



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER

File No. PR-2002-060R

Polaris Inflatable Boats (Canada)
Ltd.

v.

Department of Public Works and
Government Services

*Order issued
Monday, July 26, 2004*

IN THE MATTER OF a complaint filed by Polaris Inflatable Boats (Canada) Ltd. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision of the Federal Court of Appeal, which set aside the Canadian International Trade Tribunal's determination that refused costs to the Crown in File No. PR-2002-060 made on June 23, 2003, and remitted the matter to the Canadian International Trade Tribunal with the direction to award the Crown its reasonable costs.

BETWEEN

POLARIS INFLATABLE BOATS (CANADA) LTD.

Complainant

AND

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

**Government
Institution**

ORDER

On May 11, 2004, the Department of Public Works and Government Services (PWGSC) submitted to the Canadian International Trade Tribunal (the Tribunal) its claim for costs in the amount of \$14,219.19. That amount represents legal fees for 88.3 hours of work at the hourly rate of \$150, plus GST, and disbursements in the amount of \$47.04, including appropriate taxes. On May 31, 2004, Polaris Inflatable Boats (Canada) Ltd. (Polaris) filed comments on PWGSC's claim. On June 9, 2004, PWGSC provided its final comments to the Tribunal.

Polaris submitted that the time and costs claimed by PWGSC are excessive. It submitted that PWGSC has historically objected to Polaris's claims for costs, despite the fact that previous complaints were generally more complex and that the orders for all awarded costs in favour of Polaris have averaged approximately 27 hours per file. Polaris cited several cost orders as examples in its submission.¹ Polaris argued that, since its current complaint was in part rejected due to time limitations on filing, PWGSC's task was therefore reduced, simplified and limited to a single aspect of Polaris's complaint. It submitted that PWGSC's claim of 88.3 hours is therefore excessive and irrational when compared to similar claims to which it referred in its submission. It submitted that, considering the experience in dealing with complaints before the Tribunal, it is a reasonable presumption that external counsel should be able to deal with the complaint in a more expeditious manner and should be more efficient in processing the complaint. It noted that legal counsel for PWGSC did not delegate any of the work involved to less senior legal assistants or junior representatives.

Polaris submitted that, at the outset of PWGSC's appeal proceeding, Polaris's solicitors requested to be informed of the costs, as sought by PWGSC. The amount sought by PWGSC in February 2004 was \$5,000. It submitted that the amount currently claimed by PWGSC is almost three times the amount originally sought. Polaris argued that, as a smaller Canadian manufacturer and supplier, it is now facing a

1. *Re Cost Order in Polaris Inflatable Boats (Canada) Ltd.* (4 December 2001), PR-2000-044 and PR-2000-049 to PR-2000-053 (15 January 2003), PR-2002-003 (CITT).

large bureaucracy that will engage and unleash the full might of the Department of Justice and legal processes when an unfavourable ruling is passed on an accepted complaint against it. Polaris submitted that this practice, as adopted by PWGSC, is not constructive, as it further deters potential suppliers from challenging PWGSC or filing a complaint if needed.

PWGSC submitted that the time incurred in defending against a particular complaint must be understood in the context of the complaint. It submitted that Polaris chose to challenge numerous scores awarded during the technical evaluation and that the government incurred considerable time in defending the individual scores. PWGSC submitted that, in awarding costs in *MIL Systems*,² the Tribunal compensated the complainant for 643.0 hours, noting that “although high, [the time is] carefully accounted for in detail and reasonable in the circumstances.” PWGSC submitted that the 88.3 hours that it claimed was “carefully accounted for in detail and reasonable in the circumstances”.

Regarding the Crown’s offer to settle, PWGSC submitted that it is important to note that the offer was provided to Polaris on a “without prejudice” basis and that the letter of February 10, 2004, and the offer to settle should not be before the Tribunal. PWGSC contended that Polaris rejected a very reasonable offer to settle and that, as a result, the Crown incurred significant costs that will not be compensated.

With respect to Polaris’s submission on PWGSC’s offer to settle, the Tribunal is of the view that the actions taken by PWGSC in its attempt to negotiate a settlement are outside the scope of this claim for costs. Therefore, the Tribunal does not need to review any submission in this regard.

Regarding Polaris’s submission that the costs claimed by PWGSC are excessive, the Tribunal is of the opinion that the time spent by PWGSC on this complaint is carefully accounted for in detail and is reasonable in this case. The Tribunal therefore allows the costs incurred relating to the number of hours worked.

Regarding the hourly rate charged by PWGSC’s external legal counsel, the Tribunal notes that, in recent cost orders,³ PWGSC claimed an hourly rate of \$125 for external counsel with 12 years’ experience. The same person is counsel on this file; however, the claim on this file is for an hourly rate of \$150. While it may well be that counsel now has 13 years’ experience, and thus would move to the next range of 13 – 20 years’ experience, the Tribunal is of the opinion that an appropriate hourly rate is still \$125, which is the beginning rate, rather than the higher-end hourly rate of \$150, which would normally be accorded to counsel with closer to 20 years’ experience.

The Tribunal therefore allows PWGSC its legal fees in the amount of \$11,037.50, which represents 88.3 hours at \$125.00/hour, and disbursements in the amount of \$43.97.

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2. *Re Cost Order in MIL Systems (a Division of Davie Industries Inc.) and Fleetway Inc.* (1 March 2001), PR-99-034, (CITT).
 3. *Re Cost Order in Montage-DMC e-Business Services, A Division of AT&T Canada* (4 March 2004), PR-2003-013 (CITT); *Re Cost Order in Lemmex Group Inc.* (30 January 2004), PR-2003-030 (CITT).

The Tribunal hereby allows PWGSC costs in the amount of \$11,081.47, excluding GST,⁴ for responding to the complaint and directs Polaris to take appropriate action to ensure prompt payment.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member

Susanne Grimes
Susanne Grimes
Acting Secretary

4. GST is not included, since all GST collected will eventually be remitted to the government.