



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER

File No. PR-2002-017

Cognos Incorporated

v.

Department of Public Works and
Government Services

*Order issued
Wednesday, July 21, 2004*

IN THE MATTER OF a complaint filed by Cognos Incorporated 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, pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, that Cognos Incorporated be awarded one third of the profit that it would have earned if it had submitted a bid to perform the work at a price of one dollar lower than the estimated cost of the proposed contract.

AND FURTHER TO an award, pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, of Cognos Incorporated's reasonable costs incurred in preparing and proceeding with the complaint.

BETWEEN

COGNOS INCORPORATED

Complainant

AND

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

**Government
Institution**

ORDER AND RECOMMENDATION

INTRODUCTION

In a determination made on November 29, 2002, the Canadian International Trade Tribunal (the Tribunal), pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*,¹ awarded Cognos Incorporated (Cognos) its reasonable costs incurred in 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 Cognos be awarded one third of the profit that it would have earned if it had submitted a bid to perform the work at a price of one dollar lower than the estimated cost of the proposed contract. The Tribunal also recommended that the parties use this as the basis to develop a joint proposal for compensation that recognizes: (a) the seriousness of the deficiency of the procurement process; (b) the degree to which the complainant was prejudiced; and (c) the prejudice caused to the integrity and efficiency of the competitive procurement system.

On December 24, 2002, Cognos submitted to the Tribunal two different claims for costs in the amount of \$25,180.79 and \$14,709.77, respectively, the former having been calculated by applying rates for legal services that exceeded the rates established by the Tribunal's *Procurement Cost Guidelines (Guidelines)*. On December 20, 2002, PWGSC advised the Tribunal that it would be filing an application for judicial review of the Tribunal's determination with the Federal Court of Appeal. On January 22, 2003, the Tribunal advised the parties that it would wait for the decision of the Federal Court of Appeal before proceeding with the claims for cost and compensation. The application for judicial review at the Federal Court of Appeal was dismissed on October 29, 2003.² On November 3, 2003, the Tribunal requested that the Department of

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

2. *Attorney General of Canada v. Cognos Incorporated*, A-720-02 (F.C.A.).

Public Works and Government Services (PWGSC) file its comments on the claims for costs. On November 19, 2003, PWGSC filed comments in respect of Cognos's claims for costs. On November 21, 2003, Cognos responded to those comments.

On November 3, 2003, the Tribunal established December 1, 2003, as the deadline for the parties to submit a joint proposal relating to compensation. On December 1, 2003, the Tribunal was advised that the parties had been unable to reach an agreement with respect to a proposal for compensation to be paid to Cognos. The Tribunal requested that Cognos submit a claim for compensation by January 9, 2004. On January 9, 2004, Cognos submitted its claim for compensation in the amount of \$1,543,492.79, plus an undetermined amount of interest. PWGSC filed comments on Cognos's claim for compensation on February 18, 2004. On March 5, 2004, Cognos provided its final comments in relation to the claim for compensation. On May 7, 2004, the Tribunal requested that Cognos provide additional final comments. After being granted an extension of time, Cognos provided those additional comments on June 3, 2004.

COMPLAINT COSTS

In its first bill of costs, Cognos claimed a total of \$24,326.99 (including GST) in legal fees for 102.3 hours. That amount represents 65.7 hours at \$285.00/hour for the senior counsel, 36.3 hours at \$110.00/hour for the second counsel and 0.3 hours at \$60.00/hour for a legal assistant. Cognos also claimed \$853.80 (including GST) in disbursements relating to legal services.

In its second bill of costs, Cognos claimed \$13,855.97 (including GST) in legal fees for the same 102.3 hours. That amount represents 65.7 hours at \$150.00/hour for the senior counsel, 36.3 hours at \$85.00/hour for the second counsel and 0.3 hours at \$30.00/hour for the legal assistant. Cognos also claimed the same \$853.80 (including GST) in disbursements relating to legal services.

PWGSC submitted that there is no reason to deviate from the hourly rates set out in the Tribunal's *Guidelines*. PWGSC submitted that Cognos is only entitled to the rates set out in the *Guidelines* and that the time claimed by Cognos's counsel should be disallowed or significantly reduced.

With respect to disbursements, PWGSC submitted that the claim was unsupported by invoices, receipts or accounting records and that the *Guidelines* allow a claim of \$0.10 per copy for in-house photocopying and not \$0.25 per copy, as claimed. PWGSC further submitted that there is no justifiable reason for Cognos to claim, or be compensated, at \$0.25 per copy.

Cognos submitted that the hours worked and fees claimed in its first bill of costs are not unreasonable in view of the complexity of the complaint and the prejudice to Cognos and to the integrity of the procurement process. With respect to disbursements for photocopies, Cognos argued that the Tribunal had, in the past, allowed recovery of disbursements for photocopying at the rate of \$0.25 per copy. According to Cognos, the rate of \$0.10 a copy prescribed by the *Guidelines* applies to in-house photocopies. It submitted that photocopies that were done by Cognos's counsel were billed to Cognos as a disbursement and, as such, are not subject to the said \$0.10 per copy. Cognos further submitted that these disbursements are not unreasonable in view of the volume of material that had to be prepared and the scope of effort involved.

The Tribunal is of the view that the total number of hours claimed for legal services, namely, 102.3 hours, is not unreasonable, given the particular circumstances of the case. However, the Tribunal is also of the view that there is no reason to deviate from the hourly rates established in the *Guidelines*. Accordingly, the Tribunal will allow legal fees, plus GST, in the amount of \$13,855.97, representing

65.7 hours at \$150.00/hour for the senior counsel, 36.3 hours at \$85.00/hour for the second counsel and 0.3 hour at \$30.00/hour for the legal assistant.

Regarding the disbursements claimed, the Tribunal finds that, with the exception of the charges for in-house photocopying, all other costs are reasonable and consistent with the *Guidelines*. The claim of \$774.41 for in-house photocopying is reduced to \$309.77 (representing \$0.10 per copy), plus GST; therefore, the total amount allowed for disbursements is \$389.16.

In consideration of the above, the Tribunal hereby allows costs to Cognos in the amount of \$14,245.13 for preparing and proceeding with the complaint and directs PWGSC to take appropriate action to ensure prompt payment.

COMPENSATION FOR LOST OPPORTUNITY

Further to the Tribunal's recommendation of November 29, 2002, Cognos claimed \$1,543,492.79, plus an undetermined amount of interest for compensation.. The total is based on the following:

1. Lost profits on Offender Management System (OMS) renewal (reflecting 1/3 of actual lost profits)	\$[...]
2. Lost profits for two years' annual software maintenance and support services.	\$[...]
3. Additional compensation	\$100,000.00
4. Interest on compensation (April 20 to November 30, 2002)	\$[...]
5. Interest on compensation (November 30, 2004, to date of payment)	To be determined
Total	\$1,543,492.79 (plus 5 above)

Item 1 is based on an estimation of the breakdown of the elements of the contract that included software licences, software maintenance and support for one year, and professional services in the form of Cognos's internal resources and external contracted resources. Each of these elements attracted a certain profit margin and this total profit was multiplied by 1/3 to arrive at the final figure for each item.

PWGSC submitted that the amount claimed for lost profits (item 1 above) was significantly overstated. PWGSC argued that lost profits on goods is not a good proxy for determining lost profits on services. PWGSC submitted that costs would be higher and revenues would be lower than those submitted by Cognos. For instance, the ACAN did not ask for maintenance and support and, yet, Cognos included one year's worth of maintenance and support for its proposed software, for which, according to PWGSC, the Correctional Service of Canada (the CSC) had no need. According to PWGSC, by adding a software component to its proposal, Cognos has artificially and unreasonably increased its alleged lost profits. In addition, PWGSC submitted that the number of users upon which the price of the licence is based increased the total proposed price of its software and, therefore, would have affected the overall profit. With respect to costs, PWGSC submitted that research and development costs should be amortized over the life of a product and this would have the effect of reducing the profit margin. According to PWGSC, Cognos's five-year average net operating income of 15.2 percent would be the most objective estimate of the profits that Cognos could have earned on the OMS contract.

PWGSC submitted that, considering the time that it indicated it would have taken to complete the work, Cognos would have been incapable of performing the proposed migration with the number of resources that it proposed. According to PWGSC, the contract was actually executed on August 16, 2002,

with a contract period ending September 30, 2003, a 58-week duration. PWGSC submitted that Cognos's submission relies on the availability of a certain number of the CSC resources. PWGSC presented the example of the resources used by Core Software Inc. to do the actual project during the 58-week period.

PWGSC submitted that the claim for software maintenance and support services for two additional years should not be accepted since the original procurement did not mention or request any such support. PWGSC argues that the Tribunal's reference in its recommendation to "the work" did not include any maintenance and support. PWGSC submitted that the claim for interest on the compensation should not be granted as it was not requested by Cognos in its complaint, nor was it part of the Tribunal's recommendation. With respect to the punitive damages claimed, PWGSC submitted that nothing in this case warrants the application of damages of this nature and, in its view, PWGSC and the CSC acted in good faith throughout the process.

PWGSC submitted that there was an onus on Cognos to mitigate its damages with respect to this claim and that the Tribunal should reduce the claim by 30 percent to account for any contractual contingencies that would have served to lessen the profits available to Cognos in the normal course of the contract. PWGSC submitted that the compensation to Cognos should be \$174,549.18.

Cognos submitted that, if PWGSC's position were accepted by the Tribunal, it would amount to PWGSC and the CSC being able to buy an improper sole-sourced contract for \$174,549.18. Cognos submits that PWGSC has not produced any evidence to dispute the profit margins quoted in the sworn affidavits provided to the Tribunal. With respect to the claim for profit for additional years of software maintenance and service, Cognos submits that the loss of this profit is reasonably foreseeable and, therefore, can form part of the compensation payable to Cognos. With respect to Cognos's claim for interest, Cognos argues that, according to section 30.15 of the *CITT Act*, the Tribunal may recommend any remedy it considers appropriate and that, if PWGSC and the CSC had not dragged out the resolution of this complaint, the interest would have been less of an issue.

On the issue of additional compensation, Cognos submitted that such additional damages would reflect the grave prejudice suffered by Cognos and the damage caused to the integrity of the procurement process. Cognos presented a number of examples of proceedings whereby punitive or exemplary damages were awarded. With respect to PWGSC and the CSC's claim that Cognos should have attempted to mitigate its damages, Cognos submitted that it made every possible effort to mitigate its damages by attempting to have the procurement open to competition. It also submitted that a contingency had already been applied to the recommendation because Cognos is getting only one third of the profit that it would have made.

The Tribunal will first deal with the claims for software maintenance and support services included in items 1 and 2 of Cognos's claim. The Tribunal accepts that these services should be allowed for one year, given the installation of new software. However, the Tribunal is of the view that the additional two years provided for in item 2 of Cognos's claim should be treated as optional. As such, the Tribunal will not recommend that the additional two years form part of the final amount for compensation.

With respect to the claims for interest on the compensation amount, which are items 4 and 5 of Cognos's claim, the Tribunal's original recommendation was that Cognos "be awarded one third of the profit that it would have earned". Interest was not part of the recommendation nor was it requested as part of the complaint proper. Accordingly, the Tribunal does not recommend the payment of any interest in relation to this claim for compensation.

With respect to the claim for additional compensation, which is item 3 of the claim, the Tribunal sees no conclusive evidence of bad faith on the part of PWGSC or the CSC in this case. The Tribunal is of the opinion that PWGSC's and the CSC's behaviour was a misguided attempt to perform a task that they mistakenly believed had to be done a certain way and were intent on effecting. Although there was no indication of any urgency to do so, PWGSC awarded the contract in the midst of the complaint proceedings. It would have been better served by delaying such action. However, in the Tribunal's view, PWGSC's and

the CSC's actions do not warrant any supplemental award or additional compensation. Moreover, the Tribunal did not recommend such an award.

With respect to the profit margins for certain types of business lines, the Tribunal sees no reason to question the veracity of what has been presented by Cognos in this respect. PWGSC argues that the profit margin should be less but, in the Tribunal's view, it fails to adequately refute the evidence presented by Cognos. The Tribunal, however, is not convinced that Cognos has allowed sufficient resources in its estimate for the work to be completed. In the Tribunal's view, this is the area representing the greatest risk for Cognos. The Tribunal notes the information provided by PWGSC, which indicates that more people would likely be required by Cognos for the migration work. The number of personnel actually employed by the contract awardee, but applied to the shorter time frame proposed by Cognos, would have been double that proposed by Cognos. Although Cognos has significantly more knowledge about its own software and the Cognos-designed system, it remains that Core's process was automated. The Tribunal further notes that Cognos's proposal is based on the use of the CSC personnel as part of the migration team. The Tribunal recognizes that some interfacing would, in the normal course, be necessary between the CSC and Cognos. However, if one considers the possibility that the CSC employees may not all be available to Cognos, its proposed number of resources again may be underestimated. Accordingly, the Tribunal has made an adjustment to the profit claimed in item 1 of Cognos's claim, as it relates to the component for professional services. The Tribunal's adjustment consists of determining the costs for all professional services (i.e. by subtracting the total profit from the total proposed price for professional services) and then increasing those costs by a contingency factor of 50 percent. In the Tribunal's opinion, this represents the significant level of risk associated with the potential need for additional resources to complete the work. The new profit figure for the professional services component of item 1 was then determined by subtracting the new costs from the total proposed price for those professional services.³

In light of the above, the Tribunal recommends that Cognos be awarded compensation in the amount of \$438,853.53, which represents one third of the profit that it would have earned had it submitted a bid to perform the work at a price of one dollar lower than the estimated cost of the proposed contract. This figure does not include any profit for additional years of software maintenance and support services, interest or additional compensation.

CONCLUSION

The Tribunal hereby recommends that PWGSC pay compensation of \$438,853.53 to Cognos.

The Tribunal hereby allows costs in the amount of \$14,245.13 to Cognos for preparing and proceeding with the complaint and directs PWGSC to take appropriate action to ensure prompt payment.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Susanne Grimes
Susanne Grimes
Acting Secretary

3. The calculation details are set out in Appendix A (protected).