



Ottawa, Thursday, September 11, 2003

File No. PR-2002-015

IN THE MATTER OF a complaint filed by ZENON Environmental 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 determination made pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act* awarding ZENON Environmental Inc. its reasonable costs incurred in preparing and proceeding with the complaint.

ORDER

In a determination made on October 15, 2002, the Canadian International Trade Tribunal (the Tribunal), pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*,¹ awarded ZENON Environmental Inc. (ZENON) its reasonable costs incurred in preparing and proceeding with the complaint.

On November 13, 2002, ZENON submitted to the Tribunal its claim for costs in the amount of \$26,099.50. The Tribunal held the claim for costs in abeyance until the completion of a challenge of the Tribunal's decision in the Federal Court of Appeal. On June 11, 2003, the Tribunal requested that the Department of Public Works and Government Services (PWGSC) file its comments on the claim for costs. On July 2, 2003, PWGSC filed its comments with the Tribunal. ZENON provided its response to the Tribunal on July 14, 2003.

ZENON claimed a total of \$24,645.06² (GST included) in legal fees. That amount represents 52.7 hours at \$285.00/hour for the senior counsel, 67.8 hours at \$110.00/hour for the second counsel, 5.0 hours at \$60.00/hour for an articling student and 0.7 hour at \$60.00/hour for a legal assistant. ZENON also claimed \$1,454.44³ (GST included) in disbursements.

PWGSC submitted that the rates claimed by ZENON are in excess of those set out in the *Procurement Cost Guidelines* (the Guidelines) and that there is no reason to deviate in this matter from the hourly rates established in the Guidelines. It submitted that the Tribunal has ruled many times against claims for hourly rates in excess of those set out in the Guidelines and cited several examples to support its position.⁴ PWGSC submitted that the cost order issued by the Tribunal on November 18, 2002, in *DRS* is

1. R.S.C. 1985 (4th Supp.), c. 47.
2. ZENON's claim for legal fees contained an error in that the GST rate used in the claim was 8 percent instead of 7 percent. The correct total should have been \$24,416.86.
3. ZENON's claim for disbursements contained an error in that the GST was not applied for courier and postage services. The correct total should have been \$1,460.83.
4. *Re Complaint Filed by Novell Canada, Ltd.* (7 July 1999), PR-99-001 (CITT); *Re Complaint Filed by IBM Canada Ltd.* (5 November 1999), PR-99-020 (CITT); *Re Complaint Filed by MIL Systems (a Division of Davie Industries Inc.) and Fleetway Inc.* (6 March 2000), PR-99-034 (CITT); *Re Complaint Filed by Hewlett-Packard (Canada) Ltd.* (31 October 2002), PR-2001-030R and PR-2001-040R (CITT); *Re Complaint Filed by DRS Technologies Inc.* (2 May 2002), PR-2001-051 (CITT) [*DRS*]; *Re Complaint Filed by CMC Electronics Inc.* (2 May 2002), PR-2001-052 (CITT).

particularly pertinent to this complaint. It submitted that the complexity of the complaint in *DRS* is similar to that of this complaint, that counsel for ZENON was also counsel in *DRS* and that the cost claim submitted in *DRS* was in excess of the rates established in the Guidelines. PWGSC submitted that counsel for ZENON, having been in receipt of the Tribunal's explicit determination in *DRS*, has chosen to ignore it and earlier ones, and has re-submitted the same claims in this matter. It submitted that this is an unacceptable practice that ought to be discouraged. Accordingly, PWGSC submitted that ZENON's claim for legal fees in excess of the rates set out in the Guidelines should be dismissed.

With respect to in-house photocopying costs, PWGSC submitted that the claim is based on a rate of \$0.25/copy and that the Guidelines provide for a rate for in-house photocopies of \$0.10/copy. It therefore submitted that the claim for \$0.25/copy should be dismissed.

In its reply filed with the Tribunal on July 14, 2003, ZENON submitted that, in awarding costs, the Tribunal has the discretion to award an amount that is appropriate in the circumstances. It submitted that the hourly rates set by the Guidelines do not represent, in 2002 (the year in which the complaint was investigated), the same degree of cost recovery by a successful complainant that they represented when they were established in 1999. It further submitted that the erosion of these rates due to the passage of time is an undeniable fact. ZENON contended that an award of costs is intended to provide a complainant that has a valid complaint with a reasonable recovery of the expenses incurred in pursuing a legitimate grievance. It submitted that, when they were established, the Guidelines were presumably believed to be reflective of reasonable costs. However, it submitted that, since that time, the Guidelines have fallen significantly behind in recognizing the actual costs that complainants incur in prosecuting a successful complaint.

Regarding the in-house photocopying costs, ZENON submitted that the preparation of materials submitted to the Tribunal, including copying and binding, was conducted on the premises of legal counsel's firm. It submitted that the costs were necessarily incurred by ZENON to satisfy the Tribunal's requirements with respect to the number of copies of documents filed, as well as the necessity of filing both public and confidential versions. It argued that the charge of \$0.25 per page is charged to all clients and was actually paid by ZENON; therefore, this reasonably incurred expense should be compensable to ZENON.

ZENON submitted that it made a clerical error in calculating the GST on the total fees claimed. It submitted that, instead of the prescribed 7 percent that should have applied, a rate of 8 percent was used.

The Tribunal is of the view that the total number of hours claimed for legal services, namely 126.20 hours, is not unreasonable; however, it is also of the view that there is no reason to deviate from the hourly rates established in the Guidelines. Therefore, the Tribunal will allow an hourly rate of \$150.00 for the senior counsel, \$85.00 for the second counsel, \$60.00 for the articling student and \$30.00 for the legal assistant. Accordingly, it will allow fees in the amount of \$14,968.23, including GST; this represents 52.7 hours at \$150.00/hour for the senior counsel, 67.8 hours at \$85.00/hour for the second counsel, 5.0 hours at \$60.00/hour for the articling student and 0.7 hour at \$30.00/hour for the legal assistant.

Regarding the disbursements claimed, the Tribunal finds that, with the exception of the charges for in-house photocopying, all other costs are reasonable and consistent with the Guidelines. The claim of \$1,031.75 for in-house photocopying is reduced to \$412.70⁵ (representing \$0.10/copy), including GST. The claim for the other disbursements (binding, long distance/facsimile, courier and postage) in the total amount

5. The number of copies was not explicitly stated in the claim; therefore, the number of copies was calculated as follows: $\$964.25 \div \$0.25 = 3857$; $3857 \times \$0.10$ (including GST) = \$412.70.

of \$429.08, including GST, is reasonable. Therefore, the total amount allowed for disbursements is \$841.78, GST included.

In light of the above, the Tribunal hereby allows ZENON costs in the amount of \$15,810.01 for preparing and proceeding with the complaint and directs PWGSC to take appropriate action to ensure prompt payment.

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary