



Ottawa, Tuesday, December 17, 2002

File No. PR-2002-002

IN THE MATTER OF a complaint filed by Tendering Publications Limited 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* to award Tendering Publications Limited its reasonable costs incurred in preparing and proceeding with the complaint.

ORDER

In a determination made on July 8, 2002, pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*,¹ the Canadian International Trade Tribunal (the Tribunal) awarded Tendering Publications Limited o/a BIDS (BIDS) its reasonable costs incurred in relation to preparing and proceeding with the complaint.

On August 9, 2002, BIDS submitted to the Tribunal its claim for costs in the amount of \$17,540.72. The Department of Public Works and Government Services (PWGSC) filed comments on BIDS' claim on September 3, 2002. BIDS responded to those comments on September 13, 2002.

BIDS claimed a total of \$5,361.26 (including GST) in legal fees for 48.5 hours, which represents 22.2 hours at \$125.00/hour for counsel with 12 years' experience and 26.3 hours at \$85.00/hour for counsel with 1 year's experience. BIDS also claimed \$331.21 in disbursements relating to legal services.

BIDS claimed \$11,848.25 for in-house costs incurred in relation to preparing and proceeding with the complaint. That amount includes representatives' fees incurred for the work of two of its employees, 79.89 hours by one employee at \$125.00/hour and 16.92 hours for the other employee at \$100.00/hour, for a total of \$11,678.25 for in-house representation. Disbursements that related to in-house representation were claimed in the amount of \$170.00.

PWGSC submitted that the claim is excessive in regard to the hourly rates claimed and the duplication of tasks of the service providers. With respect to representative's fees, PWGSC submitted that, consistent with the *Procurement Cost Guidelines* (the Guidelines) and past decisions of the Tribunal, fees claimed on behalf of BIDS' officials after May 17, 2002, should be denied, since BIDS was represented by legal counsel from that date on. PWGSC also submitted that the time claimed in relation to both legal fees and representative's fees is excessive and that, consistent with the Guidelines, only the fees for the time of one employee are eligible for reimbursement.

With respect to disbursements, PWGSC submitted that the claim for disbursements relating to legal services includes a charge of \$0.30/page for in-house photocopying and that the Guidelines only allow \$0.10/page. PWGSC submitted that the per-page charges for facsimile transmission are excessive. PWGSC submitted that the charges for both file opening and secretarial overtime are more properly part of the law

1. R.S.C. 1985 (4th Supp.), c. 47.

firm's overhead and not disbursements. Finally, PWGSC submitted that disbursements incurred by BIDS' employees acting as representatives should not be granted.

In its comments filed on September 13, 2002, BIDS submitted that the time claimed in regard to work performed by its employees relates to time spent on work outside their normal duties as employees and that the claim should be allowed, even for the work performed after May 17, 2002. BIDS also submitted that there was no duplication of work and that the hours worked and the rates claimed are reasonable, given the particular circumstances of this case and the experience of the individuals involved. BIDS submitted that, with respect to disbursements relating to legal services, these costs are properly documented and represent costs actually incurred by BIDS. With respect to its own disbursements, BIDS agrees that in-house photocopying should be charged at a rate of \$0.10/page. Finally, BIDS requests its reasonable costs incurred in responding to PWGSC's comments on its claim for costs.

The Tribunal is of the view that the total number of hours claimed for legal services, namely 48.5 hours, is not unreasonable given the particular circumstances of the case. Therefore, the Tribunal will allow legal fees plus GST as claimed, in the amount of \$5,361.26.

Absent a situation where 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 employee in connection with the proceedings.² Similarly, the Tribunal has not generally awarded a litigant its disbursement costs incurred in relation to an employee's participation in proceedings unless the costs were associated with an employee's attendance and/or appearance as a witness at a hearing in the proceedings.³ With respect to representative's fees, the Tribunal notes that, on May 17, 2002, BIDS retained independent counsel to act on its behalf in proceeding with the complaint and that, in the Tribunal's opinion, BIDS' personnel who participated in the proceedings after that date were acting in their capacity as employees, not as legal counsel or representatives. The Tribunal is also of the view that the time spent by the representatives, which was attributed to events prior to the preparation of the complaint, is outside the award contemplated in its determination. According to paragraph 5.2.3 of the Guidelines, "[c]osts will not generally be recoverable in respect of employees, officers or directors of a claimant . . . [h]owever, where one of a claimant's employees, officers or directors acts as the claimant's counsel or representative, the claimant may recover its costs". The Tribunal is of the view that this situation occurred between the drafting of the complaint and May 17, 2002, and that BIDS should be entitled to claim costs for the work of one employee who acted as BIDS' representative⁴ during that time period. 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 rate. Accordingly, the Tribunal allows 25.17 hours in representative's fees for one BIDS employee at a rate of \$85.00/hour. This amounts to \$2,139.45.

Regarding the disbursements relating to legal services, the Tribunal finds that the charges for file opening and secretarial overtime are not properly disbursements, but are more akin to overhead. As such,

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2. See, for example, *Energy Absorption Systems Inc. v. Y. Boissonneault & Fils Inc.*, [1991] F.C.J. No. 53; *Wellcome Foundation Ltd. v. Apotex Inc.* (1992), 52 F.T.R. 241.
 3. See, for example, *Aerlinte Eireann Teoranta v. Canada*, [1993] F.C.J. No. 1462; *Bayliner Marine Corp. v. Doral Boats Ltd.* (1987), 15 C.P.R. (3d) 201.
 4. 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".

the claim is reduced by the amounts charged. The claim of \$71.90 for in-house photocopying is reduced to \$23.97 (representing \$0.10/copy plus GST) and, therefore, the total amount allowed is \$165.58.

With respect to disbursements claimed directly by BIDS, the Tribunal allows only the disbursements for the period from April 9, 2002 (the date on which the complaint was filed), and May 17, 2002 (the date on which BIDS retained legal counsel). Between these dates, there is a claim for a luncheon that is not allowed, as the claim does not appear consistent with the Guidelines. Paragraph 5.5.5 of the Guidelines permits a claim for meals only in connection with meetings that take place at a distance greater than 50 kilometres from the regular place of work, and the rate must be consistent with Appendix B to the Guidelines. Therefore, the Tribunal allows disbursements in the amount of \$57.70, which includes \$21.70 for in-house photocopying, \$10.50 for mileage and \$25.50 for long distance calls and facsimiles.

The Tribunal will not permit any costs to be claimed beyond those already submitted. Therefore, it denies the request made by BIDS to claim costs incurred in relation to the preparation and submission of BIDS' response to PWGSC's comments on the claim for costs.

In consideration of the above, the Tribunal hereby awards BIDS costs in the amount of \$7,723.99 for preparing and proceeding with the complaint and directs PWGSC to take appropriate action to ensure prompt payment.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary