



Ottawa, Tuesday, July 30, 2002

File No. PR-2001-038

IN THE MATTER OF a complaint filed by Papp Plastics & Distributing Limited 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 subsections 30.15(2), 30.15(3) and 30.16(1) of the *Canadian International Trade Tribunal Act*.

## ORDER AND RECOMMENDATION

### INTRODUCTION

In a determination made on January 31, 2002, the Canadian International Trade Tribunal (the Tribunal), pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*,<sup>1</sup> awarded Papp Plastics & Distributing Limited (Papp) its reasonable costs incurred in relation to preparing and proceeding with the complaint. Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommended, as a remedy, that Papp be compensated for lost profit in the amount of 10 percent of its bid price.

In its submission of March 1, 2002, and a minor correction filed on March 5, 2002, Papp submitted a claim of \$19,993.65 for costs incurred in relation to filing and proceeding with its complaint. On March 15, 2002, Papp submitted an invoice for compensation in the amount of \$39,381.35, which represented 10 percent of a total contract value of \$393,813.50.

The Department of Public Works and Government Services (PWGSC) filed comments on Papp's claim on April 22, 2002. Papp responded to those comments on May 3, 2002.

### COMPLAINT COSTS

Papp claimed \$16,320.01 for in-house costs incurred in relation to filing and proceeding with the complaint. That amount includes representatives' fees incurred for the work by two of its employees, i.e. 57.5 hours by one employee and 48.5 by the other employee, both at a rate of \$125.00 per hour. The amount also includes 6 hours by another employee for what is characterized as a service provider's fee for research at \$125.00 per hour. The amount also includes two employees' work as representative's assistants, i.e. a total of 58 hours at \$30.00 per hour. Finally, disbursements in the amount of \$455.01 are also included.

Papp also claimed \$3,673.64 in legal fees and disbursements charged by Heenan Blaikie LLP for legal services. This claim is not supported by an invoice, but is submitted using the Tribunal's Forms I, IV and V.

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

PWGSC submitted that Papp's claims are excessive in the circumstances of these complaint proceedings and inconsistent with the Tribunal's *Procurement Cost Guidelines* (the Guidelines). It submitted that this matter was not complex. PWGSC submitted that, given the fact that it conceded the errors in the procurement and indicated that the complainant could appropriately receive some compensation in this matter in its letter filed in lieu of the GIR, the complaint should have been resolved expeditiously. PWGSC submitted that the Tribunal should limit Papp's costs to those incurred up to and including Papp's consideration of its letter filed in lieu of a GIR, with the exception of the submissions made by Papp with respect to "lost profits" versus "loss of opportunity". With respect to the legal fees claimed, PWGSC submitted that these were incurred beginning on December 11, 2001, which was immediately prior to Papp's December 12, 2001, submission in response to its letter filed in lieu of the GIR. For the same reason given for limiting Papp's costs in general, it submitted that these costs should be disallowed with the possible limited exception of some costs related to the claim for costs. PWGSC submitted that the claim for time of employees should be limited to a claim for the time of only one employee, i.e. the employee who acted as the main representative for Papp. It submitted that the Tribunal explained in file Nos. PR-98-032 and PR-98-033<sup>2</sup> why the claim for only one employee is generally permitted and that these cases were applicable in this instance. PWGSC also submitted that the time claimed for the main representative at 57.5 hours is excessive and that the hourly rate does not comply with the Guidelines. In the Guidelines, the hourly rate applicable is to be based on the number of years that an individual has acted as a representative, as defined in the Guidelines. For 0 to 5 years, the rate is \$85.00 per hour. Finally, PWGSC submitted that any disbursements related to Papp's submissions of December 12, 2001, and January 2, 2002, should be disallowed.

In its comments filed on May 3, 2002, Papp submitted that its claim for costs should stand as submitted and provided a number of reasons to support its position. It submitted that it was entitled to provide a comprehensive and vigorous response to the GIR. Papp also submitted that PWGSC's position is not in line with the Guidelines or the Tribunal's practice. Moreover, it suggested that it should be awarded costs only with respect to those specific arguments on which it was successful before the Tribunal. Papp argued that this would invite complex and burdensome analysis of cost awards that are unwarranted and impractical to administer. Therefore, Papp should be entitled to recover its full and reasonable complaint costs. Papp also submitted that it is entitled to recover its costs for legal services. It disagreed that *Polaris* is fully determinative of the issue of claiming expenses relating to more than one employee acting as representatives. Papp argued that, in *Polaris*,<sup>3</sup> the Tribunal compensated the litigant for the time spent by its employees in connection with a proceeding and this might extend to situations where employees represent a litigant. Papp submitted specific reasons why it had claimed costs for each employee. It also submitted that these employees were taken away from their usual duties. Finally, Papp suggested that it be awarded reasonable costs incurred in the preparation and submission of its May 3, 2002, response.

The Tribunal is of the view that this case was relatively simple. Early in the proceeding, PWGSC readily admitted to having made mistakes and expressed its willingness to take responsibility for them. Although Papp did prolong the matter somewhat, subsequent to the filing by PWGSC of a letter in lieu of the GIR, the Tribunal is of the view that Papp raised issues that it thought were legitimate and, as such, the Tribunal did not and will not limit Papp's ability to claim its costs to a particular point in time.

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2. *Re Complaints filed by Polaris Inflatable Boats (Canada)* (8 March 1999) (CITT) [hereinafter *Polaris*].

3. *Supra*, note 2, Order (23 July 1999).

Papp claimed expenses for five of its employees. However, courts have found that, absent a situation where an in-house counsel or another employee represents 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.<sup>4</sup> The Tribunal is of the view that, while four other Papp employees acted in a supporting role, only one employee, the general manager who signed the correspondence, acted as Papp's representative in this proceeding within the meaning of representative,<sup>5</sup> as defined by the Guidelines. Therefore, the claim for expenses for the additional four employees is rejected. Papp claimed 57.5 hours for the general manager, which, given that he was the general manager of the company, the Tribunal finds to be high but not unreasonable. According to Appendix B to the Guidelines, the allowable hourly rate for an in-house representative with 0 to 5 years experience as a representative is \$85.00. The Tribunal sees no compelling reason to deviate from this amount. Therefore, it allows the in-house representative's fee in the amount of \$4,887.50.

With respect to the claim for costs for legal services rendered, the Tribunal is of the view that these costs are not costs of legal representation before the Tribunal, but are more akin to costs for advisory services, albeit legal in nature. These costs were incurred by Papp in relation to proceeding with the complaint and are allowed. The rates that were applied comply with those specified in Appendix B to the Guidelines. Therefore, the Tribunal allows the full amount of \$3,673.64, which includes the invoice for photocopying in the amount of \$61.98 submitted on March 5, 2002.

With respect to the disbursements claimed by Papp, the Tribunal finds that these costs are reasonable and supported by invoices; therefore, it allows the full amount of \$455.01.

Therefore, the Tribunal awards total costs in the amount of \$9,016.15. The Tribunal will not permit any additional costs to be claimed beyond those already submitted. Therefore, it denies the request to claim costs incurred in relation to the preparation and submission by legal counsel of a response to the comments by PWGSC on the claim for costs.

### **COMPENSATION FOR LOST PROFIT**

Initially, Papp claimed \$39,381.35 for lost profit, based on a bid price of \$393,813.50. PWGSC submitted that this was in error because that bid price included GST, which should not be used to calculate profit. It submitted that the correct figure should be \$36,805.00. Papp accepted this calculation and agreed that the compensation should be the corrected amount.

Therefore, the Tribunal recommends that Papp be compensated for its lost profit in the amount of \$36,805.00.

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4. See, for example, *Energy Absorption Systems v. Y. Boissonneault & Fils* [1991] F.C.J. No. 53 (QL); *Wellcome Foundation v. Apotex*, 52 F.T.R. 241.

5. In the Guidelines, "representative" is defined as "a person who represents a party to a procurement proceeding, but who is not a legal counsel" and "procurement proceeding" means "a Tribunal proceeding in respect of a complaint".

**CONCLUSION**

The Tribunal hereby awards Papp costs in the amount of \$9,016.15 in relation to filing and proceeding with the complaint and directs PWGSC to take appropriate action to ensure prompt payment.

The Tribunal also hereby recommends that PWGSC pay compensation for lost profit to Papp in the amount of \$36,805.00.

Pierre Gosselin  
Pierre Gosselin  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary