



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2015-064

MasterBedroom Inc.

v.

Department of Public Works and
Government Services

*Order and reasons issued
Tuesday, August 30, 2016*

TABLE OF CONTENTS

ORDER i

STATEMENT OF REASONS 1

 INTRODUCTION 1

 PROCEDURAL BACKGROUND 1

 TRIBUNAL’S ANALYSIS 2

 CONCLUSION 4

IN THE MATTER OF a complaint filed by MasterBedroom Inc. pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.);

AND FURTHER TO the Canadian International Trade Tribunal's preliminary indication of the level of complexity for the complaint case and its preliminary indication of the amount of the cost award.

BETWEEN

MASTERBEDROOM INC.

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

ORDER

In its determination of May 26, 2016, the Canadian International Trade Tribunal, pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, awarded MasterBedroom Inc. its reasonable costs incurred in preparing and proceeding with the complaint. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for the complaint case was Level 1, and its preliminary indication of the amount of the cost award was \$1,150. After considering the submissions of MasterBedroom Inc. and the Department of Public Works and Government Services, the Canadian International Trade Tribunal hereby revises its preliminary indication of the amount of the cost award by awarding MasterBedroom Inc. its costs in the amount of \$5,960 for preparing and proceeding with the complaint and directs the Department of Public Works and Government Services to take appropriate action to ensure prompt payment.

Rose Ritcey _____
Rose Ritcey
Presiding Member

STATEMENT OF REASONS

INTRODUCTION

1. In its determination of May 26, 2016, the Canadian International Trade Tribunal (the Tribunal), pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*,¹ determined that the complaint filed by MasterBedroom Inc. (MasterBedroom) was valid and awarded MasterBedroom its reasonable costs in preparing and proceeding with the complaint. The Tribunal's preliminary indication of the level of complexity for this complaint case was Level 1, and its preliminary indication of the amount of the cost award was \$1,150.

2. After considering the submissions on the matter of costs filed by MasterBedroom and the Department of Public Works and Government Services (PWGSC), the Tribunal has decided to revise its preliminary indication of the amount of the cost award and award MasterBedroom its costs in the amount of \$5,960. The reasons for the Tribunal's decision on the final amount of the cost award, including its decision that departure from the *Procurement Costs Guideline* (the *Guideline*) is warranted in this particular case, are provided below.

PROCEDURAL BACKGROUND

3. In accordance with the determination, and as contemplated in article 4.2 of the *Guideline*, the parties made submissions on the preliminary indication of the amount of the cost award. MasterBedroom initially filed its submissions on June 7, 2016, and then obtained PWGSC's consent to file supplementary submissions on June 10, 2016.

4. On June 16, 2016, PWGSC sent a letter to the Tribunal indicating its intent to implement the Tribunal's recommendation with respect to remedy, as set out in the determination of May 26, 2016, to the greatest extent possible. In its letter, PWGSC also referred to the preliminary indication of the cost award and acknowledged that the Tribunal reserved jurisdiction to establish the final amount of the award.

5. On June 17, 2016, PWGSC filed its submissions on costs.

6. On June 23, 2016, MasterBedroom filed a reply to PWGSC's submissions on costs.

7. On July 28, 2016, MasterBedroom notified the Tribunal that it had reached an agreement with PWGSC on the amount of compensation for lost profit payable to MasterBedroom, in accordance with the remedy recommended in the Tribunal's determination.

8. On August 8, 2016, the Tribunal asked MasterBedroom to provide additional information regarding the amount claimed for costs in its supplementary submissions filed on June 10, 2016.

9. MasterBedroom filed a second supplementary submission on costs on August 15, 2016, including a bill of costs for legal fees that it incurred in relation to the four complaints filed with the Tribunal and the request for documentation and information under the *Access to Information Act*.²

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].

2. R.S.C., 1985, c. A-1.

TRIBUNAL'S ANALYSIS

10. Pursuant to subsection 30.16 of the *CITT Act*, the Tribunal can award costs of proceedings. As set out in the *CITT Act*, this is a discretionary power.

11. In the exercise of its discretionary power under the *CITT Act*, the Tribunal issued the *Guideline* in order to provide direction to parties seeking to recover the costs of participating in procurement complaint proceedings. However, the *Guideline* is not binding on the Tribunal, as “. . . each case will be considered individually, and the guideline is not intended to replace, limit or detract from the discretion of the Tribunal”³

12. Furthermore, the Tribunal is not bound by its preliminary indication in making a cost order. As stated in the *Guideline*, “[i]f one or more parties make submissions, the Tribunal will consider them, request additional information, if necessary, and then make whatever cost order it believes is warranted.”⁴

13. Having carefully considered the circumstances of this case and the submissions of the parties, the Tribunal finds that a departure from the levels of complexity and the rates set out in the *Guideline* is warranted.

14. As outlined in detail at paragraphs 7 to 12 of the Tribunal's statement of reasons for the determination, MasterBedroom filed four complaints with the Tribunal relating to the same Request for a Standing Offer (RFSO).⁵ All four complaints related to the award of the standing offer for the Toronto area, which had initially been issued to MasterBedroom but was then retracted and issued instead to 4461789 Canada Inc., operating as Charley's Furniture, on the basis that its bid contained the lowest evaluated price. However, only the fourth complaint was found to meet the conditions set out in sections 6 and 7 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*⁶ and accepted for inquiry.

15. The second, third and fourth complaints alleged that Charley's Furniture's bid was improperly evaluated because it could not have met the technical criteria of the RFSO. Following the Tribunal's decision not to conduct an inquiry into the second complaint, MasterBedroom had to go to the extent of filing an Access to Information and Privacy (ATIP) request in order to obtain a copy of Charley's Furniture's bid in order to show that it did not meet the technical criteria of the RFSO. The information obtained through the ATIP request was then filed in support of the third complaint, which the Tribunal found disclosed a reasonable indication of a breach, even though it was premature.

16. In the Tribunal's view, the fact that MasterBedroom was required to make an ATIP request in order to establish that Charley's Furniture's bid was non-compliant with the technical criteria of the RFSO was an extraordinary step. MasterBedroom was forced to take that step because, even though PWGSC knew or ought to have known at the time of the evaluation that the technical proposal filed by Charley's Furniture did not comply with the mandatory requirements of the RFSO, PWGSC's responses to MasterBedroom's objections focused instead on an issue with the evaluation of Charley's Furniture's financial bid that had already been resolved.

3. *Guideline* at para. 1.1.2.

4. *Guideline* at para. 4.2.5.

5. The RFSO (Solicitation No B3275-150511/A) was issued by PWGSC on behalf of the Department of Citizenship and Immigration, for the provision of basic household furniture to individuals or families in Toronto, Hamilton, Kitchener, London, Windsor and Ottawa, Ontario.

6. S.O.R./93-602 [*Regulations*].

17. Specifically, when MasterBedroom initially objected to the evaluation of Charley's Furniture's *technical bid*, PWGSC's response indicated that any irregularities in the evaluation of Charley's Furniture's *financial bid* resulted from human error on the part of its evaluators, which were corrected when it retracted the award to MasterBedroom in favour of Charley's Furniture.⁷ The Tribunal found that the information filed in support of the second complaint did not point to a reasonable indication of a breach of the applicable trade agreements, because it was reasonable for PWGSC to correct a human error by an evaluator that had led to the improper disqualification of Charley's Furniture's financial bid. At that stage, the allegation that Charley's Furniture's technical bid was improperly evaluated was not supported by the evidence.

18. It was not until the third complaint (i.e. after the ATIP request) that the Tribunal found PWGSC knew or ought to have known at the time of the evaluation that the technical proposal did not comply with the mandatory requirements of the RFSO.⁸ As it turned out, MasterBedroom's previous objections to PWGSC and complaints to the Tribunal were correct to point out that the human error of not looking at the financial bids for the standing offer for the Toronto area did not change the fact that PWGSC had improperly found the technical bid from Charley's Furniture to be compliant with the mandatory criteria of the RFSO.

19. Even if PWGSC disagreed with MasterBedroom about whether Charley's Furniture's technical bid was compliant (which was ultimately PWGSC's position in this inquiry in relation to the fourth complaint), it should have provided MasterBedroom with an understanding of its rationale for deeming the technical bid compliant much earlier, i.e. at the time of the second complaint. Instead, as stated above, MasterBedroom had to take the extraordinary step of obtaining the information through an ATIP request and re-filing its complaint in light of that new information, which added to the costs and time that it took to resolve its complaint. In terms of the length of time, MasterBedroom filed its third complaint on January 9, 2016, more than four months after its second complaint was not accepted for inquiry on August 26, 2015.

20. The Tribunal considers some of the costs claimed by MasterBedroom to be accounted for by the amounts set in the *Guideline* because they relate to the routine costs of filing a complaint with the Tribunal. In particular, the initial objection to PWGSC and the preparation of the first complaint, the review of and reply to the GIR in relation to this inquiry, and the handling of procedural matters and correspondence are all part of the habitual costs associated with filing a complaint. This includes the intervener request that was filed by Charley's Furniture because the parties' submissions on the matter were limited and the request was withdrawn.⁹ In addition, the Tribunal notes that the parties settled the matter of the amount of compensation themselves, without the need for extended proceedings on the matter of compensation. Accordingly, the Tribunal finds that there is no need to depart from the *Guideline* in respect of these costs and that the preliminary indication of \$1,150 is reasonable for these aspects of the complaint.

21. As described above, however, MasterBedroom was required to take extraordinary steps in this case that required incurring additional costs in order to gain access to the information which formed the basis of the complaint. In particular, the information obtained through the ATIP request was instrumental in the Tribunal's decision that the complaint was valid. Moreover, the costs related to the filing of the second and

7. *MasterBedroom Inc.* (26 August 2015), PR-2015-024 (CITT) at paras. 8-12, 21-22.

8. *MasterBedroom Inc.* (12 January 2016), PR-2015-052 (CITT) at para. 15.

9. On June 24, 2016, the Tribunal received a request from Charley's Furniture to intervene in the proceedings. The Tribunal invited MasterBedroom and PWGSC to provide their views on the request for intervention. MasterBedroom filed a brief objection to the request on June 30, 2016. On July 4, 2016, PWGSC responded that it took no position in relation to the request. Given that the Tribunal's determination that the complaint was valid is a final decision, the Tribunal asked Charley's Furniture to clarify the nature and relevance of its request for intervener status. Subsequently, on July 19, 2016, Charley's Furniture withdrew its request for intervener status.

third complaints could have been mitigated or avoided altogether if PWGSC had been more forthcoming in its responses to MasterBedroom's objections, both before and after the information obtained via the ATIP request. As a result, the complaint and the proceedings were prolonged and more complicated than they needed to be. The Tribunal finds that this warrants a departure from the costs framework provided in the *Guideline*.

22. Therefore, the Tribunal finds it reasonable, in the circumstances of the present case, to award costs above Level 3 in the *Guideline* (i.e. \$4,700), by applying a partial indemnity rate of 50 percent to the fees that were incurred in relation to the extraordinary steps that MasterBedroom had to take in this case, including the filing of the second and third complaints and the ATIP request.

23. The Tribunal accepts MasterBedroom's submission that the total legal fees in relation to these proceedings amounted to \$18,063.05. Having carefully reviewed the bill of costs that was filed by MasterBedroom, the Tribunal has determined that the legal fees incurred in relation to the filing of the second and third complaints and the ATIP request amounted to \$2,520.00.¹⁰ Applying a partial indemnity rate of 50 percent, this amounts to \$1,260.00.

24. On the basis of the foregoing, the Tribunal revises its preliminary indication of the amount of the cost award and awards MasterBedroom its costs in the amount of \$5,960.

CONCLUSION

25. In light of the above, the Tribunal revises its preliminary indication of the amount of the cost award by awarding MasterBedroom Inc. its costs in the amount of \$5,960 for preparing and proceeding with the complaint and directs PWGSC to take appropriate action to ensure prompt payment.

Rose Ritcey
Rose Ritcey
Presiding Member

10. This calculation is based on the legal fees billed for the period of August 24, 2015, to January 18, 2016.