Court File No. T-1682-87

Federal Court of Canada
Trial Division

IN THE MATTER OF SECTION 44 OF THE ACCESS TO INFORMATION ACT
S.C. 1980-81-82 c. 111

BETWEEN:

SAINT JOHN SHIPBUILDING LIMITED,

Applicant,

- and -

THE MINISTER OF SUPPLY AND SERVICES,

Respondent.

REASONS FOR ORDER

MARTIN, J.

The Applicant, Saint John Shipbuilding Limited, applies, pursuant to section 44 of the *Access to Information Act*, for a review of the decision made by Pierre Lanoix, the Manager of the Access to Information Office of the Department of Supply and Services, to release to the Requester, Dan Donovan, and two other Requesters, portions of the July 29, 1983 "CPF Implementation "Mini" Contract".

This is a contract between the Government of Canada and the Applicant for the supply of six patrol frigates under the Canadian Patrol Frigate Program. Because the various contract documents are voluminous the parties to it had agreed that there should be a consolidation of the contract into what they have described as the "Mini" contract. It is this document, or rather portions of it, that Lanoix proposes releasing to the Requesters. The "Mini" contract is also the document which the Requesters have agreed to accept pursuant to their request for the contract between the Government of Canada and the Applicant.

Although Lanoix's affidavit of November 10, 1987 seems to indicate that there are two contracts, one which was too voluminous to produce and the consolidation or "Mini" contract, Counsel for the Crown assured me that such is not the case and that the only contract between the parties is the "Mini" contract a portion of which was attached to the August 17, 1987 Affidavit No. 3 of Mr. W. David Jamieson, the Vice-President of Saint John Shipbuilding Limited, and, pursuant to an Order of the Associate Chief Justice dated September 24, 1987, filed herein in a sealed envelope.

The portion of the "Mini" contract ("the contract") filed in the sealed envelope consists of approximately 30 pages of preliminary indices, tables of contents and lists of schedules. These are followed by several hundred pages of the General Terms and Conditions numbered from A to J. The last portion of the contract consists of 30 pages which form portions of schedules F and G and all of Schedule T. Of the 24 schedules to the contract numbered from A to X the Respondent has agreed to release only one in its entirety and portions of two others.

The Applicant has objected to the release of the first 30 pages of the contract on the grounds that the pages do not form a part of the contract which the Requesters have demanded. Counsel argues that the request was for the contract and that because the indices, tables of contents and lists of schedules do not form a part of the contract, and were not in existence when the contract was signed, the Respondent has no right to give them to the Requesters in response to their requests for copies of the contract.

I do not agree that a request for information should be regarded as being so limited as Counsel for the Applicant would have it. The Requesters have asked for the patrol frigate contract. If they are entitled to obtain that contract I can see no reason why they should be refused the indices, tables of contents and lists of schedules to the contract even though those documents were not in existence at the time the contract was signed. In this case the Respondent had decided that certain portions of the contract should be released. It seems to me that the Respondent is acting within the spirit of s. 2 of the *Act* in making available to the Requesters not just the specific document requested but ancillary

documentation or information which would facilitate the ability of the Requesters to understand the government information which they have requested. Indeed, I can envisage circumstances in which the Respondent could be properly criticized for withholding ancillary information of that sort once it has determined that the primary information should be released.

The second portion of the contract which the Respondent proposes releasing is the main body of the contract comprising several hundred pages of terms and conditions divided into sections numbered A to J. From this main body of the contract the Respondent has deleted from each clause of each section all time limits within which certain actions must be taken by the Applicant, all percentages, dollar figures, specific financial and financially related information under the provisions of paragraph 20(1)(c) of the *Act*.

At the opening of the hearing Counsel for the Respondent indicated that she had overlooked deleting certain information of that sort and informed me that the following further deletions would be made:

1. From the 13th page, excluding the cover page of the document, and being the first page of the second table of contents, the description and reference to sections J47 and J48 of the General Terms and Conditions of the contract.
2. From section C2 the amount of the target cost.
3. From section C9.1.1 the amount of the maximum change in the cost of any one Deliverable End Item.
4. From section C12.1 the words blocked out in red ink.
5. From section C12.1 the words blocked out in red ink.
6. All of sections C14.1, C14.2 and C14.3.

Naturally the Applicant, which opposes the release of any portion of the contract, did not object to the Respondent's decision to delete the above noted information and those sections indicated from the contract proposed to be released.

I have already decided that if the Requesters are entitled to have the contract, they are also entitled to have the ancillary information contained in the 30 pages preceding the General Terms and Conditions. There remains to be decided the extent, if any, to which the Respondent should be directed to refrain from releasing those remaining portions of the contract which it proposes to release.

If I have understood the Applicant's position correctly it objects to the release of any portion of the contract on the following grounds:

1. Because the project, which is the subject of the contract, is an urgent defence requirement in a defence contract within the meaning of the *Defence Production Act*, R.S.C. 1970, c. D-2 and is classified as such it ought not to be made public.
2. Because of the expense of developing the contract and its consequent uniqueness the Applicant asserts an exclusive proprietary interest in the form of the contract and claims that public disclosure of the terms of the contract would prejudice its competitive position in negotiations with the Government of Canada for future contracts of a like nature and could reasonably be expected to result in material financial loss to the Applicant within the meaning of paragraphs 20(1)(c) and (d) of the *Act*.
3. Because the contract contains information which, if known by the Applicant's subcontractors, suppliers or other third parties, would enable them to drive harder bargains with the Applicant than they would be capable of doing without that information, the release of the information can reasonably be expected to interfere with the Applicant's dealings with those persons within the meaning of paragraphs 20(1)(c) and (d) of the *Act*.

The Applicant's objection to the release of the contract on the basis that it is subject to strict security requirements seemed, at first glance, to be well taken. The contract by its own terms is classified as "Secret" which term itself is used to describe

documents, information or material, the unauthorized disclosure of which would endanger national security, cause serious injury to the interest or prestige of the nation, or any Government activity thereof, or would be of great advantage to a foreign nation.

Although the references to the frigate's armaments, communications, underwater combat control and electronic warfare systems are only contained in the index portion preceding the main portion of the contract I would have expected the Respondent to be reluctant to release any hint of that information on security grounds.

Counsel for the Respondent, however, pointed out that the issue of security does not arise in this matter. Under s. 15 of the *Act* the Respondent has the discretionary authority to refuse to disclose any record if its release could reasonably be expected to be injurious to the defence of Canada. The Respondent does not purport to act under that section of the *Act* but under s. 20. I agree that my review is limited to the considerations set out in s. 20 of the *Act* and that the matter of national security is irrelevant to this hearing.

In any event the secrecy or security requirements of the contract are in the contract for the benefit of the Respondent and not for the Applicant. The Respondent has no undertaking or agreement with the Applicant not to release what may or may not be security sensitive information. As well the contract speaks of the unauthorized disclosure of security information. What is being proposed here is, to the contrary, a disclosure which is authorized by the Respondent. Accordingly, despite my initial misgivings about the proposed release of portions of the defence contract, I am persuaded that I have no authority to interfere. In this respect Counsel for the Respondent has assured me that the appropriate officials of the Department of National Defence have reviewed the document proposed to be released and have indicated that they have no objection to its release.

I am not sure that I have followed the Applicant's submission concerning its exclusive proprietary right to what it claims are unique contractual concepts developed by it over the course of negotiating the contract with the Respondent. In each example named

by the Applicant the Respondent has denied the uniqueness of the concept but has, in most cases, admitted that the specific details of the clauses are unique to this particular contract. At this, Counsel for the Applicant appeared to shift his original ground and claimed that it was the specifics of the program management role of the Applicant, the target costing, the penalty and warranty provisions, and other provisions of the contract which were the unique concepts in respect of which the Applicant was claiming an exclusive protected proprietary interest.

As I understand this submission it would operate to compel the head of a government institution to refuse to disclose any portion of a government contract which contained or amounted to original conceptual contractual phrasing. It would exclude from the operation of s. 2 of the *Act* any such original contractual drafting on the basis that it might be used as a precedent and incorporated by others in their contracts with the Respondent.

To give effect to that argument would, in my view, defeat the purpose of the *Act* as expressed in s. 2 which is to

> ... provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific ...

To the extent that the Applicant's objection is founded on this so called exclusive proprietary interest in the unique phrasing contained in the contract I can find no basis in the *Act* for deleting any of the material proposed to be released by the Respondent.

However I believe that the Applicant's submission in this respect goes further than claiming an exclusive proprietary interest in the contractual phrasing. The Applicant submits that the potential use of these unique clauses by future prospective competitors in their possible negotiations with the Respondent would prejudice the Applicant's

competitive position in negotiating further similar contracts with the Respondent within the meaning of paragraph 20(1)(c) of the *Act*.

That submission, in my view, assumes too much. It assumes that the several clauses to which the Applicant has directed my attention could be used in future contracts, that there would be similar future contracts, that competitors of the Applicant would want to use those clauses rather than similar concepts which they might want to develop on their own, that the Respondent would be prepared to accept these clauses in future contracts and, finally, that the Respondent would somehow be precluded from suggesting similar or identical clauses in future negotiations with prospective contractors other than the Applicant.

What the Applicant has established, in my view, is a possibility of prejudice to its competitive position. However the possibility of prejudice to its competitive position does not meet the test established by MacGuigan J. in *Canada Packers Inc. v. The Minister of Agriculture et al.* (Federal Court of Appeal, Court File No. A-1345-87) in which he found that one must interpret the exceptions to access in paragraphs (c) and (d) of subsection (1) of section 20 of the *Act* to require a reasonable expectation of probable harm. The expectation of harm which has been shown by the Applicant in this matter has far too large an ingredient of speculation or mere possibility to meet the standard described by MacGuigan J.

The same can be said with respect to the Applicant's submission that the contract should be suppressed under the provisions of paragraph 20(1)(d) on the grounds that knowledge of the information contained in the contract will restrict the Applicant's ability to negotiate contracts with its potential subcontractors, suppliers and others as would otherwise be possible if those persons did not have knowledge of that information.

In support of the Applicant's submission in this respect I was referred to several portions of the contract in which I will assume that the Applicant concluded particularly advantageous arrangements with the Respondent. The Applicant claims that,

with knowledge of these arrangements, the subcontractors, suppliers and other third parties dealing with the Applicant will demand terms at least as favourable as those which have been negotiated by the Applicant with the Respondent and thereby cause harm to the Applicant.

No doubt, in dealing with the Applicant, potential subcontractors, suppliers and others will negotiate for the most favourable terms possible. The fact that they have knowledge of a particularly favourable term or terms which the Applicant has successfully negotiated with the Respondent is no assurance that the Applicant would give the same beneficial terms to the parties with whom it negotiates. Even if the Applicant felt constrained to concede one or all of such terms in its negotiations there is no reason why I should presume that it would not make up, in its overall negotiations, by other clauses favourable to itself what it may have lost in giving in on the clauses which the subcontractors or suppliers had adopted from the Applicant's contract with the Respondent.

The spectre of the helpless Applicant being at the mercy of avaricious subcontractors and suppliers painted by its Counsel was not a convincing scenario. I am not persuaded that the knowledge by the subcontractors and suppliers of the information contained in the portions of the contract proposed to be released will in any significant or material way diminish the Applicant's negotiating strength with these parties. The matters detailed by counsel for the Applicant as giving rise to potential problems in such negotiations were matters against which, in my view, the Applicant would be in a position to provide by suitable terms to be negotiated and incorporated in those contracts.

Here again, as I have already indicated, the Applicant has shown the mere possibility that disclosure of the contract might interfere with its contractual or other negotiations. Once again I am not persuaded that the Applicant has shown it has a reasonable expectation of probable harm arising from such a disclosure.

In the result the application will be dismissed with costs.

As these reasons, unlike the contract and affidavits which were ordered sealed, will forthwith become public I have taken pains to refer in general terms only to the contractual documents which are the subject of the application. To do otherwise would defeat the purpose of the s. 44 review in the event that the Applicant should successfully appeal my decision. In such an event it would be cold comfort for the Applicant to find quoted in my overturned public decision the very clauses in the contract which the Appeal Division might find should not be disclosed.

In keeping with that observation I direct that the contract and affidavits filed herein by the parties on a confidential basis and directed to be filed in sealed envelopes continue to be so filed to be dealt with at the direction of the Court of Appeal in the event that an appeal is taken against my decision and, upon the expiration of the time limited for filing an appeal, if no appeal is filed, to be taken out of the sealed envelopes and to form a part of the public file in this matter.

Of course should further proceedings be taken before the Trial Division the disposition of those documents filed in sealed envelopes shall be at the discretion of the Judge hearing those proceedings.

Counsel for the Respondent is asked to submit a draft Order for my signature, in accordance with these reasons, pursuant to paragraph 2(b) of rule 337 of the *Federal Court Rules* and approved as to form by counsel for the Applicant.

OTTAWA, Ontario
October 3, 1988

(Leonard A. Martin)

JUDGE