



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2004-054R

Envoy Relocation Services

v.

Department of Public Works and  
Government Services

*Determination and reasons issued  
Wednesday, April 26, 2006*

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

AND FURTHER TO a recommendation of the Canadian International Trade Tribunal, pursuant to section 30.15 of the *Canadian International Trade Tribunal Act*,

AND FURTHER TO a decision of the Federal Court of Appeal, which remitted the matter to the Canadian International Trade Tribunal for reconsideration of the recommended remedy.

**BETWEEN**

**ENVOY RELOCATION SERVICES**

**Complainant**

**AND**

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES**

**Government Institution**

**DETERMINATION OF THE TRIBUNAL**

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services compensate Envoy Relocation Services for one half of the costs that it reasonably incurred in preparing its proposals for the subject solicitation. Envoy Relocation Services shall file with the Canadian International Trade Tribunal, within 30 days of the date of this determination, a submission concerning the appropriate dollar amount of this compensation. The Department of Public Works and Government Services will then have 7 working days after receipt of this submission to file a reply submission. Envoy Relocation Services will then have 5 working days after the receipt of the reply submission to file additional submissions. Counsel must file their submissions with the Canadian International Trade Tribunal and serve each other simultaneously.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Envoy Relocation Services \$500 for its costs incurred in relation to the remand of the Canadian International Trade Tribunal's original recommendation, which costs are to be paid by the Department of Public Works and Government Services.

Ellen Fry  
Ellen Fry  
Presiding Member

Zdenek Kvarda  
Zdenek Kvarda  
Member

James A. Ogilvy  
James A. Ogilvy  
Member

Hélène Nadeau  
Hélène Nadeau  
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## STATEMENT OF REASONS

### BACKGROUND

1. On February 18, 2005, Envoy Relocation Services (Envoy) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.<sup>1</sup> The complaint concerned the procurement (Solicitation No. 24062-030147/C) by the Department of Public Works and Government Services (PWGSC), on behalf of the Treasury Board of Canada Secretariat (for the Government of Canada [GOC]), the Royal Canadian Mounted Police (RCMP) and the Canadian Forces (CF) for services relating to the relocation of employees. The solicitation, which called for a separate proposal for each of the three specified government groups, resulted in two contracts being awarded to Royal LePage Relocation Services Limited (Royal LePage)—a joint one for the GOC and RCMP requirements and a separate one for the CF requirement.

2. Envoy alleged that PWGSC improperly evaluated its proposals. Specifically, it alleged that PWGSC had improperly compared its proposals against each other, resulting in a significant downgrading of its technical scores. It submitted that the effect of this was to deny it at least one contract (the CF contract), which it believes that it ought to have won.

3. On February 28, 2005, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>2</sup>

4. On May 16, 2005, the Tribunal issued its determination, in which it found that the complaint was valid, and recommended, as a remedy, the following:

...

... that [PWGSC], within 15 working days of the publication of this determination, re-evaluate the responses to section 2.2.4.2 of Annex "D" to the Request for Proposal with regard to all bidders, with a new evaluation team, evaluating each proposal from each bidder individually and separately. If this re-evaluation results in a new winning bidder for either contract, or both, the existing contract should be cancelled and awarded to that bidder.

...

5. The Tribunal also awarded Envoy its reasonable costs incurred in preparing and proceeding with the complaint. On June 22, 2005, the Tribunal issued a cost order awarding Envoy \$2,400, to be paid by PWGSC, as the Tribunal had concluded that the level of complexity for the complaint case was Level 2, in accordance with its *Guideline for Fixing Costs in Procurement Complaint Proceedings*.

6. Also in June 2005, PWGSC applied to the Federal Court of Appeal (the Court) for a judicial review of the Tribunal's determination. The case<sup>3</sup> was heard by the Court on January 11, 2006, with Justice Marc Noël providing the following judgment from the bench:

[1] We have not been persuaded that the interpretation adopted by [the Tribunal] of the relevant terms of the Requirement for Proposal ("RFP") is patently unreasonable. The Tribunal's conclusion that there was an error in the evaluation of the bids submitted by [Envoy] ... must therefore stand.

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

2. S.O.R./93-602.

3. *The Attorney General of Canada v. Envoy Relocation Services* (11 January 2006), A-286-05 (FCA).

[2] However, we are satisfied that the remedy granted by the Tribunal cannot stand. It was not open to the Tribunal to order a re-evaluation of all bids with respect to section 2.2.4.2 of Annex "D" to the RFP because the complaint related only to an alleged error in the evaluation of Envoy's bids, and there is no evidence or suggestion that the same error occurred or might have occurred with respect to the other bids. Therefore, this matter must be remitted to the Tribunal for reconsideration of the remedy.

[3] In that regard, the record establishes that simply re-evaluating Envoy's bids with respect to section 2.2.4.2 cannot possibly affect the outcome of the bidding process. Therefore, the scope of the remedy must be limited to the monetary relief sought by Envoy in its complaint.

...

7. In its complaint, Envoy had made the following requests for relief:
- a) that the Tribunal recommend that Envoy be compensated for [lost] profits in an amount to be determined following such processes as the Tribunal may prescribe. Envoy submits that this is the most appropriate remedy in the circumstances.
  - b) in addition, Envoy should be awarded the cost of preparing their response to the RFP, and of proceeding with this complaint, pursuant to section 30.16 of the CITT Act. Such costs should include the expenses associated with legal counsel and consultants. Envoy further requests that due to the complexity of the complaint and the importance of the issues, such costs should be determined by the Tribunal and be an increase over those provided for in the tariff.

8. On January 25, 2006, the Tribunal requested that Envoy and PWGSC submit comments regarding the remanded case, which they did on February 8, 2006. On February 15, 2006, both parties submitted their responses to each other's comments.

## **POSITIONS OF THE PARTIES**

### **PWGSC's Position**

9. PWGSC submitted that, given the Court's judgment, the Tribunal may not re-open its inquiry into the complaint and must limit the scope of remedy to the monetary relief sought by Envoy in its complaint, i.e. its lost profit, its cost of preparing its response to the RFP and its costs for proceeding with the complaint.

10. PWGSC submitted that neither Envoy nor any other interested party was prejudiced at all as a result of the error found by the Tribunal; furthermore, it noted that the Tribunal did not find that the evidence indicated a lack of good faith on its part.<sup>4</sup>

11. Regarding lost profit, PWGSC submitted that the Tribunal had previously held that the burden of proof lies upon the complainant to establish and prove the loss of profit for which compensation is claimed.<sup>5</sup> PWGSC argued that it is not possible for Envoy to satisfy this burden of proof, given that the Court stated that the re-evaluation of Envoy's bid with respect to section 2.2.4.2 could not possibly affect the outcome of the bidding process, i.e. that Royal LePage won both contracts. PWGSC submitted that, as Envoy could not have won either of the contracts, it follows that Envoy did not suffer any loss of profit. It also noted that the

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4. *Re Complaint Filed by Envoy Relocation Services* (16 May 2005), PR-2004-054 (CITT).

5. *Re Complaint Filed by Conair Aviation, a division of Conair Aviation Ltd.* (8 August 1996), PR-95-039 (CITT).

Tribunal had determined in a previous case that an award for lost profit was inappropriate, as there had been no prejudice to the complainant.<sup>6</sup>

12. Regarding Envoy's claim for lost opportunity, PWGSC submitted that, as Envoy did not request compensation for lost opportunity in its complaint, it cannot now seek such compensation. It submitted that, even if the Tribunal were to allow the request, Envoy has not provided any information in support of such a claim and it must therefore be rejected.

13. Regarding Envoy's bid preparation costs, PWGSC submitted that this request should be treated in the same fashion as the claim for lost profit and be denied. It submitted that, given that Envoy could not have won either of the contracts, that there was no prejudice to any party and that the Tribunal had not found a lack of good faith on the part of PWGSC, Envoy would have incurred costs associated with preparing its bids as part of its normal course of business. PWGSC also submitted that any reference to costs associated with Envoy's participation in an earlier bidding process are irrelevant, as are any other factors outside the scope of the present procurement.

14. Regarding Envoy's claim for costs of the complaint consequent to the matter being remitted to the Tribunal, PWGSC submitted that Envoy should be entitled to no costs other than those already awarded by the Tribunal. PWGSC submitted that any costs incurred resulted from Envoy's own request<sup>7</sup> to the Tribunal to make submissions regarding the Court's judgment, rather than from any steps that it was required to take.

15. In summary, PWGSC submitted that Envoy should be awarded limited monetary relief in the form of its costs associated with pursuing its complaint before the Tribunal, pursuant to section 30.16 of the *CITT Act*. It submitted that such costs should be fixed in accordance with the Tribunal's relevant guideline. PWGSC submitted that this relief would be consistent with the Court's judgment, in that it represents one of the forms of monetary relief sought by Envoy in its complaint and reflects the Court's conclusion that "... the record establishes that simply re-evaluating Envoy's bids with respect to section 2.2.4.2 cannot possibly affect the outcome of the bidding process..." It also submitted that this award would be consistent with a significant body of the Tribunal's jurisprudence<sup>8</sup> involving similar circumstances, where a breach of the trade agreements has been found but the effect of the breach has had no impact on the award of the contract.

### **Envoy's Position**

16. Envoy submitted that it should be compensated for its bid preparation costs, the lost opportunity to profit from the two contracts and the costs that it incurred as a result of the matter being remitted to the Tribunal. Envoy submitted that, in its ruling, the Court directed that "... the scope of the remedy must be limited to the monetary relief sought by Envoy in its complaint..." Given the circumstances of the case, Envoy submitted, the Tribunal has effectively been sent back to the drawing board and the Court has left the Tribunal with the responsibility of determining the appropriate remedy.

17. Regarding its bid preparation costs, Envoy submitted that it had made the substantial investment of time and money in preparing two bids in two years and that it was owed, in return, a duty of fair and equal

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6. *Re Complaint Filed by Beals, Lalonde & Associates* (27 July 2004), PR-2004-009 (CITT) [Beals].

7. Envoy's letter dated January 20, 2006.

8. *Beals; Re Complaint Filed by TireeRankinJV* (27 January 2005), PR-2004-038 (CITT); *Re Complaint Filed by Siemens Westinghouse Inc.* (19 March 2001), PR-2000-039 (CITT); *Re Complaint Filed by Navatar Ltd.* (30 May 2000), PR-99-043 and PR-99-044 (CITT); *Re Complaint Filed by Radiant Point Inc.* (11 September 2000), PR-2000-005 (CITT).

treatment by PWGSC and the client departments. Envoy disagreed with PWGSC's argument that Envoy's bid preparation costs are simply part of "... the normal course of business ...".<sup>9</sup> It submitted that for PWGSC to seriously suggest that the cost to Envoy of being drawn into such a flawed exercise is simply the "normal course of business" cannot be accepted. Envoy submitted that it is not the "normal course of business" for a company to throw away money and management time to participate in a badly managed or discriminatory process.

18. Regarding its lost opportunity to profit from the awarded contracts, Envoy submitted that PWGSC has fought for more than a year to avoid the very re-evaluation that it now argues would have been inconsequential. Envoy submitted that, given that parties do not engage in expensive and lengthy litigation that is essentially moot, the inference that it drew from PWGSC's actions is that PWGSC feared that the re-evaluation might change something if all bids were re-evaluated by a new evaluation team. However, Envoy submitted that, as PWGSC had thwarted Envoy's opportunity for a fair evaluation and that it will never receive the evaluation that it had the right to receive, the outcome of a proper evaluation will never be known. It therefore disagreed with PWGSC's assertion that Envoy was not prejudiced by the process. It argued that PWGSC cannot now rely on the improper evaluation results to argue that Envoy cannot prove that it would have won any of the contracts in question.

19. Envoy submitted that, at the very least, the problems with the procurement process were egregious enough to support a conclusion that it was deprived of the opportunity to profit from these contracts. It submitted that it was convinced that it won the CF contract on merit and price and that PWGSC had to find a way to deduct enough points to take advantage of the discriminatory scoring formula.

20. Envoy submitted that it had already been awarded its complaint costs and that the current proceeding was merely an extension of the complaint and that it should therefore be compensated for the costs that it incurred in respect of the current case before the Tribunal.

21. In response to PWGSC's argument regarding the Tribunal's jurisprudence, Envoy submitted that no case cited by PWGSC is comparable to the current circumstances and that the Tribunal must consider each case on its own facts. Specifically, it argued that none of the cases cited by PWGSC contained the extent of deficiencies and the prejudice apparent in this case.

22. In summary, Envoy submitted that it should be compensated as follows:

- For all costs of preparing and submitting its bids, in recognition of the fact that it did not receive the benefit of the evaluation process that it contemplated when it incurred the costs of preparing its proposals;
- For the lost opportunity represented by these two contracts, on the basis that the improper methodology used by PWGSC affected the award of the contracts, either through negligence or by design. Envoy noted that there were two bidders for the CF contract and three compliant bidders for the RCMP-GOC contract and submitted that its lost opportunity should be set at one half and one third, respectively, of the profit that it would have earned, had it won both contracts; and
- For the costs of its complaint consequent to the matter being remitted to the Tribunal, as the further proceedings should also be included in the costs of the complaint.

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9. PWGSC's comments dated February 8, 2006, para 35.



**TRIBUNAL'S DECISION**

23. The Tribunal is directed to redetermine the remedy in accordance with the Court's judgment.

24. In the original determination,<sup>10</sup> the Tribunal found that there had been a serious breach of evaluation procedures that prejudiced the integrity of the government procurement system as a whole. It believes that the remedy should reflect the seriousness of the impact of PWGSC's breach.

25. Given the direction provided by the Court, in this instance the Tribunal is unable to recommend a re-evaluation of all the bids. It is therefore not possible for the Tribunal to recommend a remedy that gives Envoy the benefit of the evaluation process that it expected when it prepared its three proposals for the GOC, CF and RCMP requirements.

26. The Tribunal will therefore follow the alternative approach of trying to put Envoy into the same position in which it would have been if it had known how PWGSC was going to evaluate section 2.2.4.2 of Annex "D" to the RFP. In doing so, the Tribunal considered how Envoy would have been likely to change its bid if it had been aware of the evaluation process undertaken by PWGSC. By definition, this involves considering a hypothetical situation and, therefore, the Tribunal can only arrive at an approximation, predicting what action would reasonably have been taken and the probable financial consequences of that action.

27. The Tribunal notes that the evaluation scheme allocated 75 percent of points for the technical portion of the bids and 25 percent for the financial portion. The Tribunal believes that, given the heavy technical weighting and the fact that section 2.2.4.2 was a technical criterion, Envoy would reasonably have taken its bid proposals for section 2.2.4.2 very seriously. The Tribunal also considers that, when Envoy was preparing its proposals, it would have had no way of knowing if the evaluation of section 2.2.4.2 would have made the difference between winning and losing one or both contracts.

28. The Tribunal considers that, had Envoy known that section 2.2.4.2 of its bids would be compared by the evaluators, contrary to the provisions of the RFP, it would have had the choice of the following:

- (a) not bidding at all—this would have eliminated all its bid preparation costs;
- (b) structuring section 2.2.4.2 of its bids differently to avoid the perceived inconsistencies, i.e. bidding a completely different team for each of the two contracts—this might well have resulted in increasing the amounts bid by Envoy; or
- (c) bidding only on either the CF or the GOC-RCMP contract, if Envoy either could not put together two discrete teams or did not wish to do so for cost or other reasons—this would have eliminated part of its bid preparation costs.

29. The Tribunal notes that, in its submissions, Envoy did not indicate what it would have done, had it known how its bids were to be evaluated. However, the Tribunal considers that Envoy has consistently indicated a serious interest in this contract, e.g. through its correspondence to PWGSC on the contents of the RFP and its decision to bid on the second solicitation after the cancellation of the first. The Tribunal therefore does not consider that Envoy would have refrained from bidding altogether.

30. With respect to options (b) and (c) outlined above, the Tribunal is not clear as to which one Envoy would likely have chosen. However, given the seriousness of the breach of evaluation procedures, which

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10. *Re Complaint Filed by Envoy Relocation Services* (16 May 2005), PR-2004-054 (CITT) at para. 34.

deserves significant compensation, the Tribunal considers that an amount equal to 50 percent of Envoy's bid preparation costs is an appropriate amount of compensation.

### **COSTS OF THE REMAND**

31. The Tribunal awards Envoy \$500 for the costs that it incurred in making submissions to the Tribunal after the remand by the Court. It notes that, although Envoy's submissions were extensive, a significant proportion dealt with issues not relevant to the question of the remedy to be recommended.

### **DETERMINATION OF THE TRIBUNAL**

32. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that PWGSC compensate Envoy for one half of the costs that it reasonably incurred in preparing its proposals for the subject solicitation. Envoy shall file with the Tribunal, within 30 days of the date of this determination, a submission concerning the appropriate dollar amount of this compensation. PWGSC will then have 7 working days after receipt of this submission to file a reply submission. Envoy will then have 5 working days after the receipt of the reply submission to file additional submissions. Counsel must file their submissions with the Tribunal and serve each other simultaneously.

33. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Envoy \$500 for its costs incurred in relation to the remand of the Tribunal's original recommendation, which costs are to be paid by PWGSC.

Ellen Fry  
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Presiding Member

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