

HARPER GREY LLP  
3200 – 650 West Georgia Street  
Vancouver, British Columbia, V6B  
4P7  
Canada

Tel: 604 687 0411  
Fax: 604 669 9385

## CASE SUMMARY: FCA UPHOLDS FINDING THAT PUBLIC WORKS ISSUED RFP IN VIOLATION OF THE AGREEMENT ON INTERNAL TRADE

The Federal Court of Appeal upholds a finding that the Department of Public Works and Government Services issued a request for proposal in violation of the Agreement on Internal Trade on the basis that the Royal Canadian Navy imposed certain requirements that made it impossible for some select parties to submit bids.

**Administrative law – Decisions reviewed – Canadian Trade Tribunal; Judicial review – Standard of review – Reasonableness; Government – Contracts**

*Canada (Attorney General) v. Springcrest Inc.*, [2017] F.C.J. No. 913, 2017 FCA 202, Federal Court of Appeal, October 5, 2017, D.G. Near, M.J.L. Gleason and J.M. Woods JJ. A.

The Department of Public Works and Government Services (the “PWGSC”) issued a request for proposal on behalf of the Department of National Defence for seawater pumps for the Halifax class frigates of the Royal Canadian Navy (the “RFP”). The RFP was issued on an urgent basis, as the pumps were needed to keep all of the ships fully operational. The RFP included a requirement that the bid include a shock testing certificate for the pumps. It was common knowledge that it took almost a year to obtain such a certificate for a manufacturer. However, the original manufacturer was exempt from providing a certificate so long as it supplied the same motors as previously certified. When the RFP was issued, parties had only 62 days to put a response together to meet the deadline.

In light of these circumstances, the respondent, Springcrest Inc., who was a non original manufacturer, filed a complaint with the Canadian International Trade Tribunal (the “CITT”), arguing that the RFP violated, *inter alia*, section 504(3)(c) of the *Agreement on Internal Trade*, 18 July 1994, C. Gaz (1995) I, 1323. This section states the timing of events in the tender process cannot prevent suppliers from submitting bids. Springcrest argued that the RFP was in direction violation of this section in that the timeline proposed in the RFP made it impossible for certain suppliers (namely, any non original manufacturer) to submit a responsive bid in compliance with the RFP conditions.

The CITT agreed with Springcrest and found the RFP was issued in violation of s. 504(3)(c). The CITT found that the provision did not require that the PWGSC had to have acted deliberately in creating this bias. Therefore, the fact the PWGSC tried to justify the condition in the RFP as necessary in light of the circumstances it was facing to get the ships fully operational, was no excuse. The Attorney General of Canada, on behalf of the PWGSC, sought judicial review of the CITT’s decision.

The sole issue before the Court on judicial review was whether the CITT’s decision was reasonable. There was no dispute that the standard of reasonableness applied.

The Court agreed with the CITT's analysis that intention was immaterial to the violation in this case—as the Court held, regardless of any legitimate operational requirement, the fact remained that it was objectively impossible for suppliers of equivalent products to meet the timelines (para. 23). Further, and importantly for the Court, it was open to the PWGSC to rely on other provisions of the Agreement on Internal Trade to exempt the RFP from the procedural obligations in section 504(3)(c) to serve a legitimate objective, such as urgency or public safety. The CITT too pointed to this in its reasons, which the Court concluded as completely reasonable. In other words, the PWGSC had the legislative tools available to it (which were likely applicable in this case), but simply failed to utilize them. This, the Court viewed, as significant.

In the end, the Court dismissed the application for judicial review and confirmed the CITT's decision.

The Department of Public Works and Government Services (the "PWGSC") issued a request for proposal on behalf of the Department of National Defence for seawater pumps for the Halifax class frigates of the Royal Canadian Navy (the "RFP"). The RFP was issued on an urgent basis, as the pumps were needed to keep all of the ships fully operational. The RFP included a requirement that the bid include a shock testing certificate for the pumps. It was common knowledge that it took almost a year to obtain such a certificate for a manufacturer. However, the original manufacturer was exempt from providing a certificate so long as it supplied the same motors as previously certified. When the RFP was issued, parties had only 62 days to put a response together to meet the deadline.

In light of these circumstances, the respondent, Springcrest Inc., who was a non original manufacturer, filed a complaint with the Canadian International Trade Tribunal (the "CITT"), arguing that the RFP violated, *inter alia*, section 504(3)(c) of the *Agreement on Internal Trade*, 18 July 1994, C. Gaz (1995) I, 1323. This section states the timing of events in the tender process cannot prevent suppliers from submitting bids. Springcrest argued that the RFP was in direct violation of this section in that the timeline proposed in the RFP made it impossible for certain suppliers (namely, any non original manufacturer) to submit a responsive bid in compliance with the RFP conditions.

The CITT agreed with Springcrest and found the RFP was issued in violation of s. 504(3)(c). The CITT found that the provision did not require that the PWGSC had to have acted deliberately in creating this bias. Therefore, the fact the PWGSC tried to justify the condition in the RFP as necessary in light of the circumstances it was facing to get the ships fully operational, was no excuse. The Attorney General of Canada, on behalf of the PWGSC, sought judicial review of the CITT's decision.

The sole issue before the Court on judicial review was whether the CITT's decision was reasonable. There was no dispute that the standard of reasonableness applied.

The Court agreed with the CITT's analysis that intention was immaterial to the violation in this case—as the Court held, regardless of any legitimate operational requirement, the fact remained that it was objectively impossible for suppliers of equivalent products to meet the timelines (para. 23). Further, and importantly for the Court, it was open to the PWGSC to rely on other provisions of the Agreement on Internal Trade to exempt the RFP from the procedural obligations in section 504(3)(c) to serve a legitimate objective, such as urgency or public safety. The CITT too pointed to this in its reasons, which the Court concluded as completely reasonable. In other words, the PWGSC had the legislative tools available to it (which were likely applicable in this case), but simply failed to utilize them. This, the Court viewed, as significant.

In the end, the Court dismissed the application for judicial review and confirmed the CITT's decision.

This case was digested by [Adam R. Way](#), and first posted on Quicklaw and published in the Harper Grey Administrative Law Newsletter. If you would like to discuss this case further, please contact Adam R. Way at [away@harpergrey.com](mailto:away@harpergrey.com).