Federal Court of Appeal

Cour d'appel fédérale

Date: 20150416

Docket: A-106-14

Citation: 2015 FCA 96

CORAM: **NADON J.A.**
WEBB J.A.
BOIVIN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

RAPISCAN SYSTEMS, INC.

Respondent

Heard at Toronto, Ontario, on January 29, 2015.

Judgment delivered at Ottawa, Ontario, on April 16, 2015.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: NADON J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] This is an appeal from a decision of Mr. Justice Annis of the Federal Court (the judge) dated January 21, 2014. The judge allowed the judicial review application made by the respondent, Rapiscan Systems Inc. (Rapiscan), of a decision of the Canadian Air Transport Security Authority (CATSA) to award a procurement contract to Smiths Detection Montreal Inc. (Smiths), one of Rapiscan's commercial competitors in the field of security screening equipment.

[2] The Attorney General of Canada (the appellant) now appeals the judge's decision essentially arguing that the judge erred in finding that the decision of CATSA's Board of Directors (CATSA's Board) was flawed. In response, Rapiscan maintains that the procurement process at issue was unfair and anti-competitive and seeks declaratory relief to that effect.

[3] For the reasons that follow, I would dismiss the appeal.

I. Factual Background

[4] CATSA, a Crown corporation, was created in 2002 pursuant to the *Canadian Air Transport Security Authority Act*, S.C. 2002, c. 9, s. 2 [CATSA Act]. As part of its mandate, CATSA oversees passenger and baggage screenings at airports across Canada for security purposes. To this end, CATSA purchases the equipment required to conduct such screenings, including replacement equipment when necessary. The purchase of CATSA's security screening equipment is made through procurement processes.

[5] In September 2009, CATSA announced that it awarded a non-competitive sole-source procurement to Smiths for the purchase of multi-view x-ray equipment used to screen passengers' baggage at security checkpoints in airports across Canada. CATSA's management assured CATSA's Board that this non-competitive approach remained an exception and future purchases would be done using an open procurement process (Briefing Note to the Board of Directors dated June 18, 2009, appeal book, volume 4, tab 16-S at 1046).

[6] About a year later, on August 16, 2010, CATSA initiated another procurement process in the form of a Request for Submission (RFS) in order to purchase multi-view x-ray screening equipment. The RFS was posted on MERX, an electronic tendering service, inviting prospective suppliers to submit information on their respective products, including pricing.

[7] The RFS at issue was designed as a multi-phased process, the first being a Request for Information (RFI) which could lead to either (i) entering directly into a Standing Offer Agreement (SOA) with one or more suppliers, or (ii) a further phase allowing suppliers to present their proposed equipment or (iii) the cancellation of the RFS.

[8] Rapiscan was not amongst the list of suppliers who initially responded to the posting on MERX but was later invited by CATSA to participate in the RFS. In total, CATSA received submissions from four (4) suppliers in response to its RFS, including submissions from Smiths and Rapiscan.

[9] On October 4, 2010, CATSA's Board awarded the SOA exclusively to Smiths. It did so on the recommendation of CATSA's management, which had determined that Smiths was the only supplier able to perform the contract for the required multi-view x-ray screening equipment.

[10] Unsatisfied with CATSA's handling of the procurement process, Rapiscan filed an application in the Federal Court on November 5, 2010 seeking judicial review of CATSA's Board's decision to award the SOA to Smiths. Following, *inter alia*, protracted exchanges over document production, the hearing took place on June 12 and 13, 2013 and July 26, 2013.

II. The Judge's Decision

[11] As part of his decision, the judge provided a detailed review of the facts at issue including a description of CATSA's mandate, its Contracting Policy and Procedures, the background leading to the 2010 procurement process and the Board's decision. The judge also noted CATSA's equipment purchase history from Rapiscan's main competitor, Smiths. On the standard of review applying to procurement cases such as the one at issue, he determined that the applicable standard was reasonableness (judge's reasons at paras. 47 and 127).

[12] The first issue considered by the judge was whether the present case could fall within the purview of public law. The judge expressed the view that this case "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" (judge's reasons at para. 4).

[13] In this regard, the judge referred to our Court's decision in *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488 at paragraph 1 [*Irving Shipbuilding*], noting that "Public contracts lie at the intersection of public law and private law". In *Irving Shipbuilding*, our Court refused in principle the application of public law over a procurement decision. In the present case, the judge distinguished this finding on the basis that the issue in *Irving Shipbuilding* was the availability of judicial review for <u>sub-contractors</u> in a public procurement process whereas this case relates to <u>direct suppliers</u> (bidders). On the basis of

that distinction, the judge concluded that public law could apply in the present procurement context.

[14] The judge then turned his mind to the "public-private" factors set out by this Court in *Air Canada v. Toronto Port Authority Et Al*, 2011 FCA 347, [2013] 3 F.C.R. 605 and concluded that they applied "to colour the present matter with a public element" and, as such, bring the matter within the purview of public law and that a "public law remedy would be useful" (judge's reasons at para. 52). Relying further on *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, the judge added the additional factor of "setting the requirements for a fair process in the future" in determining whether public law remedies should apply in this case (judge's reasons at para. 121).

[15] Ultimately, the judge accepted Rapiscan's contention that CATSA's Board was so significantly misled by CATSA's management that it undermined the integrity of the government procurement process. This, in itself, he held, would be sufficient to ground a public law remedy. He also added that the RFS explicitly ousted the usual contractual remedies contained in "Contract A", thus opening the door to grounding a complaint about the fairness of CATSA's procurement process in public law (judge's reasons at paras. 124-126).

[16] Specifically, the judge found that in making its procurement decision, CATSA's Board failed to consider relevant factors, namely: that the RFS was not an open process; neither was it authorized by CATSA's Contracting Policy and Procedures; that the requirement that the equipment have a minimum of three view generators was not disclosed in the RFS, and that

Rapiscan's model costs significantly less than Smiths'. On this basis, the judge found that the RFS was therefore an unfair procurement process. Moreover, given his finding that CATSA's management deliberately misled the Board on these factors, the judge further concluded that CATSA acted in bad faith.

[17] Accordingly, the judge allowed the application for judicial review in public reasons issued on February 6, 2014, subject to receiving submissions on the appropriate remedy in order to avoid jeopardizing CATSA's operational requirements. On April 4, 2014, the judge issued his Order and declared that the decision of CATSA's Board dated October 4, 2010 awarding the SOA to Smiths was "procedurally unlawful and unfair".

A. *Issues*

[18] There are three substantive issues before this Court, as well as one preliminary procedural issue regarding the admissibility of an affidavit. These issues are as follows:

1. Is the Affidavit of Mr. Peter Kant admissible?
2. Did CATSA fail to follow its Contracting Procedures?
3. Did CATSA breach a duty of procedural fairness?
4. Did CATSA act in bad faith?

B. *Standard of review*

[19] In an appeal from a judicial review decision, the role of this Court is to determine first, whether the judge identified the appropriate standard of review and, second, whether he applied it correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Canada Revenue Agency v. Telfer*, 2009 FCA 23).

[20] In the present case, the judge correctly identified the standard of review when he found that "[i]n 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" (judge's reasons at para. 47).

[21] However, as part of his decision, the judge also made a large number of findings of fact which is unusual in a judicial review application. Findings of fact and of mixed fact and law of the judge are reviewable under the standard of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*]).

III. Analysis

(1) Preliminary issue*: Is the Affidavit of Mr. Peter Kant admissible?*

[22] In support of its application for judicial review, Rapiscan served upon the appellant an affidavit from Mr. Peter Kant, a Rapiscan executive, (the Kant affidavit) on May 23, 2012 and

subsequently filed it with the Court as part of its application record on August 31, 2012. The application record containing the Kant affidavit was also served on the appellant the same day.

[23] Before the judge, the admissibility of the Kant affidavit was challenged. An exchange ensued between counsel as to whether the proper procedure would be to bring a separate motion prior to the hearing, which would have required an adjournment or whether it was better to raise the issue of striking the affidavit at the hearing. Counsel for the appellant stated that "we are content that you [the judge] look at it [Kant affidavit] and give it little or no weight" (appeal book, volume 6, tab 28 at 1678).

[24] The suggestion by counsel for the appellant was accepted by the judge (*ibid* at 1681 and 1690) who then proceeded with counsel for the parties to consider the affidavit, in particular the portions of which were challenged. Towards the end of the hearing, the appellant requested that the judge make a ruling in this regard and the judge agreed to do so (appeal book, volume 8, tab 31 at 2135-2136). At that point, the affidavit could accordingly be considered as forming part of the record.

[25] However, the ruling requested by the appellant was never formally made by the judge. There is no reference to such ruling in the judge's reasons, nor do his reasons indicate the weight he gave to the Kant affidavit. In fact, the Kant affidavit is never mentioned in the judge's decision. The appellant submits that the judge erred in failing to make any determination regarding the Kant affidavit and it should accordingly be found inadmissible.

[26] I cannot accept the appellant's submission on the Kant affidavit. The appellant challenges its admissibility on the basis of an alleged failing on the part of the judge, yet between the time that the Kant affidavit was served and filed in 2012 and the hearing before the judge in 2013, close to one year elapsed. During this entire period, the appellant chose not to cross-examine Mr. Kant on the content of his affidavit nor did the appellant submit an affidavit in response. Had the appellant wished to challenge the Kant affidavit, it had ample time to do so by filing a proper motion in accordance with the *Federal Courts Rules,* SOR/98-106, to strike portions of the Kant affidavit prior to the hearing. In failing to bring such a motion, I am of the view that it is not open to the appellant to argue that the affidavit should now be deemed inadmissible merely because it was not mentioned by the judge.

[27] In sum, although it would have been preferable for the judge to expressly address the Kant affidavit in his decision, I am satisfied that in the context of the present case, the judge did not err in any way in this regard.

[28] I now turn to the first substantive issue which I consider to be central in this appeal.

(2) *Did CATSA fail to follow its Contracting Procedures?*

(a) *Overview of CATSA's Contracting Procedures*

[29] In essence, the mandate of CATSA is to conduct passenger and baggage screenings at airports for security purposes and to purchase the equipment necessary to do so. This appeal concerns the procurement responsibilities which form part of CATSA's mandate.

[30] In fulfilling its procurement responsibilities, CATSA is governed by subsection 8(5) of the CATSA Act which states the following:

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.	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.

[31] This provision thus expressly imposes upon CATSA a statutory duty to establish policies and procedures applicable to its procurement process. These policies and procedures must, *inter alia*, "promote transparency, openness, fairness and value for money in purchasing".

[32] In accordance with subsection 8(5) of the CATSA Act, CATSA's Contracting Policy was adopted on July 1, 2009 and its Contracting Procedures were adopted on December 22, 2009. The central issue raised by this appeal concerns the latter.

[33] For the purpose of this appeal, the relevant portions of CATSA's Contracting Policy and Procedures are reproduced here:

CATSA Contracting Policy (July 1, 2009)

6.6 Competition in Procurement Contract. An open process appropriate to the nature of a Procurement Contract will be used unless:

[…]

(ii) Directed Contract. After conducting its evaluation of the market, CATSA has determined that only one person or firm is capable of performing the contract:

[…]

Notwithstanding the foregoing exclusions transparency, fairness and value for money will be promoted in all Contracts.

CATSA Contracting Procedures (December 22, 2009)

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.

[…]

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

[…]

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.

[…]

5.3 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.

(b) *Whether CATSA failed to follow its Contracting Procedures in the context of awarding the procurement contract at issue*

[34] In bringing its application for judicial review, Rapiscan maintained, as it does on appeal, that CATSA did not adhere to its Contracting Procedures in this case. It is recalled that the procurement decision at issue is the result of a RFS, which led to the procurement contract being awarded to Smiths.

[35] Rapiscan emphasizes that CATSA's Contracting Procedures provide for a number of authorized procurement vehicles. For instance, "Open Procurement Process" is defined as "a contracting process involving any of an RFI (Request for Information), RFQ (Request for

Quotation), RFP (Request for Proposal), RFSO (Request for Standing Offer), tender, Third Party Standing Offer, or a procurement process in which ACAN is used and not validly challenged".

[36] However, as noted by Rapiscan, the RFS procurement process used by CATSA is remarkably absent from CATSA's Contracting Procedures. Indeed, this prompted the judge to find that "[t]he 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" (judge's reasons at para. 65).

[37] For its part, the appellant argues that the RFS although not specifically referred to in CATSA's Contracting Procedures, was nevertheless a proper procurement vehicle. More particularly, the appellant submits that the RFS was in fact a combined procurement process first made of an RFI and followed by a directed contract or further evaluation of submissions after a presentation or proof of concept (appellant's memorandum of arguments at para. 40). The appellant contends that the RFS terminology should therefore not be given any significant weight.

[38] With respect, I find the appellant's submissions unconvincing.

[39] The appellant has provided no explanation as to why the RFS procurement vehicle - which is not part of CATSA's Contracting Procedures - was chosen by CATSA's management instead of another approved procurement process included in CATSA's Contracting Procedures.

Nor is there any explanation as to why the RFS procedure was required or on what basis it was authorized. The judge noted the existing confusion concerning how the RFS came to be selected as a procurement vehicle when he referred to the testimony of Mr. Corrigan, CATSA's Director of Screening Services in 2009-2010. Mr. Corrigan admitted in cross-examination that "he did not know how the [procurement] process came to carry the RFS label" (judge's reasons at para. 75). Moreover, not only does the alleged choice on the part of CATSA's management to combine the procurement vehicles of a RFI and a directed contract remain unexplained, this combination is also not contemplated by the Contracting Procedures.

[40] If the RFS consists in fact of a merging of an RFI and a directed contract, as argued by the appellant, evaluation criteria would have been required pursuant to the Contracting Procedures to ensure that the said RFS process would be considered an open and valid procurement vehicle. Indeed, if the first step of the RFS is to be understood as an RFI, the RFI is by definition an "Open Procurement Process" and requires evaluation criteria. This is made abundantly clear at Section 5.3 of the Contracting Procedures which states that "Evaluation Criteria in <u>any</u> procurement shall be established <u>prior</u> 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." [Emphasis added.]

[41] However, in the present case, evaluation criteria were nowhere to be found in the RFS. Absent evaluation criteria, it would be difficult, if not impossible, for suppliers to know and satisfy the needs of CATSA. This is more so for Rapiscan, the only party submitting who was not an existing supplier of CATSA. Upon receipt of the suppliers' information, CATSA's

management was thus in a position to pick and choose which suppliers met its needs and eliminate suppliers who failed to meet undisclosed requirements known only by its officers.

[42] In short, the information – or lack thereof – conveyed by CATSA's management to CATSA's Board could reasonably have led it to believe that CATSA's management ran an open procurement process when, in fact, CATSA's management never did and ultimately proceeded by way of directed contract. The judge observed the following at paragraph 76 of his reasons:

> 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 [Contracting] 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.

[43] I would also add that I remain unconvinced by the appellant's argument that a mere reference to section 6.6 of the Contracting Policy in the Approval Request submitted to the Board was sufficient to allow the Board to reasonably understand how the procurement process was defined prior to providing its approval and how transparency, fairness and value for money was promoted (appeal book, volume 3, tab D at 712). Further, CATSA's management also failed to inform the Board that Smiths' equipment costs were substantially higher than Rapiscan's equipment. As a result, I agree with the judge that the Board was not provided with the information allowing it to exercise "its oversight function" (judge's reasons at para. 77). In the end, through no apparent fault of its own, the Board could not arrive at a reasonable conclusion.

[44] In support of the submission that CATSA was entitled to define the procurement process as it did, the appellant insists that the Contracting Procedures need to be applied with flexibility and that CATSA requires a “freedom to manoeuvre”. That is so, argues the appellant, because CATSA’s screening equipment must constantly adjust to meet evolving international standards. The appellant contends that the judge’s approach, in that respect, was too rigid.

[45] In my opinion, CATSA’s submissions on this point defeat the very purpose of implementing the Contracting Procedures. What would be the objective of the Contracting Procedures if CATSA could ignore, arbitrarily and without justification, its own rules as required by and pursuant to the CATSA Act? I can only agree with Rapiscan that such a result is contrary to common sense and flies in the face of CATSA’s duty to promote transparency, fairness or value for money pursuant to CATSA Act and CATSA’s Contracting Policy and Procedures (Subsection 8(5) of the CATSA Act; sections 5.6.1, 5.7 of the Contracting Procedures and section 6.6 of the Contracting Policy).

(c) *Three view generators issue*

[46] This last point results from the appellant’s argument that there was no requirement for three view generators when the RFS went to market. The appellant submits that the judge erred when (i) he found that the RFS contained an undisclosed requirement that the x-ray equipment sought by CATSA have three view generators and (ii) that this requirement was known to CATSA at the time that the RFS went out to suppliers.

[47] It is to be recalled that when CATSA approved a non-competitive award of a contract to Smiths for the purchase of multi-view x-ray screening equipment in 2009, "three view generators" was a requirement. Rapiscan was eliminated in the 2009 process because its equipment model (620 DV-AT) failed to meet the minimum requirement of "three view generators" (Briefing Note to Board of Directors dated June 18, 2009, appeal book, volume 4, tab S at 1061).

[48] A year later, when the RFS was issued in 2010, it did not contain any requirement of a minimum number of view generators. On that basis, Rapiscan made a submission for its equipment comprising two view generators (620DV-AT). However, in the end, Rapiscan's submission was eliminated on the basis that CATSA required three or more view generators (Briefing Note to the Board of Directors dated October 4, 2010, appeal book, volume 4, tab 16-S at 1046).

[49] The judge found that since the three view generators was a requirement in 2009 when the contract was awarded to Smiths, the three view generators requirement was still a minimum requirement for the procurement process in 2010. In making his finding on the three view generators requirement, the judge relied on two documents: i) the Briefing Note to the Board of Directors dated October 4, 2010 (appeal book, volume 4, tab 16-S at 1046); and ii) the Briefing Note to the Board of Directors dated June 18, 2009 (appeal book, volume 4, tab 16-S at 1062) (judge's reasons at paras. 84-87).

[50] Although the appellant admits that equipment with three view generators was a minimum requirement in the 2009 procurement process which was awarded to Smiths, it maintains that the judge had no basis for inferring that the same minimum requirement was also adopted during the 2010 RFS procurement process.

[51] In light of the deference which this Court owes to a lower court's findings of fact in accordance with *Housen*, I disagree with the appellant.

[52] The 2010 Briefing Note refers back to the 2009 procurement process and states that "For this requirement [in 2009], the multi-view X-ray machines required 3 or more views which is again a factor in this year's evaluation" (judge's reasons at para. 39).

[53] Although the Briefing Note may be read to say that the quality of an equipment having three or more views was simply one among several factors to be weighed, it may also be read to say that the three view requirement was again a critical factor in the 2010 procurement process that could exclude certain equipment. The judge's preference for the latter interpretation does not, in my view, amount to a palpable and overriding error.

[54] The judge also found that CATSA's management's representations regarding Smiths' products and its high performing technology could not be reasonably justified and that CATSA had further failed to inform the Board that Rapiscan's equipment's costs were substantially less and thus more competitive.

[55] On the basis of the evidence adduced, the judge came to the conclusion that the Board was not aware that management conducted the procurement process the way it did. This resulted in the Board being unable to exercise its oversight function. In my view, this finding was open to the judge and he did not commit any error which would warrant the intervention of this Court.

[56] For the above reasons, because I find that CATSA's decision was reached through a flawed process, I can only conclude that CATSA's decision derived from that process is equally flawed and unreasonable. This finding is, in and of itself, sufficient to dispose of the case and dismiss the appeal. I feel it necessary however to briefly address the two remaining issues.

(3) *Did CATSA breach a duty of procedural fairness?*

[57] An important feature in a procurement process is the established and notional contract known as "Contract A" that is created when a bidder responds to the purchaser's tender call and submits a tender (*Ontario v. Ron Engineering & Construction (Eastern) Ltd.,* [1981] 1 S.C.R. 111). It is settled law that the formation of the said "Contract A" in a procurement process will create implied rights and obligations arising out of the said process (e.g. a duty of fairness), which is distinct from the contract to be awarded at the conclusion of the bidding process ("Contract B").

[58] Pursuant to *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd*., [1999] 1 S.C.R. 619 [*M.J.B. Enterprises*], the Supreme Court of Canada established that upon submission of a tender, "Contract A" will not necessarily arise. The creation of a "Contract A" will depend on the intention of the parties - as with the formation of any contract - and the terms

and conditions established in the tendering documents (*M.J.B. Enterprises; Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860 and *Naylor Group Inc. v. Ellis-Don Construction Ltd.,* 2001 SCC 58, [2001] 2 S.C.R. 943). In the event that no "Contract A" is created, it follows that, in principle, the parties are governed by the traditional law of contracts and the rights and obligations implied in a "Contract A" do not arise. (Paul Emanuelli, *Government Procurement*, 3d ed. (Lexis, 2012) at page 68).

[59] The judge was alive to the notion of "Contract A" and was also concerned that the present case involved a unique aspect because the RFS explicitly excluded "Contract A". In his opinion, the result of this exclusion was to deny "any duty of fair and equal treatment owed to the bidding parties" (judge's reasons at para. 122). He was of the view that even if a satisfactory remedy in the traditional law of contract was available to Rapiscan, he nonetheless felt compelled given the circumstances of the case, to find a public law remedy for breach of procedural fairness (judge's reasons at paras. 125-126). In so finding, he concluded that CATSA had breached its duty of procedural fairness vis-à-vis Rapiscan and a remedy was accordingly warranted to maintain the integrity of the governmental procurement process.

[60] However, in finding a public law duty of procedural fairness, the judge seems to have conflated the issue of whether CATSA's decision was reasonable with the issue of whether CATSA breached a duty of procedural fairness. This is evident when the judge states that "[t]he Board authorized an award of a contract that resulted from an <u>unfair</u> and non-competitive procurement process" (judge's reasons at para. 4). [Emphasis added.] The issues of fairness and reasonableness are expressly joined together where he describes CATSA's decision as "unfair,

unreasonable, arbitrary and made in bad faith" (judge's reasons at para. 131; see also paras. 127 and 129).

[61] The root of the judge's reasoning can be found in his reliance on *GDC Gatineau Development Corp v. Canada (Minister of Public Works and Government Services)*, 2009 FC 1295 at paragraph 24 [*GDC Gatineau*], which purported to affirm earlier Federal Court jurisprudence, which stands for the questionable proposition that a tendering decision is unreasonable where "tendering authority acted in an unfair, unreasonable or arbitrary manner, based its decision on irrelevant considerations, or acted in bad faith." By proposing that reasonableness should be measured in part in terms of fairness, the *GDC Gatineau* test clearly runs contrary to the well-established distinction between substantive review and procedural fairness and the resulting rule that procedural fairness is reviewed separately on a correctness standard (*Khela v. Mission Institution*, 2014 SCC 24, [2014] 1 S.C.R. 502 at para. 79).

[62] It is also to be recalled that in *Irving Shipbuilding*, our Court restricted access to public law remedies to situations involving grave misconduct such as fraud, bribery or corruption (at para. 62). The judge, at paragraph 115 of his reasons, inferred that the threshold of grave misconduct referred to in *Irving Shipbuilding* "must have been directed at the particular situation involving subcontractor's rights" as opposed to direct bidders. *A priori*, I am not prepared to distinguish *Irving Shipbuilding* on this ground.

(4) *Did CATSA act in bad faith?*

[63] Although the issue of bad faith was mentioned at the hearing before the judge, Rapiscan did not suggest that the Board acted in bad faith (appeal book, volume 6, tab 28 at 1726). Before our Court, Raspican further confirmed that it did not "press" the bad faith argument before the judge. This was not denied by the appellant.

[64] Despite Rapiscan's position, the judge nonetheless embarked on an analysis which led him to find that CATSA acted in bad faith. In reaching this conclusion, the judge inferred that CATSA acted in bad faith but failed to ground his finding in the evidence. Not only did the judge find bad faith on a "reasonable inference", but he further questioned his own inference at paragraph 94 of his reasons:

> In the circumstances, including CATSA's tendering history, <u>it would appear to be a reasonable inference</u> 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. <u>Whether or not that was the intention, that was the result</u>.
>
> [Emphasis added.]

[65] In light of the foregoing, I can only observe that the judge's finding on bad faith was unsupported and improper.

IV. Conclusion

[66] For the above reasons, I find that the Board's decision is unreasonable and unlawful. I would accordingly dismiss the appeal with costs. I would also declare that CATSA failed to follow its Contracting Procedures enacted pursuant to the CATSA Act with respect to the 2010 procurement process which awarded the contract to Smiths and I would vary the judge's order accordingly.

"Richard Boivin"
J.A.

"I agree
M. Nadon J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-106-14
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. RAPISCAN SYSTEMS, INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 29, 2015
REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	NADON J.A. WEBB J.A.
DATED:	APRIL 16, 2015

APPEARANCES:

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