



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER

File No. PR-2005-020

C2 Logistics Incorporated

v.

Department of National Defence

*Order issued
Monday, July 31, 2006*

IN THE MATTER OF a complaint filed by C2 Logistics Incorporated 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 C2 Logistics Incorporated be compensated for its lost opportunity by an amount equal to one eighth of the profit that it would reasonably have earned, had it been awarded the contract;

AND FURTHER TO an award, pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, of C2 Logistics Incorporated's reasonable costs incurred in preparing and proceeding with the complaint.

BETWEEN

C2 LOGISTICS INCORPORATED

Complainant

AND

THE DEPARTMENT OF NATIONAL DEFENCE

**Government
Institution**

ORDER AND RECOMMENDATION

INTRODUCTION

In a determination made on January 27, 2006, the Canadian International Trade Tribunal (the Tribunal), pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*,¹ awarded C2 Logistics Incorporated (C2) 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 C2 be compensated for its lost opportunity by an amount equal to one eighth of the profit that C2 would reasonably have earned, had it been the successful bidder in the procurement (Invitation to Tender—Operation AUGURAL—Deployment) by the Department of National Defence (DND). The Tribunal's *Guideline for Fixing Costs in Procurement Complaint Proceedings* and its *Procurement Compensation Guidelines—Revised* (June 2001) (*Compensation Guidelines*) apply to C2's claim for compensation.

C2 and DND were to negotiate the amount of the compensation and, within 30 days of the date of the Tribunal's determination, report back to the Tribunal on the outcome of the negotiations. Within 15 days of that time, should the parties have been unable to agree, they were to make simultaneous submissions to the Tribunal on the amount of compensation.

The parties were not able to agree on an amount of compensation and, on March 13, 2006, C2 and DND filed submissions on an appropriate amount of compensation to C2. Also on March 13, 2006, C2 filed a motion requesting that the Tribunal order DND to produce additional information relating to certain additional fees paid to Skylink Aviation Inc. (Skylink), the successful bidder. On March 17, 2006, DND filed its comments on C2's motion and, on March 20, 2006, C2 filed its response. On March 24, 2006, the

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

Tribunal granted C2's motion and ordered DND to produce certain information relating to the designated contract. On March 29 and 30, 2006, DND provided the information. On April 5, 2006, C2 submitted its reply to DND's submission and, on April 7, 2006, DND submitted its comments. C2 submitted its final comments on April 11, 2006.

COMPLAINT COSTS

The Tribunal's preliminary indication of the level of complexity for this complaint case was Level 2, and its preliminary indication of the amount of the cost award was C\$2,400. Noting that there have been no submissions contesting the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, the Tribunal hereby confirms its preliminary indication.

COMPENSATION FOR LOST OPPORTUNITY

C2 submitted that the original published value of the contract awarded to Skylink was US\$8,867,600.00, which provided for 54 air charter flights. It submitted that DND subsequently notified it of an error in the original contract value and provided an amended value that reflected an increase of approximately 36 percent, which increase was attributed to demurrage and repositioning charges that had been omitted from the earlier value and an additional flight that was undertaken by Canada. C2 submitted that it was advised that Skylink had received a total of C\$14,032,952.11.² C2 also submitted that it was advised by DND that certain other additional amounts were paid to Skylink, including US\$1,500.00 to cover the cost of off-loading per flight and that various import, cargo and airport improvement levies that were charged to Skylink were passed on to DND at cost.

C2 submitted that DND refused to provide detailed information on demurrage and repositioning charges, which are estimated by DND to total C\$3,402,432.00, and other costs that are necessary to calculate an appropriate amount for lost profit.

C2 submitted that it based its claim for compensation on a detailed breakdown of the costs associated with its tender submitted in response to the second solicitation.³ It further submitted that the requirements of the second solicitation were virtually identical to the requirements of the contract at issue.

C2 submitted that its total costs for the contract at issue would have been US\$7,614,699.00⁴ and, based on the original value of the contract, less US\$1 (US\$8,867,599.00), its profit would have been US\$1,252,930.00. It submitted that its profit margin is therefore 14.13 percent. C2 submitted that, applying the profit margin to the total amount paid under the contract at issue, C\$14,032,952.11,⁵ and then dividing that amount by eight, the total amount of compensation should be **C\$247,857.00**.

In the alternative, C2 submitted that the Tribunal may rely upon a reasonable proxy for the profit that C2 would have earned on the contract based on the criteria established in the Supply Manual of the Department of Public Works and Government Services (PWGSC) that supports C2's claim for a profit

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2. On March 29, 2006, DND advised the Tribunal and C2 that the correct total value of the contract was C\$14,824,899.93.
 3. An invitation to tender issued by DND on August 22, 2005, for the provision of air charter services was subsequently cancelled on September 2, 2005.
 4. A breakdown of the costs can be found in C2's confidential version of its compensation submission at para 29.
 5. See note 2.

margin of 14.13 percent. In addition, C2 submitted that the Tribunal has previously applied a proxy of 10 percent to estimate profit margin in low-risk contracts and 15 percent in riskier contracts.⁶

DND submitted that, to confirm its understanding of reasonable industry profit margins, it sought the views of two of the eight air charter brokers on its permanent suppliers' list. The first supplier confirmed that average profit margins range from 3 to 5 percent. The second supplier independently advised that a broker could reasonably expect a profit of 2 to 3 percent.

DND submitted that a reasonable profit will be illustrated over the course of several contracts and that any single contract does not necessarily illustrate what is reasonable in a given case. It submitted that the Tribunal has stated in the past that it does not expect its compensation recommendation to be a windfall for the complainant.⁷ It further submitted that any compensation paid to C2 on the demurrage and repositioning costs incurred by Canada represents a pure windfall to C2 resulting from interference with the delivery of Canada's foreign aid by the Senegalese government. DND submitted that C2 did not reasonably expect to earn a profit on demurrage and aircraft positioning costs and, further, that bidders were not required to identify a demurrage cost. It submitted that the award of the contract was initially delayed until conditions allowed for the delivery of Canadian foreign aid and that Canada could not have anticipated new delays and the resulting additional costs.

In its reply, C2 submitted that suppliers to DND are placed in a conflict of interest situation by the request for information concerning profit margins. C2 submitted that it is not surprising that Skylink chose to provide DND with information concerning the general industry standards for profit margins in the air chartering industry, rather than the actual profit that Skylink earned on the contract in question.

C2 submitted that the figures provided to DND appear to relate to broker profitability. However, under the terms of the contract at issue, Skylink was not acting as a broker, but rather was required to assume the contractual risk. C2 contended that assumption of this risk is associated with increased profit margins. For example, it cited section 10.020 of PWGSC's Supply Manual, which recognizes that suppliers assuming contractual risk on a firm price contract, such as the contract at issue, should be entitled to an increase in profit margin of up to an additional 7 percent. Therefore, using DND's own figures, C2 submitted that a profit margin of between 9 and 12 percent is appropriate.

In its reply, DND submitted that the information upon which C2 should properly base its claim for lost profit is sufficiently technical to require more than mere unsubstantiated claims of anticipated costs from a cancelled solicitation. It submitted that there is no assurance that the list of costs is complete. Specifically, it submitted that C2 has not provided written corroboration of its anticipated cost per flight, its administrative cost and its personnel cost. It further submitted that there is a discrepancy in C2's costs for aircraft positioning and that demurrage costs can vary considerably between different operators.

DND submitted that a reasonable level of net profit on the contract is as follows:

Flights	C\$314,439.08
Demurrage/repositioning charges	C\$85,406.48
Import fees	C\$0.00
Additional flight	C\$624.83
Total	C\$400,470.39

6. *Re Complaint Filed by ACE/ClearDefense Inc.* (17 April 2002), PR-99-051 (CITT); *Re Complaint Filed by IHS Solutions Limited* (8 March 2004), PR-2003-067 (CITT); *Re Complaint Filed by AppDepot Web Services Inc.* (8 March 2004), PR-2003-069 (CITT).

7. *Re Complaint Filed by Douglas Barlett Associates Inc.* (7 January 2000), PR-98-050 (CITT).

Having regard to the Tribunal's recommendation of one eighth of the profit that C2 would reasonably have earned on the subject contract, DND submitted that a reasonable amount of profit is **C\$50,058.80**.

In its final comments, C2 provided support for its cost per flight submission and maintained that its quoted demurrage fees are inclusive of associated personnel costs. It also reduced its overall profit margin for flights to 12.6 percent.

C2 therefore submitted that it should receive relief based on non-optional flights at 12.6 percent profit divided by eight, plus appropriate demurrage and repositioning fees for a total of **C\$516,306** or, in the alternative, an estimated profit margin of between 10 and 15 percent, divided by eight for a total of between **C\$185,311** and **C\$277,967**. C2 also requested the costs of and incidental to the compensation phase of the proceeding.

The Tribunal examined the submissions of both parties in detail, attempting to find firm evidence of a reasonable profit margin under the circumstances of a procurement of this nature. The parties' submissions left a significant gap between the levels of profit that they saw as reasonable under the circumstances. Although both parties supported their positions with certain evidence and argument, neither provided the Tribunal with a formula that was complete or could be applied without serious question.

On the basis of the evidence offered, the Tribunal attempted to reconstruct the relation between costs and total bid price, applicable either to this specific instance or to a procurement that might be considered typical of a procurement of this nature. It attempted to find a value that could be expressed variously as a percentage of the total bid or as a percentage of costs. This proved to be impossible with any degree of certainty on the strength of the evidence and argument put forward.

In the absence of the necessary information, the Tribunal sought a less complex means of arriving at a reasonable level of profit. Each party, in its submissions, put before the Tribunal a range of percentages of the contract value that it considered reasonable. In discussions with two brokers, DND received answers that ranged from 2 to 5 percent;⁸ C2 claimed that it was more than a broker and that DND's own figures would result in a range of 9 to 12 percent.⁹ The Tribunal therefore took these two ranges and used the average between the high end of the lower range and the low end of the higher range, which results in a 7 percent profit margin.

Because payment would be made to the successful bidder in Canadian currency, the Tribunal has based its calculation on the value of the contract, as expressed by DND in its March 29, 2006, letter, in Canadian dollars. The Tribunal notes that the import fees were passed on to DND at cost and, therefore, those costs were excluded from the profit calculation.

The Tribunal's calculation—one eighth of 7 percent of the value of the contract less import fees—is as follows:

$$0.125 \times 0.07 \times (\text{C\$}14,824,899.93 - \text{C\$}52,445.48) = \text{C\$}129,258.98$$

Therefore, the Tribunal recommends that C2 be compensated in the amount of **C\$129,258.98**.

8. DND's submission dated March 13, 2006.

9. C2's submission dated April 5, 2006, para 17.

With respect to C2's request for its costs of and incidental to the compensation phase of the proceedings, the Tribunal's recommendation only contemplated lost opportunity, represented by a portion of the profit that C2 might have made. It did not include any other costs. Therefore, the Tribunal will not include any additional amount in its recommendation.

CONCLUSION

The Tribunal hereby awards C2 costs in the amount of C\$2,400.00 in relation to preparing and proceeding with the complaint and directs DND to take appropriate action to ensure prompt payment.

The Tribunal hereby recommends that DND pay compensation to C2 for lost opportunity in the amount of C\$129,258.98.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Ellen Fry
Ellen Fry
Member

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

Hélène Nadeau
Hélène Nadeau
Secretary