



Ottawa, Wednesday, May 21, 2003

File No. PR-2002-036

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

AND FURTHER TO a determination made pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act* awarding Noël Import/Export its reasonable costs incurred in preparing and proceeding with the complaint;

AND FURTHER TO a determination made pursuant to subsection 30.15(2) of the *Canadian International Trade Tribunal Act* recommending that Noël Import/Export be compensated for the profit that it would have reasonably made if it had been awarded a contract for 13 inflatable ice and water rescue craft.

## ORDER AND RECOMMENDATION

### INTRODUCTION

In a determination made on February 6, 2003, the Canadian International Trade Tribunal (the Tribunal) recommended that Noël Import/Export (Noël) be compensated for the profit that it would have reasonably made if it had been awarded a contract for 13 inflatable ice and water rescue craft and awarded Noël its reasonable costs incurred in relation to preparing and proceeding with the complaint.

On March 3, 2003, Noël submitted to the Tribunal its claim for costs in the amount of \$3,708 and a claim for lost profit of \$32,804.<sup>1</sup> The claim for lost profit was comprised of \$14,584 in lost profit for Noël and \$18,220 in lost profit for Oceanid, LLC (Oceanid), the manufacturer of the product and Noël's representative in the complaint proceeding.

Noël claimed that its gross profit per craft was \$1,230 and that, after deducting expenses, the lost profit per craft was \$1,121. Hence, the total lost profit for the 13 craft was \$14,584. Oceanid claimed that its selling price per craft was \$3,108 and that its gross profit per craft was \$1,786. After deducting expenses, the net profit per craft for Oceanid was calculated to be \$1,402. Accordingly, Oceanid calculated its lost profits for the 13 craft to be \$18,220.

Regarding costs, Noël claimed fees for its representative, Oceanid, in the amount of \$1,953 and for another service provider in the amount of \$1,755, for a total of \$3,708. The amount claimed for Oceanid is 21 hours at \$93 per hour. The amount claimed for the other service provider is 15 hours at \$117 per hour.

The Department of Public Works and Government Services (PWGSC) submitted that Noël's claim improperly seeks compensation for both Oceanid and Noël. PWGSC submitted that the complainant in this

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1. Although the claim was submitted in U.S. dollars, all amounts have been converted to Canadian dollars at CAN\$1.48=US\$1.00. The rate used was the Canada—United States exchange rate in effect on March 3, 2003, the date on which Noël filed its claim for costs with the Department of Public Works and Government Services.

matter was Noël and that, on November 14, 2002, the Tribunal advised PWGSC that it had accepted for inquiry a complaint filed by “Oceanid, LLC, on behalf of “Noël Import/Export”. PWGSC further submitted that, in issuing its determination, the Tribunal recommended compensation specifically for “Noël Import/Export” for the profit that it would have made had it won the award for 13 inflatable ice and rescue craft and awarded Noël its reasonable costs incurred in preparing and proceeding with the complaint. Therefore, PWGSC submitted that all claims for compensation for Oceanid should be dismissed, which includes Oceanid’s lost profit and complaint costs. It submitted that the only eligible claim is for lost profit with respect to Noël.

Furthermore, PWGSC argued that the profit calculation submitted in the claim for costs is excessive, having regard to the proposed contract value, and is defective since it does not account for a number of standard business costs such as overhead, handling, shipping and brokerage, costs to cover the warranty, contingency costs and the costs of after-sales service.

In response to PWGSC’s comments, Noël submitted that Oceanid has been distributing rapid deployment craft (RDC) to Canadian customers for several years (both directly and through its representatives). According to Noël, in transactions involving more than one or two units, Oceanid’s representatives make the representations and demonstrations and work directly with the purchasing organizations to complete the shipments and financial arrangements. Noël submitted that none of Oceanid’s representatives stock any Oceanid inventory, and Oceanid covers the costs of all the marketing materials and advertising efforts and pays all the exhibitors’ fees for the trade shows that it attends.

Noël submitted that the precedent for this business model was firmly established when Oceanid delivered 26 RDC that were distributed to various fire departments along the Rideau Canal, in Ontario. Although Oceanid’s representative was instrumental in working with the fire departments and obtaining a grant, the shipping and financial arrangements were directly between Oceanid and the grant committee (sponsored by the Parks Canada Agency). Oceanid’s representative received the commission after the RDC were shipped and the financial matters completed. Noël further submitted that, as Oceanid’s representative, it has not invested any of its own funds for inventory, advertising and marketing or defending intellectual property. According to Noël, the cash flow and lost profit calculations are appropriate, accurate and are not excessive, exceptional or unusual when considering that marketing to a very thin, widespread market is a very expensive endeavour. Noël also submitted that it is neither the position nor the privilege of PWGSC to determine the methods or substance of Oceanid’s business model.

## **COMPLAINT COSTS**

The Tribunal finds that the hourly rates submitted for both Oceanid, as Noël’s representative, and the other service provider are within the limits imposed in Appendix B of its *Procurement Cost Guidelines*. It does not find the hours claimed to be unreasonable, given the circumstances of this complaint, and it will allow the total amount of \$3,708.

## **COMPENSATION FOR LOST PROFIT**

With respect to the claim for lost profit, the Tribunal agrees with PWGSC that, although Oceanid represented Noël throughout the process, it was Noël that was the complainant and for which the Tribunal recommended compensation for lost profit. Accordingly, it will award lost profit to Noël only. With respect to PWGSC’s claim that the lost profit per craft is excessive, the Tribunal notes that these comments applied mostly to the calculation for Oceanid’s lost profit. Furthermore, PWGSC did not provide evidence that convinced the Tribunal that Noël’s profit was excessive. The Tribunal does not consider that Noël’s claim

for lost profit is unreasonable and, accordingly, recommends that PWGSC compensate Noël for the full amount that it claimed for lost profit, that is, \$14,584.

## CONCLUSION

In consideration of the above, the Tribunal hereby awards Noël \$3,708 in costs for preparing and proceeding with the complaint and directs PWGSC to take appropriate action to ensure prompt payment. The Tribunal recommends that PWGSC compensate Noël \$14,584 for the profit that it would have reasonably made if it had been awarded a contract for 13 inflatable ice and water rescue craft.

Ellen Fry  
Ellen Fry  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary