

Ottawa, Tuesday, December 4, 2001

File Nos. PR-2000-044 and PR-2000-049 to PR-2000-053

IN THE MATTER OF six complaints filed by Polaris Inflatable Boats (Canada) Ltd. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND IN THE MATTER OF a determination made pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act* to award Polaris Inflatable Boats (Canada) Ltd. its reasonable costs incurred in relation to filing and proceeding with the six complaints.

ORDER

INTRODUCTION

In a determination made on May 14, 2001, the Canadian International Trade Tribunal (the Tribunal), pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*,¹ awarded Polaris Inflatable Boats (Canada) Ltd. (Polaris) its reasonable costs incurred in relation to filing and proceeding with the six complaints.

On July 18, 2001, Polaris submitted to the Tribunal its claim for costs in the amount of \$23,746.20. On October 26, 2001, the Department of Public Works and Government Services (PWGSC) submitted comments on Polaris's claim.² Polaris responded to these comments on November 15, 2001.

COMPLAINT COSTS

Polaris has claimed \$23,370.00 in fees for its three senior officers who were acting as representatives³ in this procurement proceeding. That amount represents 109, 30 and 25 hours of work, at \$125.00 per hour, done by the President, the Vice-President and the Managing Director respectively. In support of its claim for fees for its representatives, Polaris argued that all three senior representatives acted as counsel and were directly involved throughout the entire process relating to the complaints and that they are equal partners in Polaris, with a hands-on approach to work. Moreover, the time that they spent in responding to the complaints took time away from the execution of daily affairs. Polaris has also claimed \$376.20 in disbursements. Furthermore, Polaris sought permission to present a further claim for the costs to be incurred due to the application for judicial review of the Tribunal's determination.

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1. R.S.C. 1985 (4th Supp.), c. 47.
 2. On August 7, 2001, PWGSC informed the Tribunal that it had applied for judicial review of the determination to the Federal Court of Appeal and sought an extension of time to provide its comments on the claim for costs pending the outcome of the matter. On August 10, 2001, the Tribunal notified the parties that the claim for costs was held in abeyance while awaiting the decision of the Federal Court of Appeal.
 3. In the Tribunal's *Procurement Cost Guidelines* (Guidelines), "representative" is defined as a person who represents a party to a procurement proceeding, but who is not a legal counsel. "Procurement proceeding" means a Tribunal proceeding in respect of a complaint.

In its reply, PWGSC submitted that Polaris's claim was inconsistent with the Guidelines, excessive and out of proportion with the complexity of the complaints. It also submitted that Polaris did not include any supporting documentation relating to the time or disbursements claimed as required by paragraphs 5.3.1 and 5.5.4 of the Guidelines and as expressly acknowledged by Polaris in its July 17, 2001, submission.

PWGSC also stated that the award of costs is restricted to the complaint costs and that the claim for costs incorrectly includes costs for time and disbursements relating to bid preparation. Noting a statement by Polaris in its claim for costs, referring to Appendix A,⁴ section 4.1 of the Guidelines, PWGSC submitted that costs for time and disbursements relating to bid preparation should be disallowed in accordance with the May 14, 2001, determination of the Tribunal.

With respect to Polaris's claim for three representatives, PWGSC submitted that Polaris can only claim the time of the one employee who acted as Polaris's representative, as contemplated in paragraph 5.2.3 of the Guidelines. Consequently, all claims concerning the Vice-President and Managing Director should be disallowed. Further, PWGSC submitted that, in an order dated July 23, 1999, issued following the Tribunal's inquiry into earlier complaints made by Polaris (File Nos. PR-98-032 and PR-98-033), the Tribunal allowed only the hours for the President of Polaris. In that claim for costs, Polaris had claimed time with respect to the same three individuals. With respect to the total number of hours claimed by the President of Polaris for the current complaints, PWGSC submitted that these complaints were dealt with together in one process and that, as the President had gained experience from the previous complaints, the number of hours to be claimed should not exceed 76.

PWGSC also submitted that the appropriate hourly rate applicable for the president of Polaris acting as a representative is \$85 per hour and not \$125 as claimed, as it is the number of completed years that a person has acted in his capacity as a representative for his company before the Tribunal in a procurement proceeding that is to be taken into account and not the number of years as an employee. In this case, PWGSC submitted that the President's experience is less than five years as a representative and that the appropriate hourly rate is \$85. Finally, PWGSC submitted that the Tribunal lacks jurisdiction with respect to any proceedings that occur subsequent to the issuance of its determination.

Polaris responded to PWGSC's comments in detail. As a general comment, Polaris argued that the costs submitted were fair, reasonable and justified. With respect to the lack of provision of documentation, Polaris submitted that, as it acts as its own representative, it would not invoice itself. As such, Polaris provided a summary of the time spent in support of its claim for costs. Moreover, the purpose of estimating the costs was to save time and money. Polaris submitted that retrieving, identifying and extrapolating the relevant costs would require an additional two to three hours and that the costs submitted are reasonable and most fair. It also submitted that, in the event that invoices are required, it should be allowed to adjust its claim for costs for the amount of time that will be spent in assembling and presenting these costs. Polaris also stated that it did not submit costs for bid preparation.

With respect to the claim for the fees of its three representatives, Polaris submitted that its senior officers acted as a single claimant and that one individual could not represent Polaris's best interest to the fullest extent possible, as the three representatives have individual perspectives and expertise. Polaris also submitted that its principals had always acted as its representatives and that its claim for costs accurately represents the time that they spent in filing and proceeding with the complaints. Finally, Polaris corrected the total number of hours worked by the President to read 107.

4. Appendix A of the Guidelines relates to bid preparation costs.

As in the previous complaints filed by Polaris, the Tribunal is of the view that the President of Polaris could in effect be seen as acting as the representative in all the complaints. The Tribunal understands that the Vice-President and Managing Director, in their capacity as senior officers and partners in the company, assisted the President in his capacity as representative for Polaris. The courts have found that, absent a situation where employees represent a litigant in a proceeding, the power to award costs does not include the power to compensate a litigant for the time spent by its employees in connection with the proceeding.⁵ Accordingly, other than the hours claimed by the President, the Tribunal will disallow the claim for costs in respect of the Vice-President and the Managing Director.

The Tribunal is also of the view that the time spent by the President of Polaris to prepare and proceed with the complaints is neither excessive nor unreasonable, given the number of complaints and their complexity. The Tribunal will allow the total number of hours claimed by the President of Polaris as a representative, i.e. 107 hours at the rate of \$125.00 per hour. Therefore, the Tribunal allows costs for the representative in the amount of \$13,375.00. With respect to the disbursements claimed by Polaris for photocopies, long distance calls, courier service and the downloading of the various solicitations and updates, the Tribunal notes that these costs are unsupported by invoices. The Tribunal finds that the disbursements are reasonable in the circumstances. In addition, the Tribunal accepts Polaris's submission that these costs were estimated and not extensively researched in order to save time and additional costs to all parties. Therefore, the Tribunal allows the full amount of \$376.20 for disbursements.

Finally, the Tribunal will not consider a further claim for costs from Polaris with respect to the application for judicial review to the Federal Court of Appeal, as this is not a proceeding before the Tribunal. The Tribunal has no jurisdiction in determining such costs.

CONCLUSION

The Tribunal hereby awards Polaris costs in the amount of \$13,751.20 in relation to filing and proceeding with the complaints and directs PWGSC to take appropriate action to ensure prompt payment.

Michel P. Granger
Michel P. Granger
Secretary

Zdenek Kvarda
Zdenek Kvarda
Presiding Member

5. See, for example, *Energy Absorption Systems v. Y. Boissonneault & Fils* [1991] F.C.J. No. 53 (QL).