Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

Canadian International Trade Tribunal

Procurement

Order

File No. PR-2003-005R

Ready John Inc.

v.

Department of Public Works and Government Services

Order issued
Tuesday, August 23, 2005

Canada

IN THE MATTER OF a complaint filed by Ready John Inc. 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 made pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act* that Ready John Inc. be compensated for the profit that it would reasonably have made, had it been issued the standing offer;

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

BETWEEN

READY JOHN INC. **Complainant**

AND

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

ORDER AND RECOMMENDATION

INTRODUCTION

In a determination made on July 20, 2004, the Canadian International Trade Tribunal (the Tribunal), pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*,[1] awarded Ready John Inc. (Ready John) its reasonable costs incurred in preparing and proceeding with the complaint. Pursuant to subsections 30.15(2) and (3), the Tribunal recommended, as a remedy, that Ready John be compensated for the profit that it would reasonably have made, had it been issued the standing offer. The Tribunal's *Procurement Cost Guidelines* (November 1999) and *Procurement Compensation Guidelines—Revised* (June 2001) (*Compensation Guidelines*) apply to Ready John's claim for costs and compensation.

On June 1, 2005, Ready John submitted to the Tribunal its claim for costs in the amount of $14,139.90 (HST included) and its claim for compensation in the amount of $252,348.74. On June 30, 2005, the Department of Public Works and Government Services (PWGSC) filed comments on Ready John's claims. On July 11, 2005, Ready John provided its final comments.

COMPLAINT COSTS

Ready John claimed a total of $13,938.00 (HST included) in legal fees. That amount represents 28 hours at $200.00/hour for the senior counsel, 64 hours at $85.00/hour for the second counsel and 18 hours at $60.00/hour for the third counsel. Ready John also claimed $201.90 (HST included) in disbursements.

PWGSC submitted that a significant portion of the total amount claimed in legal fees is ascribed to issues relating to the cost claim. It submitted that, with respect to the submission for the senior counsel, an

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

amount of $3,450 is included to "[r]eceive and review various correspondence from CITT with respect to Submission on Lost Profit Calculation, review of financial statements and research concerning determination and calculation of lost profit; Prepare Submission on Lost Profit Calculation". It also submitted that, with respect to the submission for the second counsel, an amount of $6,256 is attributed to aspects relating to cost award issues. PWGSC referred to the Tribunal's decisions regarding cost orders in *Les Entreprises P. Cormier*[2] and *Hewlett-Packard*[3] in support of its position that these costs are not costs relating to the complaint proceedings and should not be allowed.

In response to PWGSC's submission, Ready John submitted that the jurisprudence supports its position that the Tribunal's award of "costs incurred in preparing and proceeding with the complaint" includes costs that are incurred between the drafting of the complaint and the filing of the claim for costs. In support of its position, it referred to the cost order in *Papp Plastics and Distributing Ltd.*[4]

The Tribunal has not been persuaded that the nature and circumstances of this proceeding are akin to those that gave rise to the cost award in *Papp Plastics and Distributing Ltd.* Rather, the Tribunal is of the opinion that, consistent with its rulings in *Les Entreprises P. Cormier* and *Hewlett-Packard*, the costs claimed by Ready John with respect to the preparation of its claim for costs and for compensation are costs that relate to actions other than those incurred in preparing and proceeding with the complaint and, therefore, disallows those costs.

The Tribunal therefore allows the following costs for legal fees: 13 hours at $200.00/hour for the senior counsel, 1 hour at $85.00/hour for the second counsel and 16 hours at $60.00/hour for the third counsel, for a total of $4,191.75 (HST included).

With respect to Ready John's claim for disbursements, the Tribunal notes that the dates on three of the eight courier receipts are beyond the date of the Tribunal's determination of July 14, 2003, and its determination on remand of July 20, 2004. The Tribunal is of the opinion that these courier receipts do not pertain to disbursements made in the course of preparing and proceeding with the complaint. Therefore, the Tribunal disallows the claims for the courier receipts dated October 5, 2004, in the amount of $16.96, October 6, 2004, in the amount of $12.12 and December 1, 2004, in the amount of $12.18. The Tribunal therefore allows total disbursements in the amount of $168.46 (HST included).

COMPENSATION FOR LOST OPPORTUNITY

Ready John submitted that the loss of contribution to its profit during the term of the standing offer, had it been issued to Ready John, should be calculated based upon its lost revenue less the incremental costs that the company would have incurred to service the standing offer during its term plus additional costs that it incurred as a result of not having been issued the standing offer. Ready John submitted that this is the only meaningful manner by which to assess the lost profit, as the term of the standing offer overlaps fiscal years.

Ready John submitted that the standing offer was issued to the successful offeror for the period of April 1, 2003, to March 31, 2005, subject to a contract value of $300,000 exclusive of applicable taxes, and was to be re-tendered when the contract value reached 80 percent of the contract value exclusive of taxes. Ready John further submitted that the tender for a new standing offer valued at $460,000 (the 2004 standing

2. *Re Complaint Filed by Les Entreprises P. Cormier* (13 June 2003), PR-2002-038 (CITT).
3. *Re Complaint Filed by Hewlett-Packard (Canada) Ltd.* (31 March 2003), PR-2001-040R (CITT).
4. *Re Compliant Filed by Papp Plastics & Distributing Limited* (22 October 2002), PR-2001-066 (CITT).

offer) was issued in April 2004 with a closing date of August 4, 2004, and that the term of the 2004 standing offer was to have been from the date of issuance of the standing offer until March 31, 2007.

Ready John submitted that it was awarded the 2004 standing offer effective September 15, 2004, and that, accordingly, the period for which the lost profit should be calculated should be from the effective date of the initial standing offer (April 1, 2003) until September 15, 2004, i.e. 16 1/2 months or approximately 76 weeks (532 days). Ready John submitted that it used the actual value of the standing offer ($296,413) as the lost gross revenues exclusive of taxes. It submitted that there should be no reduction of the amount claimed for profits for any unknown contractual contingencies.

Ready John. submitted its claim for compensation based on the following calculation:

Actual Gross Revenue Exclusive of Applicable Taxes (April 1, 2003, to September 15, 2004)	$296,413.00
Deduct Incremental Costs	
Labour	$27,840.00
Supplies and Cleaning	$2,835.00
Fuel	$21,280.00
Repairs/Maintenance	$6,600.00
Aggregate Incremental Costs	$58,555.00
Contribution to Profit Before Additional Costs	$237,858.00
Add Additional Costs	
Costs of Removing Units From the Gagetown Site	$5,400.00
Increased Interest Cost From Loss of Contribution	$9,090.74
Estimated Lost Profit	$252,348.74

PWGSC submitted that Ready John is claiming a projected profit margin of 80 percent and, when additional costs are included, the claimed profit margin is 85 percent. It further submitted that this profit margin cannot be considered “reasonable” in accordance with the Tribunal’s recommendations and that the claim is based on a fundamentally flawed methodology and is inconsistent with the financial performance of Ready John, as set out in the financial statements provided with the claim.

PWGSC submitted that the service provided by Ready John is neither unique nor specialized and that the industry in which it operates is a competitive one, as evidenced by the history of the competitions referenced in the complaint process. It contended that, taken at its simplest and most fundamental, profit is usually understood to represent the margin between accrued revenues and costs incurred in the earning of those revenues. It submitted that Ready John has proposed a profit margin for the standing offer at issue that is based on deducting only a limited number of the costs that it claims it would have incurred in the course of earning the revenues from the standing offer and that, in particular, the type of costs identified by Ready John in the calculation of its claimed profit margin are limited to cost categories directly attributable to the project itself and do not include normal business overhead costs.

PWGSC submitted that the costs identified by Ready John are limited to certain costs for “labour”, “supplies and cleaning”, “fuel” and “repairs and maintenance”. It argued that a normal profit calculation should include, at least, allowances for the project’s share of the company’s general and administration costs, shop costs, financing costs and depreciation of assets. It submitted that general and administrative costs would include, for example, costs for the administration of payroll, accounts receivable, accounts payable, human resources and management. It also submitted that falling within this category would be the company’s facility costs for utilities, rents and mortgages relating to the company’s staff and that all these costs are necessarily incurred by a company in the course of its day-to-day operations. It submitted that shop costs are included in the direct support of equipment used on the project and that amortization on the equipment that would have been used on the contracts must also be included. In addition, it submitted that financing costs include the financing and interest costs incurred by the company in its day-to-day operations, including meeting payroll and renting equipment.

PWGSC submitted that the additional costs cited by Ready John with respect to “costs of removing units from the CFB Gagetown site” and “increased interest cost from loss of contribution” constitute costs of doing business and do not fall within the lost profit calculation, as specified by the Tribunal.

With respect to a reasonable profit margin, PWGSC submitted that, for the subject standing offer work, a reasonable profit margin would be 10 percent of the total revenues generated by the standing offer, or $29,641.30. It contended that the services proposed by Ready John were offered in the context of a mature, competitive industry and that a profit margin of 10 percent built into a supplier’s bid proposal would provide a reasonable return for a supplier, while still permitting a competitive bid. It submitted that a profit margin of 10 percent would also be consistent with the evidence of Ready John’s actual company-wide profitability rates during the five-year period leading up to the period at issue.

In its reply, Ready John submitted that, with respect to PWGSC’s submission on its methodology of calculating its lost profit, it refers to the external accountant’s affidavit attached to its submission which confirms that its methods and estimates accurately reflect a fair and reasonable estimate of the profit which it would reasonably have made, had it been awarded the standing offer.

Ready John submitted that, regarding PWGSC’s position that a portion of its general and overhead costs should be deducted from the estimate of its lost profit, the types of costs alluded to by PWGSC are fixed costs that it incurs in any event and are costs which would not have changed, had it been issued the standing offer. It further submitted that the portable toilets required to service the standing offer at issue had been previously purchased to service another requirement and were in its inventory at the time of the award of the standing offer. Accordingly, it submitted that it would not have incurred additional costs to acquire the toilets, had it been awarded the standing offer and that, similarly, because it was providing its services to other customers at the time of the award of the standing offer, it had the infrastructure in place and was incurring the type of overhead and general costs referenced in PWGSC’s submission. It argued that, as a result, the only additional costs that it would have incurred, had it been awarded the standing offer, are those originally identified in its cost submission, for example, transportation and fuel costs in travelling to the site, maintenance and servicing of the toilets, and labour costs.

Regarding the unit removal costs, Ready John submitted that these are direct, foreseeable costs which were incurred as a result of not having been awarded the standing offer and that it is of the view that it should be compensated for these costs.

With respect to PWGSC’s submission on Ready John’s profit margin, Ready John submitted that a reasonable estimate of its lost profit as a result of not having been awarded the standing offer should not be based, or grounded in, its overall profit margin and that it has demonstrated that the contributions to its profits from both the standing offer at issue and previous standing offers were significant.

In determining the amount of lost profit, it is important to remember the purpose of compensation for damages, which is summarized in the *Compensation Guidelines* as follows:

> **3.1.2** In determining the amount of compensation to recommend, the Tribunal will attempt, insofar as is appropriate in the circumstances and bearing in mind any other relief that it recommended, to

place the complainant in the position in which it would have been, but for the government's breach or breaches.

The Tribunal will first deal with the methodology used to calculate the lost profit. After examining Ready John's statement of earnings for the period ending January 31, 2005,[5] in particular, the statement pertaining to Base Gagetown, and the incremental costs included in Ready John's submission, the Tribunal is of the opinion that additional costs should be included for the purposes of calculating lost profit. These costs are vehicle and equipment depreciation costs, and sundry operating and communications costs. The Tribunal is of the opinion that the other costs, such as general and administrative costs, as referenced by PWGSC, are costs that Ready John would have incurred regardless of whether it had been awarded the standing offer. In determining a reasonable amount for the applicable costs, the Tribunal used expense-to-revenue ratios derived from the Base Gagetown statement and applied them to the value of the standing offer to arrive at the final figures.

With respect to the cost of removing units from the Base Gagetown site, the Tribunal is of the opinion that this is a cost of doing business and that it is reasonable to expect that this cost would have been included in Ready John's submission for the previous standing offer to cover such costs in the event that the standing offer was not renewed. Therefore, the Tribunal disallows this cost.

Regarding the increased interest cost from loss of contribution, the Tribunal has examined the financial statements submitted by Ready John, covering the period of the standing offer, and is of the opinion that Ready John did in fact incur an increase in interest cost from the loss of contribution of the standing offer to its revenue base. In determining a reasonable amount for this cost, the Tribunal calculated the additional interest cost incurred for the affected period by using, as a base point, the interest and service charges expense reported for the period immediately preceding the period of the standing offer. The amount relating to this base point was then subtracted from the interest and service charges reported for the period covering the standing offer in order to arrive at the additional interest cost figure.

In light of the foregoing, the Tribunal finds that the following calculation of lost profit[6] is reasonable:

Revenue	
Contract Value	$296,413
Expenses	
Labour (wages and benefits)	$79,608
Supplies and Cleaning (chemicals and paper)	$5,998
Fuel	$26,423
Repairs and Maintenance	$9,223
Vehicle and Equipment Depreciation	$17,430
Sundry Operating and Communications	$4,898
Estimated Profit (before additional cost)	$152,925
Increased Interest Cost	$4,067
Estimated Lost Profit	$156,992

5. Ready John's confidential version of its submission with respect to damages.
6. The calculation details are set out in Appendix A (protected).

CONCLUSION

The Tribunal hereby awards Ready John costs in the amount of $4,360.21 in relation to preparing and proceeding with the complaint and directs PWGSC to take appropriate action to ensure prompt payment.

The Tribunal hereby recommends that PWGSC pay compensation for lost profit to Ready John in the amount of $156,992.

Meriel V. M. Bradford
Meriel V. M. Bradford
Presiding Member

Susanne Grimes
Susanne Grimes
Acting Secretary

PUBLIC

APPENDIX A

Costs*	Cost From the Statement of Earnings (Base Gagetown) for the Period Ending Jan. 31, 2005 $	Revenue From the Statement of Earnings (Base Gagetown) for the Period Ending Jan. 31, 2005 $	Applicable Percentage (column B/ column C) $	Contract Value $	Cost Estimate (column E x column D) $
Wages and Benefits					
Chemicals					
Paper					
Fuel					
Repairs and Maintenance					
Vehicle and Equipment Depreciation					
Sundry Operating					
Communications					

	Cost From the Statement of Loss and Deficit for the Year Ended Jan. 31, 2004 (2003 fiscal year column)	Cost From the Statement of Loss and Deficit for the Year Ended Jan. 31, 2004 (2004 fiscal year column)	Cost From the Statement of Earnings for the Period Ending Jan. 31, 2005	Increased Interest Cost for the Year Ended Jan. 31, 2004 (column C - column B)	Increased Interest Cost for the Period Ending Jan. 31, 2005 (column D - column B)	Total Increased Interest Cost (column E + column F)
Interest Cost From Ready John Statements						

*The terms used are those that appear in the relevant documents.