the text of articles 6.2 and 8.0 of the bid solicitation shows that it also applies to legal persons. Article 6.2 includes the following text:

[TRANSLATION]

...

It is also essential to provide sufficient details in the attached documents to indicate clearly that the person(s) proposed *meet all of the mandatory requirements*.

(Emphasis added.)

At article 8.0, the contract acceptance certificate asks for the [TRANSLATION] "legal name and address of the supplier/contractor" and the name of the [TRANSLATION] "person authorized to sign on behalf of the supplier/contractor".

[28] Therefore, read as a whole, the text of the bid solicitation cannot be interpreted in the manner suggested by the applicant. The text may not be a model of clarity, but one certainly cannot attribute to the respondent an intention to exclude companies from the contract because, on the one hand, it accepted the bid of Multi Options Nursing Inc. and, on the other hand, such

an interpretation amounts to a claim that the respondent prepared the bid solicitation in contravention of the federal public administration's principles for managing public money by voluntarily shrinking the pool of candidates. The respondent is bound by the Treasury Board's *Contracting Policy* and must draft the bid solicitation in such a way as to provide an equal opportunity for all firms and individuals to compete (paragraph 10.3.1(b) of the *Contracting Policy*).

[29] Given this context, the respondent's recognition of Multi Options Nursing Inc. as a person authorized to submit a bid in accordance with the bid solicitation seems to me to result from a correct interpretation and application of the bid solicitation.

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

[30] The applicant argues that it is expressly prohibited for a dentist to offer his or her services through a partnership or company unless that partnership or company meets the various requirements of the *Regulation respecting the practice of the dental profession within a limited liability partnership or a joint-stock company*, R.R.Q., c. D-3, r. 7.2 (Regulation). The applicant also argues that dentists may not share fees with anyone other than a dentist or person, trust or enterprise named in paragraph 1 or 2 or section 3 of the Regulation (*Code of ethics of dentists*, R.R.Q., c. D-3, r. 4, s. 3.05.07 [Code of ethics]).

[31] The applicant submits that it appears that Dr. Kuzina shares her fees with Multi Options, but that the latter is not a company that meets the requirements of the Regulations. The applicant

argues that Dr. Kuzina cannot offer her dental services through Multi Options without infringing both the Code of ethics and the Regulation.

[32] I do not accept the applicant's interpretation of section 3.05.07 of the Code of ethics. In *Ordre des opticiens d'ordonnances du Québec v. Ward*, 2002 QCTP 69, the Professions Tribunal of Quebec interpreted a similar rule in the *Code of ethics of dispensing opticians*, R.R.Q., c. O-6, r. 3.1 and concluded that an association with non-opticians for a legitimate purpose—for administration purposes, for example—was permissible. I am not convinced that Dr. Kuzina is violating the Code of ethics or the Regulation by offering dental services through Multi Options.

[33] I agree with the respondents that even if the agreement between Multi Options and Dr. Kuzina were violating a statute or regulation, the applicant's argument must be rejected. In *Double N Earthmovers Ltd. v. Edmonton (City)*, [2007] 1 S.C.R. 116, at paragraph 51, the Supreme Court of Canada dealt with the issue of the compliance of a bid at the time of its submission. The Court held that the parties had no reason to expect the owner to verify whether a bidder complies with the requirements because a bidder whose bid is accepted is bound by those requirements.

[34] In this case, therefore, it was reasonable for the respondent, having concluded that Dr. Kuzina and her proposed replacement met the mandatory requirements of the bid solicitation, not to verify whether the contract between Multi Options and the dentist violated the standards governing the practice of dentistry in Quebec. The respondent specified in article 1.0 of the bid solicitation that it was seeking a dentist for the inmates of the Laval Complex [TRANSLATION] “in

compliance with the relevant statutes and regulations governing the practice of dentistry in the province of Quebec". It is reasonable that the respondent not be obliged to look beyond the bids to find out whether they comply with the relevant statutes and regulations.

[35] It remains open to the applicant to file a complaint against Dr. Kuzina with the Syndic of the Ordre des dentistes du Québec, if he deems it appropriate.

* * * * *

[36] For all of these reasons, the application for judicial review is dismissed with costs.

JUDGMENT

The application for judicial review of the Correctional Service of Canada's decision to award a service contract to Multi Options Nursing Inc. to provide dental services to the inmates of the Laval Complex, the only other bidder for this contract being the applicant, is dismissed with costs.

“Yvon Pinard”

Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1033-11

STYLE OF CAUSE: SYLVAIN ROBERT v. ATTORNEY GENERAL OF CANADA and MULTI OPTIONS NURSING INC.

PLACE OF HEARING: Montréal, Quebec

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REASONS FOR JUDGMENT AND JUDGMENT: Pinard J.

DATED: October 26, 2012

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