CITATION: IRVING SHIPBUILDING INC. *v.* CANADA (ATTORNEY GENERAL), 2009 FCA 116, [2010] 2 F.C.R. 488 A-547-08

Irving Shipbuilding Inc. and **Fleetway Inc.** (*Appellants*)

v.

The Attorney General of Canada and **CSMG Inc.** (*Respondents*)

INDEXED AS: IRVING SHIPBUILDING INC. v. CANADA (ATTORNEY GENERAL) (F.C.A.)

Federal Court of Appeal, Richard C.J., Evans and Ryer JJ.A.—Ottawa, February 24, 25 and April 16, 2009.

Crown — Contracts — Appeal from Federal Court decision dismissing judicial review by subcontractors of unsuccessful bidder BAE Systems (Canada) Inc. (BAE) to set aside contract awarded by Minister of Public Works and Government Services Canada (PWGSC) to respondent CSMG Inc. (CSMG) — Applications Judge holding appellants not "directly affected" by award of contract, lacking standing under Federal Courts Act, s. 18.1(1) — Whether subcontractor of unsuccessful bidder for government procurement contract may apply for judicial review to challenge fairness of process when unsuccessful bidder deciding not to litigate — Appellants' losses not making them "directly affected" by PWGSC's decision, standing not determined by quantum of applicant's loss — Whether PWGSC owing duty of fairness to appellants — Duty of fairness arising either from contract, legislation, common law — Appellants having no contractual relationship with PWGSC, could not rely on contract between BAE, PWGSC — Financial Administration Act, s. 40.1 not sufficiently precise to impose immediate legal duty of procedural fairness enforceable by bidder, subcontractor — Common law duty of fairness not free-standing — Normally inappropriate to import into predominantly commercial relationship governed by contract public law duty developed in context of performance of governmental functions pursuant to powers derived solely from statute — When Crown entering into contract, rights, duties, available remedies generally determined by law of contract — Subcontractors permitted to bring judicial review proceedings to challenge fairness of process only in extraordinary situations: fraud, bribery, corruption, grave misconduct undermining public confidence in essential integrity of process — Here, appellants not establishing breach of duty of fairness in conduct of procurement process — Appeal dismissed.

Practice — Parties — Standing — Public Works and Government Services Canada (PWGSC) awarding contract to respondent CSMG Inc. — Appellants, subcontractors of unsuccessful bidder, seeking judicial review of that decision — Applications Judge holding appellants not "directly affected" by award of contract, lacking standing under Federal Courts Act, s. 18.1(1) — Appellants' losses not making them directly affected by PWGSC decision — PWGSC not owing duty of fairness to appellants — Even if such duty owed, duty not breached herein — Appellants thus not having standing to challenge PWGSC decision.

This was an appeal from a decision of the Federal Court dismissing an application for judicial review by the appellants to set aside a contract to provide in-service support to submarines awarded by the Minister of Public Works and Government Services Canada (PWGSC) to CSMG Inc. (CSMG). The appellants were subcontractors to BAE Systems (Canada) Inc. (BAE), the unsuccessful bidder. In response to PWGSC's request for proposals (RFP), the appellants and other subcontractors entered into "teaming agreements" with BAE. The agreement explicitly stated that the "team" was not a joint venture between the appellants and BAE, which remained the sole primary bidder on the submarine contract. The appellants' contract with BAE would have entitled them to 50% of the revenue and 50% of the work from the submarine contract. The applications Judge held that the appellants were not "directly affected" by the award of the contract to CSMG and hence lacked

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standing under subsection 18.1(1) of the *Federal Courts Act* to make an application for judicial review. He rejected the argument that the award of the contract was vitiated by conflict of interest and a reasonable apprehension of bias due to the involvement of Weir, a shareholder of CSMG, in the development of the RFP. The principal issue was whether the appellants had a right to procedural fairness in the process by which PWGSC awarded the submarine contract to CSMG.

Held, the appeal should be dismissed.

The award of the submarine contract by the Minister of PWGSC was reviewable under section 18.1 of the *Federal Courts Act* (Act) as a decision of a "federal board, commission or other tribunal" made in the exercise of "powers conferred by or under an Act of Parliament". The argument focussed on whether the appellants' losses made them "directly affected" by PWGSC's decision so as to enable them to make this application for judicial review. If PWGSC owed the appellants a duty of fairness and awarded the contract to CSMG in breach of that duty, they would be directly affected by the impugned decision. Most judicial review statutes are drafted against the background of the common law of judicial review (*Canada (Citizenship and Immigration) v. Khosa*). To respect the context and purpose of the statutory language of subsection 18.1(1) of the Act, significance must be attached to the common law standing requirements ("person aggrieved" or "specially affected"). Standing is not determined by the quantum of an applicant's loss. The relationship of the loss to the administrative action impugned and whether it falls within the range of interests protected by the enabling legislation is at least as important.

The fact that this case involved the award of a contract provided the essential context in which to determine if a duty of fairness was owed to the appellants. On the facts of this case, such a duty could arise from contract, legislation or common law. A tender in response to an RFP creates a contract (contract A) governing the conduct of the party calling for tenders. In the present case, BAE elected not to initiate judicial review proceedings in order to establish that the submarine contract was awarded to CSMG in breach of the duty of fairness implicit in contract A. As subcontractors of BAE who have no contractual relationship with PWGSC, the appellants could not rely on contract A between BAE and PWGSC as the source of any legal duty owed to them. Having elected not to enter in a joint venture with BAE to bid for the submarine contract, the appellants could not now claim the benefit of contract A.

Legislation may impose a duty of procedural fairness on PWGSC in its conduct of the procurement process. However, section 40.1 of the *Financial Administration Act* relied on by the appellants, in providing that the Government of Canada is committed to taking appropriate measures to promote fairness in the bidding process, is not sufficiently precise to impose an immediate legal duty of procedural fairness enforceable by a bidder, let alone by a subcontractor.

The common law duty of fairness is not free-standing, but is imposed in connection with the particular scheme in which the impugned administrative decision has been taken. It will normally be inappropriate to import into a predominantly commercial relationship governed by contract (such as in the present case) a public law duty developed in the context of the performance of governmental functions pursuant to powers derived solely from statute. First, judicially imposed procedural duties in favour of subcontractors would undermine the right of a bidder for a procurement contract to determine what, if any, steps it should take in the event of an apparent breach of contract A. Second, procedural rights are personal to those whose substantive rights or interests they protect. Third, the appellants' logic that they were entitled to procedural fairness opened the alarming possibility of a cascading array of potential procedural rights holders. Fourth, since those who bid in response to an RFP have contractual rights to ensure that their tenders are evaluated accurately and fairly, the protection of the public interest in the integrity of the process does not require a judicial extension of procedural rights to subcontractors. Fifth, the public interest in the efficiency of the tendering process may be compromised by an extension of the right to procedural fairness. Such an extension to subcontractors could only complicate the procurement process and introduce new levels of uncertainty into essentially commercial relationships. To supplement the contractual safeguards with the common law duty of fairness would thus frustrate the parties' expectations. Sixth, once a contract has been awarded, the public has an interest in the avoidance of undue

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delays (such as those caused by setting aside a contract and starting the tendering process again) in its performance and in ensuring that government is able promptly to acquire the goods and services that it needs for the discharge of its responsibilities. When the Crown enters into a contract, its rights, duties, and available remedies are generally to be determined by the law of contract.

Finally, it will only be in the most extraordinary situations that subcontractors should be permitted to bring judicial review proceedings to challenge the fairness of the process. The facts of this case fell short of the kind of extraordinary circumstances in which the Court might intervene at the instance of a subcontractor. These would be, for example, fraud, bribery, corruption or other kinds of grave misconduct which, if proved, would undermine the public confidence in the essential integrity of the process. Here, even if the appellants did have standing, they did not establish a breach of the duty of fairness, including a reasonable apprehension of bias, on the part of PWGSC in its conduct of the procurement process.

STATUTES AND REGULATIONS CITED

Defence Production Act, R.S.C., 1985, c. D-1, s. 16(*a*) (as am. by S.C. 2004, c. 25, s. 125(F)).
Department of Public Works and Government Services Act, S.C. 1996, c. 16, s. 6 (as am. by S.C. 2001, c. 4, s. 157; 2005, c. 30, s. 121).
Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, ss. 28(1)(*b*),(*c*).
Federal Court Act, R.S.C., 1985, c. F-7, ss. 18(1)(*a*) (as am. by S.C. 1990, c. 8, s. 4), 28.
Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 2 "federal board, commission or other tribunal" (as am. *idem*, s. 15), 18.1 (as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27).
Financial Administration Act, R.S.C., 1985, c. F-11, s. 40.1 (as enacted by S.C. 2006, c. 9, s. 310).

CASES CITED

APPLIED:

Design Services Ltd. v. Canada, 2008 SCC 22, [2008] 1 S.C.R. 737, 293 D.L.R. (4th) 434, 64 C.C.L.I. (4th) 159; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, 304 D.L.R. (4th) 1, 82 Admin. L.R. (4th) 1.

CONSIDERED:

Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services), [1995] 2 F.C. 694, (1995), 125 D.L.R. (4th) 559, 184 N.R. 260 (C.A.); *Sunshine Village Corp. v. Superintendent of Banff National Park* (1996), 44 Admin. L.R. (2d) 201, 20 C.E.L.R. (N.S.) 171, 202 N.R. 132 (F.C.A.).

REFERRED TO:

Cardinal et al. v. Director of Kent Institution, [1985] 2 S.C.R. 643, (1985), 24 D.L.R. (4th) 44, [1986] 1 W.W.R. 577; *Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111, (1981), 119 D.L.R. (3d) 267, 13 B.L.R. 72; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, 193 D.L.R. (4th) 1, 3 C.C.L.T. (3d) 1; *Ratepayers of the School District of the New Ross Consolidated School et al. and Chester and District Municipal School Board, Re* (1979), 102 D.L.R. (3d) 586 (N.S.S.C. (T.D.)).

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Mullan, David J. and Andrew J. Roman. "*Minister of Justice of Canada v. Borowski*: The Extent of the Citizen's Right to Litigate the Lawfulness of Government Action" (1984), 4 *Windsor Y.B. Access Just.* 303.

Woolf, Lord *et al*. *De Smith's Judicial Review*, 6th ed. London: Sweet & Maxwell, 2007.

APPEAL from the Federal Court decision (2008 FC 1102, 89 Admin. L.R. (4th) 200, 336 F.T.R. 208) dismissing an application for judicial review by subcontractors of the unsuccessful bidder to set aside a contract awarded by the Minister of Public Works and Government Services Canada. Appeal dismissed.

APPEARANCES

J. Bruce Carr-Harris, *David Sherriff-Scott* and *Vincent DeRose* for appellants.
Michael F. Ciavaglia for respondent Attorney General of Canada.
Lawrence E. Thacker for respondent CSMG Inc.

SOLICITORS OF RECORD

Borden Ladner Gervais LLP, Ottawa, for appellants.
Deputy Attorney General of Canada for respondent Attorney General of Canada.
Lenczner Slaght Royce Smith Griffin LLP, Toronto, for respondent CSMG Inc.

The following are the reasons for judgment rendered in English by

EVANS J.A.:

A. INTRODUCTION

[1] Public contracts lie at the intersection of public law and private law. The question raised in this appeal is whether a subcontractor of an unsuccessful bidder for a government procurement contract may apply for judicial review to challenge the fairness of the process for awarding the contract when the unsuccessful bidder decides not to litigate.

[2] This is an appeal from a decision of the Federal Court in which Justice Harrington (applications Judge) dismissed an application for judicial review by Irving Shipbuilding Inc. and Fleetway Inc. (appellants) to set aside a contract awarded by the Minister of Public Works and Government Services Canada (PWGSC) to CSMG Inc. (CSMG), a company formed by Devonport Management Limited and Weir Canada Inc. (Weir) for the purpose of bidding on this contract.

[3] The appellants were subcontractors to BAE Systems (Canada) Inc. (BAE), the unsuccessful

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bidder on a contract to provide in-service support to Canada's Victoria Class submarines (the submarine contract). If the submarine contract had been awarded to BAE, which is not a party to this litigation, the appellants' contract with BAE would have entitled them to 50% of the revenue and 50% of the work from the submarine contract. The potential total value of the submarine contract is said to be approximately $1.5 billion over 15 years.

[4] The applications Judge held that, unlike BAE, the primary bidder, the appellants were not "directly affected" by the award of the contract to CSMG and hence lacked standing under subsection 18.1(1) [as enacted by S.C. 1990, c. 8, s. 5] of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [s. 1 (as am. by S.C. 2002, c. 8, s. 14)], to make an application for judicial review. Nonetheless, he went on to consider the application on its merits. The applications Judge rejected the appellants' argument that the award of the contract to CSMG was vitiated by procedural unfairness, namely, conflict of interest and reasonable apprehension of bias. The decision is reported as *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2008 FC 1102, 89 Admin. L.R. (4th) 200.

[5] The appellants say that the applications Judge erred in law by construing too narrowly the words "anyone directly affected" in subsection 18.1(1). Since the termination of their rights under the subcontract to perform work and to receive remuneration was, the appellants argued, the inevitable and foreseen consequence of the Minister's award of the contract to CSMG, they had standing to challenge the fairness of the procurement process. The appellants' essential complaint about the process is that the Minister failed to ensure that no bidder had an unfair advantage over others. More particularly, they allege, an employee of Weir, one of the companies that formed CSMG, gained an insight into the "mindset", or preferences, of the Department of National Defence (DND) officials who evaluated the bids as a result of having worked, in another capacity, with those officials in developing the solicitation documents.

[6] In my view, the appellants have failed to establish that PWGSC owed them a duty of fairness. Since they did not tender to PWGSC's request for proposals (RFP), they cannot claim that the duty was contractual. Nor can they point to legislation which confers on subcontractors a statutory right to procedural fairness. While a broad right to procedural fairness is afforded by the common law to those whose rights, interests or privileges are adversely affected by administrative action, this public law right has little application, if any, to an essentially commercial relationship governed for the most part by the law of contract. Accordingly, I would dismiss the appeal.

B. FACTUAL BACKGROUND

[7] On March 30, 2004, PWGSC solicited letters of interest for the submarine contract and received requests for information from, among others, Peacock Inc. (which later became Weir), Irving, Fleetway, and BAE. Irving and Fleetway are affiliated.

[8] Weir administered, through its marine engineering services division, the Naval Engineering Test Establishment (NETE) which is a government-owned, but privately operated organization. NETE provides independent and impartial test and evaluation services to the Canadian Navy. When Weir was awarded the contract to manage NETE in 1999, it undertook to take steps to ensure that it would not gain any real or perceived unfair competitive advantage in its other dealings with DND as a result of its management of NETE.

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[9] In March 2005, PWGSC issued an industry solicitation requesting feedback on the proposed statement of work (SOW), developed by NETE, which was to be incorporated into the RFP for the submarine services. In the following months, the SOW was discussed at both public and closed-door meetings with the interested companies, as a result of which changes were made to the SOW.

[10] On September 22, 2005, PWGSC issued its first RFP soliciting bids for the submarine contract. Bids were submitted by three parties, including CSMG and BAE. As already noted, CSMG was formed for the purpose of bidding on the submarine contract and Weir was one of its two shareholders.

[11] Rather than form a new corporation or enter into a joint venture, BAE acted as the sole primary bidder and prepared its bid with the cooperation of subcontractors; collectively they referred to themselves as "Team Victoria". The appellants and other subcontractors entered into agreements with BAE, which they called the "teaming agreements". The appellants' teaming agreement provided, among other things, for the creation of a steering committee, through which the appellants would have a 50% say in any management decisions taken in the preparation of the bid and, if successful, the execution of the submarine contract. The teaming agreement also explicitly stated that Team Victoria was not a joint venture between the appellants and BAE, which remained the sole primary bidder on the submarine contract.

[12] Before submitting the Team Victoria bid, BAE raised concerns with PWGSC about Weir's role in developing the SOW and requested that it ensure that no conflict of interest arose. In response, PWGSC assured BAE that it had taken all necessary steps and informed it that any bid submitted would constitute an acknowledgment of this. Team Victoria submitted a bid.

[13] On June 1, 2006, PWGSC informed BAE that the bidding process was cancelled as none of the bidders met all the mandatory requirements. On July 21, 2006, a second RFP was issued, and both CSMG and BAE again submitted bids. On January 10, 2007, PWGSC informed BAE that, although its bid was compliant, CSMG would be awarded the submarine contract because it had received a higher score for the technical aspects of the bid.

[14] The appellants brought an application for judicial review in the Federal Court to challenge the validity of the award of the contract to CSMG. Since the contract concerns national security, the Canadian International Trade Tribunal has no jurisdiction over complaints arising from its award.

C. DECISION OF THE FEDERAL COURT

[15] The applications Judge held that the appellants had no standing to seek judicial review because, as subcontractors of the unsuccessful bidder, they were not "directly affected" by the award of the contract to CSMG within the meaning of subsection 18.1(1) of the *Federal Courts Act*. Relying by way of analogy on actions in tort for purely economic loss, he held (at paragraph 22) that "direct" means "without intermediaries", and that, as the primary bidder on the submarine contract, BAE was an "intermediary". He relied also (at paragraph 28) on *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737 (*Design Services*), where subcontractors of an unsuccessful bidder failed to establish that PWGSC owed them a duty of care in tort not to award a contract to a non-compliant bidder.

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[16] Finally, the applications Judge held (at paragraphs 52–54) that, even if the appellants had the requisite standing, he would have dismissed their claim on its merits, because they had only established a "possibility of mischief", and not a "probability of mischief", as a result of any failure by PWGSC to prevent CSMG from benefiting from an unfair advantage based on Weir's involvement in the development of the RFP. The facts of this case, the applications Judge concluded, did not give rise to a reasonable apprehension that PWGSC was biased in its evaluation of the bids.

[17] Accordingly, the applications Judge dismissed the appellants' application for judicial review.

D. ISSUES AND ANALYSIS

(i) Jurisdiction

[18] The parties do not dispute that the award of the submarine contract can be the subject of an application for judicial review as an exercise of power conferred by an Act of Parliament on a federal board, commission or other tribunal. I agree with the parties for the following reasons.

[19] The relevant provisions of the *Federal Courts Act* provide as follows [s. 2 (as am. by S.C. 2002, c. 8, s. 15)]:

2. (1) . . .

"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, . . .

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

[20] The Minister of Public Works and Government Services Canada has broad statutory responsibilities for the acquisition of goods and services for the Government of Canada. The following statutory provisions are of particular relevance to the present case:

Department of Public Works and Government Services Act, S.C. 1996, c. 16 [s. 6 (as am. by S.C. 2001, c. 4, s. 157; 2005, c. 30, s. 121)]

6. The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to

(*a*) the acquisition and provision of articles, supplies, machinery, equipment and other materiel for departments;

(*b*) the acquisition and provision of services for departments;

. . .

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(*e*) the construction, maintenance and repair of public works, federal real property and federal immovables;

Defence Production Act, R.S.C., 1985, c. D-1 [s. 16(*a*) (as am. by S.C. 2004, c. 25, s. 125(F)]

16. The Minister may, on behalf of Her Majesty and subject to this Act,

(*a*) buy or otherwise acquire, utilize, store, transport, sell, exchange or otherwise dispose of defence supplies;

In my view, these provisions include a power to contract for the maintenance and servicing of submarines for the DND.

[21] The fact that the power of the Minister, a public official, to award the contract is statutory, and that this large contract for the maintenance and servicing of the Canadian Navy's submarines is a matter of public interest, indicate that it can be the subject of an application for judicial review under section 18.1 [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27], a public law proceeding to challenge the exercise of public power. However, the fact that the Minister's broad statutory power is a delegation of the contractual capacity of the Crown as a corporation sole, and that its exercise by the Minister involves considerable discretion and is governed in large part by the private law of contract, may limit the circumstances in which the Court should grant relief on an application for judicial review challenging the legality of the award of a contract.

[22] This Court reached a similar conclusion in *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694 (C.A.) (*Gestion Complexe*), at paragraphs 7–17. The Court held that the exercise by a Minister of a statutory power to call for tenders and to enter into contracts for the lease of land by the Crown could be the subject of judicial review under the former paragraph 18(1)(*a*) [as am. by S.C. 1990, c. 8, s. 4] of the *Federal Court Act* [R.S.C., 1985, c. F-7] as a decision of "a federal board, commission or other tribunal".

[23] Although not addressing the particular issue in dispute in the present case, Justice Décary, writing for the Court, also emphasized the difficulties facing an applicant in establishing a ground of review that would warrant the Court's intervention in the procurement process through its judicial review jurisdiction. Thus, he said (at paragraph 20):

> As by definition the focus of judicial review is on the legality of the federal government's actions, and the tendering procedure was not subject to any legislative or regulatory requirements as to form or substance, it will not be easy, in a situation where the bid documents do not impose strict limitations on the exercise by the Minister of his freedom of choice, to show the nature of the illegality committed by the Minister when in the normal course of events he compares the bids received, decides whether a bid is consistent with the documents or accepts one bid rather than another.

[24] This view of the Court's jurisdiction is consistent with that generally adopted by other courts in Canada: see Paul Emanuelli, *Government Procurement*, 2nd ed. (Markham, Ont.: LexisNexis, 2008), at pages 697–706, who concludes (at page 698):

> As a general rule, the closer the connection between a procurement process and the exercise of a statutory power, the greater the likelihood that the activity can be subject to judicial review. Conversely, to the extent that the procurement falls outside the scope of a statutory power and within the exercise of government's residual

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executive power, the less likely that the procurement will be subject to judicial review.

English authorities on public contracts and judicial review are considered in Lord Woolf, Jeffrey Jowell and Andrew Le Sueur, *De Smith's Judicial Review*, 6th ed. (London: Sweet & Maxwell, 2007), at pages 138–145. Courts generally require an "additional public element" before concluding that the exercise by a public authority of its contractual power is subject to judicial review, even when the power is statutory.

[25] Consequently, on the basis of both authority and principle, I agree that the award of the submarine contract by the Minister of PWGSC is reviewable under section 18.1 of the *Federal Courts Act* as a decision of a "federal board, commission or other tribunal" made in the exercise of "powers conferred by or under an Act of Parliament" (section 2).

(ii) Standard of review

[26] The principal issue that I need to decide in order to dispose of this appeal is whether the appellants had a right to procedural fairness in the process by which PWGSC awarded the submarine contract to CSMG. This is a question of law to be determined on a standard of correctness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*), at paragraph 129.

Issue 1: Are the appellants "directly affected" by the award of the submarine contract to CSMG?

[27] The parties made lengthy submissions on the question of whether the appellants had standing to challenge the award of the submarine contract to CSMG as a result of the loss of both their contractual rights as subcontractors and significant potential revenue from the work to be performed under that contract. In particular, the argument focussed on whether the appellants' losses made them "directly affected" by PWGSC's decision to award the submarine contract to CSMG so as to enable them to make this application for judicial review under subsection 18.1(1) of the *Federal Courts Act.*

[28] In my view, the question of the appellants' standing should be answered, not in the abstract, but in the context of the ground of review on which they rely, namely, breach of the duty of procedural fairness. Thus, if the appellants have a right to procedural fairness, they must also have the right to bring the matter to the Court in order to attempt to establish that the process by which the submarine contract was awarded to CSMG violated their procedural rights. If PWGSC owed the appellants a duty of fairness and awarded the contract to CSMG in breach of that duty, they would be "directly affected" by the impugned decision. If they do not have a right to procedural fairness, that should normally conclude the matter. While I do not find it necessary to conduct an independent standing analysis, I shall briefly address two issues that arose from the parties' submissions.

[29] First, I do not accept the respondents' contention that, in providing in subsection 18.1(1) of the *Federal Courts Act* that "anyone directly affected by the matter in respect of which relief is sought" may make an application for judicial review, Parliament intended litigants challenging federal administrative action to have more limited access to the Federal Courts than that typically available to those challenging in provincial superior courts administrative action taken by provincial statutory authorities.

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[30] Indeed, prior to the 1992 amendments to what was then the *Federal Court Act*, the words "directly affected" only applied to standing to bring an application for judicial review in the Appellate Division of the Federal Court of Canada under the former section 28 with respect to a decision or order of a tribunal to which that section applied. Since standing to bring judicial review proceedings in the Trial Division was left undefined, it was determined on the basis of the common law. As a result of the 1992 amendments, the statutory application for judicial review was extended to the administrative law jurisdiction of both Federal Courts. It seems to me implausible that, by retaining the words "directly affected" in subsection 18.1(1), Parliament thereby intended to narrow litigants' access to the Federal Court from that which litigants previously had to the Trial Division of the Federal Court.

[31] The principal purpose of the administrative law aspects of the *Federal Court Act* [R.S.C. 1970 (2nd Supp.), c. 10] when enacted in 1970 was to transfer from the superior courts of the provinces to the Federal Court of Canada an almost exclusive supervisory jurisdiction over federal administrative action: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (*Khosa*), at paragraph 34. Indeed, far from restricting judicial review, former paragraphs 28(1)(*b*) and (*c*) of the Act expanded it somewhat, by removing the common law requirement that any error of law by the tribunal must be apparent on the face of its record, and by including error of fact as a discrete ground of review, even when it could not be said to have been based on "no evidence". The 1992 extension of the application for judicial review as the procedural vehicle for challenging federal administrative action in both Federal Courts was designed to modernize and facilitate judicial review, not to restrict access to the Federal Court.

[32] To attach the significance urged by the respondents to Parliament's choice of the words "directly affected", rather than any of the common law standing requirements ("person aggrieved" or "specially affected", for example) would, in my view, ignore the context and purpose of the statutory language of subsection 18.1(1). As the Supreme Court of Canada said recently in *Khosa* (at paragraph 19):

> . . . most if not all judicial review statutes are drafted against the background of the common law of judicial review. Even the more comprehensive among them . . . can only sensibly be interpreted in the common law context. . . .

[33] Moreover, since all these terms are somewhat indeterminate, Parliament's choice of one rather than another should be regarded as of relatively little importance. See also Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986), at pages 163–164 (*Locus Standi*), especially his apt description (at page 163) of the "semantic wasteland" to be traversed by a court in attempting to apply the various "tests" for standing, both statutory and common law. Although directed at differences between the French and English texts of subsection 18.1(4) of the *Federal Courts Act*, the following statement in *Khosa* (at paragraph 39) seems equally apt in the interpretation of the words "directly affected" in subsection 18.1(1):

> A blinkered focus on the textual variations might lead to an interpretation at odds with the modern rule [of statutory interpretation] because, standing alone, linguistic considerations ought not to elevate an argument about text above the relevant context, purpose and objectives of the legislative scheme. . . .

[34] The interpretation of the standing requirement in subsection 18.1(1) was addressed by this

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Court in *Sunshine Village Corp. v. Superintendent of Banff National Park* (1996), 44 Admin. L.R. (2d) 201 (F.C.A.), at paragraphs 66–68. Writing for the Court, Desjardins J.A. concluded that it was not intended to preclude the Court from granting public interest standing to persons who were not directly affected. The appellants in the present case do not rely on public interest standing.

[35] Second, I do not necessarily agree with the appellants' argument that standing is determined by the quantum of an applicant's loss. Attempting to determine whether a loss is big enough to confer standing would tend to be arbitrary and productive of undue uncertainty, although a *de minimis* loss may be regarded as no loss at all. At least as important as the quantity of any loss sustained by an applicant for judicial review is its relationship to the administrative action impugned, and whether it falls within the range of interests protected by the enabling legislation.

Issue 2: Did the appellants have a right to procedural fairness?

[36] The appellants argue that the applications Judge was "distracted" by the "contractual matrix" of this litigation. They say that he should have applied the test for the application of the duty of fairness used with respect to administrative action taken pursuant to the exercise of a statutory power, namely, whether it affects the rights, privileges or interests of individuals: see, for example, *Cardinal et al. v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at page 653.

[37] I do not agree. In my view, the fact that this case involves the award of a contract provides the essential context in which it must be determined if a duty of fairness is owed to the appellants. On the facts of this case, a duty of fairness may arise in one of three ways: contract, legislation, and the common law.

(i) Contract

[38] A tender in response to an RFP creates a contract (contract A) governing the conduct of the party calling for tenders: *Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111. The terms of contract A may include a promise, express or implied, that the contract for which tenders were requested (contract B) will be awarded in a procedurally fair manner and bidders will be treated equally: *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, at paragraph 88.

[39] In the present case, BAE could have relied upon contract A with PWGSC to allege that contract B was awarded to CSMG in breach of the duty of fairness implicit in contract A. Whether BAE would have succeeded, either on an application for judicial review or in an action for damages for breach of contract, is, of course, another question.

[40] However, BAE has elected not to initiate judicial review proceedings, or an action for breach of contract, in order to establish that the contract was awarded to CSMG in breach of the duty of fairness and should be set aside for procedural unfairness or PWGSC should pay damages for breach of contract A. As subcontractors of BAE who have no contractual relationship with PWGSC, the appellants may not rely on contract A between BAE and PWGSC as the source of any legal duty owed to them.

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[41] It would have been different if the appellants had entered into a joint venture with BAE to bid for the submarine contract or, together, they had formed a company for the purpose of bidding on the contract. In either of these events, the appellants would have had the benefit of contract A with PWGSC. However, having elected to be subcontractors of BAE, and thus not to expose themselves to potential contractual liability to PWGSC, the appellants cannot now claim the benefit of contract A between PWGSC and BAE because they were not a party to it.

(ii) Statute

[42] In the course of oral argument, counsel for the appellants submitted that legislation conferred on them rights to procedural fairness. Counsel relied on the following provisions:

Financial Administration Act, R.S.C., 1985, c. F-11 [s. 40.1 (as enacted by S.C. 2006, c. 9, s. 310)]

40.1 The Government of Canada is committed to taking appropriate measures to promote fairness, openness and transparency in the bidding process for contracts with Her Majesty for the performance of work, the supply of goods or the rendering of services.

[43] Legislation may, of course, impose a duty of fairness on PWGSC in its conduct of the procurement process, and specify its content. However, I am not persuaded that the above provision assists the appellants. The phrase "The Government of Canada is committed to taking appropriate measures to promote the fairness . . . in the bidding process" is not sufficiently precise to impose an immediate legal duty of procedural fairness enforceable by a bidder, let alone by a subcontractor. Rather, it sets a goal and only commits the Government to take future, unspecified steps to ensure that the procurement process is fair.

(iii) Common law

[44] The appellants argue that, as persons adversely affected by the award of the submarine contract to CSMG, they are entitled to challenge the fairness of the process by which it was awarded. They say that their right to procedural fairness arises from the common law in respect of administrative action, namely, the award of the contract to CSMG, because it ended their legal rights under their contract with BAE and caused them substantial financial loss. I do not agree.

[45] The common law duty of fairness is not free-standing, but is imposed in connection with the particular scheme in which the impugned administrative decision has been taken. In my opinion, it cannot be assumed that a duty imposed on the exercise of administrative action taken in the performance of a statutory, governmental function applies in the case of a decision to purchase goods and services where the legal relations of the parties are largely governed by the law of contract.

[46] The context of the present dispute is essentially commercial, despite the fact that the Government is the purchaser. PWGSC has made the contract pursuant to a statutory power and the goods and services purchased are related to national defence. In my view, it will normally be inappropriate to import into a predominantly commercial relationship, governed by contract, a public law duty developed in the context of the performance of governmental functions pursuant to powers

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derived solely from statute.

[47] First, judicially imposed procedural duties in favour of subcontractors would undermine the right of a bidder for a procurement contract to determine what, if any, steps it should take in the event of an apparent breach of contract A. The law should normally not override the decision of an unsuccessful bidder to do nothing because, for example, of a fear that the institution of litigation would jeopardize its prospects of obtaining a contract in the future, or of its desire not to be involved in costly and time-consuming litigation. See also *Locus Standi*, at page 171, where Justice Cromwell notes that the law generally defers to the decision of "the more obvious plaintiff" not to institute legal proceedings and therefore does not confer standing on a person less affected by the impugned administrative action.

[48] Second, while also serving the public interest in good government, procedural rights are, to a large extent, personal to those whose substantive rights or interests they protect. For example, in most cases, a person who has waived a right to procedural fairness may not subsequently challenge an administrative decision on the ground that it was made in breach of the duty of fairness: for the relevant authorities, see Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Canvasback Publishing, 1998), at paragraph 11:5500.

[49] The decision in *Ratepayers of the School District of the New Ross Consolidated School et al. and Chester and District Municipal School Board, Re* (1979), 102 D.L.R. (3d) 586 (N.S.S.C. (T.D.)) is anomalous in conferring standing on a ratepayers' group challenging the dismissal of a school principal on the ground that he had not been afforded a fair hearing, even though he himself had not litigated the matter: see David J. Mullan and Andrew J. Roman, "*Minister of Justice of Canada v. Borowski*: The Extent of the Citizen's Right to Litigate the Lawfulness of Government Action" (1984), 4 *Windsor Y.B. Access Just*. 303, at pages 339–341 and 349.

[50] Third, the logic of the appellants' argument that they are entitled to procedural fairness opens the alarming possibility of a cascading array of potential procedural rights holders. What, for example, of employees of unsuccessful bidders or their subcontractors who lose their employment as the result of the award of the contract to another bidder? The adverse impact on such employees may be just as serious to them as the loss of the subcontract is to the appellants. It would be unduly formalistic to say that the appellants' position is distinguishable because their contract provided that their right to share the revenue terminated if the submarine contract was not awarded to BAE.

[51] Fourth, the appellants say that to confer upon them a right to procedural fairness would advance the public's interest in obtaining value for money by protecting the fairness of the procurement process, an unfair process may discourage bidders from tendering to future RFPs. However, since those who bid in response to an RFP have contractual rights to ensure that their tenders are evaluated accurately and fairly, the protection of the public interest in the integrity of the process does not require a judicial extension of procedural rights to subcontractors. Moreover, if a free-standing right to procedural fairness existed it would not have been necessary for the courts to have implied it as a term of contract A.

[52] Fifth, the public interest in the efficiency of the tendering process may well be compromised by an extension of the right to procedural fairness in the manner urged by the appellants. To extend

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the right to procedural fairness to subcontractors and, possibly, to others who have been adversely affected by a contract award, can only complicate the procurement process and introduce new levels of uncertainty into essentially commercial relationships.

[53] To supplement the contractual safeguards with the common law duty of fairness would thus frustrate the parties' expectations. A duty of fairness based on the common law would presumably also include a right for subcontractors, and others, to participate in the procurement process by making representations before the contract was awarded. As already noted, the appellants could have brought themselves within the protection of contract A if they had so chosen, including any duty of fairness arising from it.

[54] Sixth, once a contract has been awarded, the public has an interest in the avoidance of undue delays in its performance, and in ensuring that government is able promptly to acquire the goods and services that it needs for the discharge of its responsibilities. The normal remedy for breach of contract is a simple award of damages, which does not delay the performance of the contract by the winning bidder. In contrast, the more intrusive public law remedy sought by the appellants is that the contract awarded to CSMG be set aside, so that the tendering process can start again. Governments' recent resort to funding "shovel-ready" infrastructure projects as part of a strategy for promoting economic recovery vividly illustrates that delays in getting publicly financed work underway may be detrimental to the public interest.

[55] Two recent decisions of the Supreme Court of Canada support the conclusion that a duty of fairness was not owed to the appellants with respect to the procurement process: *Design Services* and *Dunsmuir*.

[56] The facts of *Design Services* are similar to those of the present case. The appellants were the subcontractors of an unsuccessful bidder on a government contract. As in our case, the appellants in *Design Services* could have entered into a joint venture with the unsuccessful bidder, but did not. The subcontractors and the unsuccessful bidder sued the Government for damages on the ground that it had awarded the contract to a non-compliant bidder. However, on settling its claim, the unsuccessful bidder discontinued its action.

[57] The question for the Court was whether the subcontractor had an action in negligence against the Government for awarding the contract to a non-compliant bidder. In giving the judgment of the Court dismissing the appeal, Justice Rothstein said (at paragraph 56):

> In essence, the appellants are attempting, after the fact, to substitute a claim in tort law for their inability to claim under "Contract A". After all, the obligations the appellants seek to enforce through tort exist only because of "Contract A", to which the appellants are not parties. In my view, the observation of Professor Lewis N. Klar (*Tort Law* (3rd ed. 2003), at p. 201) — that the ordering of commercial relationships is usually in the bailiwick of the law of contract — is particularly apt in this type of case. To conclude that an action in tort is appropriate when commercial parties have deliberately arranged their affairs in contract would be to allow for an unjustifiable encroachment of tort law into the realm of contract.

[58] The appellants argue that *Design Services* is distinguishable because the concern of the Court in that case was that the imposition of a duty of care would increase the Crown's exposure to potential financial liability far beyond the contractual arrangements: paragraphs 59–66. But in the

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present case, they say, no claim for damages is being made and, once granted, the remedy sought, namely the quashing of the award of the contract, can only be granted once. In my view, however, this is too narrow a reading of *Design Services*.

[59] In *Dunsmuir* the Court considered (at paragraphs 102–117) the appropriateness of imposing a duty of fairness prior to the dismissal of a Crown employee and office holder. The Court decided that, as a general rule, a duty of procedural fairness, and remedies other than damages for breach of contract, have no place in the legal relationship between the Crown on the one hand, and office holders and employees on the other, when their relationship is rooted essentially in contract.

[60] Admittedly, the facts of our case are different from those in *Dunsmuir* because the appellants have no contractual rights against PWGSC. Nonetheless, the broader point made by both *Design Services* and *Dunsmuir* is that when the Crown enters into a contract, its rights and duties, and the available remedies, are generally to be determined by the law of contract.

[61] Finally, if a case arose where the misconduct of government officials was so egregious that the public interest in maintaining the essential integrity of the procurement process was engaged, I would not want to exclude the possibility of judicial intervention at the instance of a subcontractor. However, given the powerful reasons for leaving procurement disputes to the law of contract, it will only be in the most extraordinary situations that subcontractors should be permitted to bring judicial review proceedings to challenge the fairness of the process.

[62] In my view, the facts of this case fall far short of the kind of extraordinary circumstances in which the Court might intervene at the instance of a subcontractor. The appellants do not allege, for example, fraud, bribery, corruption or other kinds of grave misconduct which, if proved, would undermine public confidence in the essential integrity of the process. Indeed, in careful reasons, the applications Judge explained why he was not persuaded that, even if the appellants had standing, they had established a breach of the duty of fairness, including a reasonable apprehension of bias, on the part of PWGSC in its conduct of the procurement process.

E. CONCLUSIONS

[63] For these reasons, I would dismiss the appeal with costs.

RICHARD C.J.: I agree.

RYER J.A.: I agree.

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