



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## ORDER

File No. PR-2002-069R

EDS Canada Ltd.

v.

Department of Public Works and  
Government Services

*Order issued  
Thursday, August 5, 2004*

IN THE MATTER OF a complaint filed by EDS 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 decision of the Canadian International Trade Tribunal refusing costs to the Crown in File No. PR-2002-069 made on July 30, 2003, and remitted the matter to the Canadian International Trade Tribunal with the direction to award the Crown its reasonable costs.

**BETWEEN**

**EDS 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 \$21,381.81. That amount represents legal fees for 127.7 hours of work at \$150.00/hour, plus appropriate taxes, and disbursements in the amount of \$885.96, including appropriate taxes. EDS Canada Ltd. (EDS) filed comments on PWGSC's claim on May 21, 2004. On May 31, 2004, PWGSC provided its final comments to the Tribunal.

EDS submitted that, in November 2003, the Tribunal issued a draft cost guideline to update the 1999 *Procurement Cost Guidelines* (the 1999 guidelines) and that the new guideline has now been finalized. EDS submitted that, although the new guideline applies to awards of costs in procurement complaint proceedings initiated by complaints filed after January 31, 2004, such a restriction cannot be considered binding on the Tribunal. EDS submitted that, in light of the new guideline, it would be an unreasonable exercise of discretion by the Tribunal to award the costs requested by PWGSC.

In the alternative, EDS submitted that the claim for costs submitted by PWGSC is excessive. EDS submitted that counsel for PWGSC was called to the bar in 1991 and that the 1999 guidelines made it clear that counsel's articling year was not to be considered a "complete year of practicing" and that, accordingly, the hourly rate claimed should only be \$125. EDS also submitted that PWGSC has claimed time incurred in relation to the various motions before the Tribunal and that it was made very clear in the Tribunal's letter dated May 27, 2003, that "[t]he Tribunal will not award costs incurred in the filing of these motions to any party as the costs of each motion are off-set by the costs of the other motions brought forward on this case."

EDS disputed the inclusion of what it submitted were various non-essential and therefore unreasonable costs claimed by PWGSC. In particular, it submitted that PWGSC is not entitled to any costs incurred with respect to any consideration by PWGSC of a potential settlement with EDS and all counsel fees relating thereto, including deliberations and representation to EDS. It also submitted that PWGSC is not entitled to any of the costs incurred for counsel for PWGSC to forward soft copies of the Government Institution Report (GIR) to counsel and the interveners, since the Tribunal's process provides for all affected parties to receive all relevant materials. EDS submitted that PWGSC is not entitled to any of the costs

incurred on July 2, 2003, since the proceedings had closed and the Tribunal had not yet issued a decision on the matter, and EDS contended that there was no relevant work to be done.

EDS submitted that the time claimed in association with the review of the complaint and the drafting of the GIR is excessive and unreasonable. It submitted that, between April 2 and 4, 2003, counsel for PWGSC spent 20.2 hours reviewing and discussing the complaint with its client and that this time is entirely separate from the time claimed for the drafting of the GIR. It also submitted that, between April 7 and 22, 2003, counsel for PWGSC spent 77.7 hours drafting the GIR, which is only 38 pages, double-spaced. EDS argued that 97.9 hours to review the complaint and draft the GIR is clearly excessive when viewed in relation to previous awards of costs to the Crown. It contended that, to date, the average number of hours that was deemed reasonable by the Tribunal in awards of costs concerning entire complaints on behalf of the Crown is approximately 63.0 hours.

EDS submitted that all the time that can be clearly attributed to the re-evaluation of the “Miscellaneous In-Service Support” should be deleted, since PWGSC took the position that the errors that it made in evaluating that stream were unrelated to the complaint. EDS argued that it should not bear the costs associated with re-evaluating the proposals in that stream. It submitted that, while there is no detailed breakdown of the time spent during the drafting of the GIR, it is reasonable to assume that at least a third of that time related to such discussions, given that there were three streams at issue in the complaint.

Finally, EDS argued that, pursuant to the Tribunal’s cost award in *Montage-DMC eBusiness Services*,<sup>1</sup> GST should not be included in fees and disbursements claimed by PWGSC, since all GST collected will eventually be remitted to the government.

In response to EDS’s comments, PWGSC submitted that, with regard to the use of the Tribunal’s new guideline, the Tribunal expressly rejected its use when awarding costs in *Goodfellow Cleaners*.<sup>2</sup> PWGSC argued that the new guideline was not in effect when EDS filed its complaint and that its costs are properly calculated using the 1999 guidelines.

With respect to its claim for costs incurred in responding to the motions in this case, PWGSC submitted that it did not file the motions and, therefore, did not incur costs “in the filing of these motions”. It contended that, in its decision to “not award costs incurred in the filing of these motions”, the Tribunal was not denying PWGSC its costs, rather, it was denying EDS and ADGA Group Consultants Inc. their costs. PWGSC argued that its “reasonable costs” include those costs incurred in responding to the motions in this case.

Regarding PWGSC’s costs incurred in attempting to settle a portion of the complaint, PWGSC submitted that, in its decision, the Tribunal had stated the following: “[G]iven that PWGSC has stated that it is assembling a new team to re-evaluate all proposals in Stream 4, the Tribunal will not further consider this ground of complaint.”<sup>3</sup> PWGSC submitted that it would not have incurred time on the ground of the complaint relating to Stream 4 but for EDS’s unreasonable refusal to withdraw the issue.

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1. *Re Complaint Filed by Montage-DMC eBusiness Services, A Division of AT&T Canada* (4 March 2004), PR-2003-013 (CITT) [*Montage-DMC*].
  2. *Re Complaint Filed by Goodfellow Cleaners* (2 March 2004), PR-2003-039 (CITT).
  3. *Re Complaint Filed by EDS Canada Ltd.* (30 July 2003), PR-2002-069 (CITT) at 10.

With respect to the number of hours incurred in responding to the complaint, PWGSC submitted that the time incurred must be understood in the context of the complaint. It submitted that EDS chose to challenge numerous scores that it had been awarded and that PWGSC spent considerable time in defending the individual scores. PWGSC submitted that, in awarding costs in *MIL Systems*,<sup>4</sup> 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.”<sup>5</sup> PWGSC submitted that the 127.7 hours that it has claimed in the present case are “carefully accounted for in detail and reasonable in the circumstances”.

Regarding the matter of which cost guideline should apply to PWGSC’s claim for costs, the Tribunal wishes to emphasize that it is not bound to follow either the new guideline or the 1999 guidelines. As a matter of record, however, the new guideline was not in effect at the time that the complaint was filed and, therefore, the Tribunal will not refer to it in relation to this claim for costs. As indicated in its letter dated April 27, 2004, the Tribunal instructed PWGSC to submit its relevant claim for costs in accordance with the 1999 guidelines.

Regarding the hourly rate charged by PWGSC’s external legal counsel, the Tribunal notes that, in recent cost orders, *Montage-DMC* and *Lemmex Group Inc.*,<sup>6</sup> PWGSC claimed an hourly rate of \$125 for an external counsel with 12 years’ experience. The same legal counsel is counsel on this file, but 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 rate is still \$125/hour which is the beginning rate of this new range rather than the higher end rate of \$150/hour, which would normally be accorded to counsel with closer to 20 years’ experience.

In its decision on the motions filed in the complaint, the Tribunal stated that it “will not award costs incurred in the filing of these motions to any party as the costs of each motion are off-set by the costs of the other motions brought forward on this case.” PWGSC did not file a motion in this case, but it was required to respond to the motions. The Tribunal is therefore of the opinion that PWGSC reasonably incurred these costs in responding to the complaint and allows those costs.

Regarding EDS’s position that PWGSC is not entitled to any costs incurred with respect to consideration of a potential settlement with EDS, including deliberations and representation to EDS, the Tribunal is of the opinion that the action taken by PWGSC took place outside the proceeding before the Tribunal and, therefore, the Tribunal does not allow costs on this basis.

Regarding PWGSC’s cost associated with the transmission of a soft copy of the GIR, the Tribunal is of the view that such a transmission was unnecessary and, therefore, disallows that cost. Regarding the cost incurred on July 2, 2003, the Tribunal is of the opinion that there was no requirement to take any action on that date in response to the complaint and, therefore, disallows that cost.

Regarding EDS’s position that the number of hours is excessive, particularly the hours incurred between April 2 and 4, 2003, the Tribunal notes that, when the complaint was initially filed and sent to PWGSC for response, PWGSC did not have external counsel. On April 2, 2003, the Tribunal received notification that PWGSC would use external counsel on this file and, therefore, the Tribunal is of the opinion that it is reasonable for PWGSC’s external counsel to expend some time to become familiar with

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4. *Re Complaint Filed by MIL Systems (A Division of Davie Industries Inc.) and Fleetway Inc.* (1 March 2001), PR-99-034 (CITT).

5. *Ibid.* at 1.

6. *Re Complaint Filed by Lemmex Group Inc.* (30 January 2004), PR-2003-030 (CITT).

the complaint and allows this cost. The Tribunal is also of the opinion that, while more than an average amount of time was spent by counsel on this complaint, the time 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, except where noted to the contrary.

With respect to Stream 4 of the complaint, the Tribunal notes that this stream was included in EDS's complaint and that, as such, PWGSC was required to provide a response. The Tribunal is of the opinion that it is reasonable, in this case, for PWGSC to expend some time examining its approach to the re-evaluation of Stream 4 in conjunction with EDS's complaint regarding that stream to ensure consistency in the evaluation process. The Tribunal therefore allows PWGSC its costs associated with responding to this ground of complaint.

The Tribunal therefore allows PWGSC its legal fees in the amount of \$14,887.50, which represents 119.1 hours at \$125.00/hour, and allows PWGSC its disbursements in the amount of \$843.62.

The Tribunal hereby allows PWGSC costs in the amount of \$15,731.12, excluding GST,<sup>7</sup> for responding to the complaint and directs EDS to take appropriate action to ensure prompt payment.

James A. Ogilvy  
James A. Ogilvy  
Presiding Member

Pierre Gosselin  
Pierre Gosselin  
Member

Patricia M. Close  
Patricia M. Close  
Member

Susanne Grimes  
Susanne Grimes  
Acting Secretary

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