



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2004-054R

Envoy Relocation Services

v.

Department of Public Works and
Government Services

*Order and reasons issued
Friday, October 26, 2007*

TABLE OF CONTENTS

ORDERi

STATEMENT OF REASONS 1

 BACKGROUND..... 1

 COMPENSATION..... 1

 Period to be Covered by the Bid Preparation Costs2

 General Operating and Personnel Costs.....3

 Outside Firms5

 Return on Investment and Interest.....5

 CONCLUSION.....6

APPENDIX I7

APPENDIX II..... 10

IN THE MATTER OF a complaint filed by Envoy Relocation Services 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 Canadian International Trade Tribunal, pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, recommending that Envoy Relocation Services be compensated by an amount equal to one half of the costs it reasonably incurred in preparing its proposals for Solicitation No. 24062-030147/C.

BETWEEN

ENVOY RELOCATION SERVICES

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

ORDER

The Canadian International Trade Tribunal hereby recommends that the Department of Public Works and Government Services compensate Envoy Relocation Services in the amount of \$207,769.31, which represents one half of the costs that it reasonably incurred in preparing its proposals for the subject solicitation.

Ellen Fry

Ellen Fry
Presiding Member

Zdenek Kvarda

Zdenek Kvarda
Member

James A. Ogilvy

James A. Ogilvy
Member

Hélène Nadeau

Hélène Nadeau
Secretary

STATEMENT OF REASONS

BACKGROUND

1. In its determination of April 26, 2006, the Canadian International Trade Tribunal (the Tribunal), pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*,¹ recommended that the Department of Public Works and Government Services (PWGSC) compensate Envoy Relocation Services (Envoy) by an amount equal to one half of the costs that it reasonably incurred in preparing its proposals for Solicitation No. 24062-030147/C. The Tribunal also awarded Envoy \$500 for its costs incurred in relation to the remand of the Tribunal's original recommendation, which costs were to be paid by PWGSC.

2. PWGSC challenged the Tribunal's determination at the Federal Court of Appeal (FCA), which dismissed the judicial review application on May 3, 2007. On June 6, 2007, Envoy submitted its initial arguments and claim for compensation. PWGSC responded on June 15, 2007, and Envoy filed its comments on PWGSC's response on June 22, 2007.

COMPENSATION

3. In determining the amount to recommend for bid preparation costs, the Tribunal considered its *Procurement Cost Guidelines (November 1999)* (the *Guidelines*), which include the principle that costs awarded shall not exceed those necessarily and reasonably incurred by the claimant.

4. Bid preparation costs are the direct and indirect costs incurred by a claimant in preparing a proposal for a designated contract.

5. The *Guidelines* provide as follows:

...

APPENDIX A – BID PREPARATION COSTS

...

1.2 All bid preparation costs claimed, whether direct or indirect, must be supported. Copies of invoices, receipts, timecards and other documentation necessary to support a claim are to be submitted when the claim is filed.

...

5.1 The following costs are considered non-recoverable costs for the purposes of any claim for bid preparation costs:

- (a) entertainment expenses;
- (b) fines and penalties;
- (c) provisions for contingencies;
- (d) losses on other contracts;
- (e) losses on investments, bad debts and expenses for their collection;
- (f) federal and provincial income taxes, surtaxes and/or special expenses in connection therewith;
- (g) legal, accounting and consulting fees in connection with financial re-organization, security issues, capital stock issues, obtaining of patents and licenses and prosecution of other claims against the Crown;

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

- (h) allowances for interest on invested capital, bonds, debentures, bank or other loans together with related bond discounts and finance charges;
- (i) amortization of unrealized appreciation of assets;
- (j) depreciation of assets paid for by the Crown; and
- (k) expenses and depreciation of excess facilities.

...

6.1 Profit must not be included in any form as part of a claim for bid preparation costs

6. The parties' submissions focussed on the following issues:
- the length of time encompassed by "preparation of proposals";
 - general operating costs and the hourly rate to be applied to, and expenses incurred by, various employees and contractor personnel;
 - services provided, and expenses incurred, by outside companies; and
 - Envoy's unrealized return on investment and interest.

Period to be Covered by the Bid Preparation Costs

7. Envoy submitted that the relevant period started on August 29, 2003, when it was informed by PWGSC that, as a result of the initial solicitation being cancelled, the contracts in question were going to be re-competed. It submitted that it began preparing for the new Request for Proposal (RFP) immediately, as it did not know when the new RFP was going to be issued by PWGSC, and that it had had to take immediate steps to be in a position to re-bid. Envoy submitted that the magnitude and complexity of the procurement required that a huge amount of work be undertaken immediately after the notification of re-tender. It submitted that the relevant period ended on December 28, 2004, when it received its debriefing from PWGSC regarding its unsuccessful proposals. Envoy argued that the debriefing should be considered part of the relevant period, as PWGSC provided information on the evaluation and scoring of the proposals, as well as the reasons for which its proposals were not successful. It also submitted that, until that point, it had been obligated to maintain certain core management staff on standby in the event that PWGSC sought clarifications regarding its proposals. Envoy submitted that, rather than setting a specific time frame, such as between the issuance and closing of the RFP, as argued by PWGSC, a more reasonable test regarding the validity of costs would be to ask whether or not the costs claimed would have been incurred but for Envoy's participation in the bidding process, regardless of the date on which the expense was incurred.

8. PWGSC submitted that the time period for which Envoy can claim costs is bounded by the date on which the RFP was made available through MERX,² i.e. April 20, 2004, and the due date for the receipt of proposals, i.e. June 14, 2004. PWGSC submitted that the contents of the RFP were not released until April 20, 2004, and that, therefore, bid preparation could only begin then, as the requirements only became known to bidders on that date. PWGSC submitted that there had been a letter of interest, with a draft RFP, posted on MERX for 30 days starting on December 15, 2003, but that any comments provided during that time were purely voluntary and that, therefore, such input cannot be considered as part of bid preparation. PWGSC also submitted that any time spent or costs incurred after the proposals were submitted cannot properly be considered compensable as bid preparation costs.

9. The Tribunal is of the view that costs relating to the preparation of proposals must be confined to the time from when bidders were in a position to be aware of the actual requirements of the solicitation documents to when the proposals were submitted. As PWGSC submitted, until the RFP is made available,

2. Canada's electronic tendering service.

bidders cannot be aware of what is necessary for them to bid successfully on the requirement. Any actions prior to that date are speculative and, in the case of commenting on the draft RFP, voluntary and not directly related to the preparation of an actual proposal. The Tribunal also considers that, once a proposal has been submitted, it is no longer in the bid preparation stage; therefore, it will not consider claims for costs that were incurred after the proposals were submitted. Accordingly, the Tribunal will base its recommended compensation amount on claims for costs that were incurred from the MERX posting date of April 20, 2004, to the bid closing date of June 14, 2004 (the Approved Bidding Period).

General Operating and Personnel Costs

10. Personnel costs included hourly rates charged for management monthly salaries for full-time employees, fees and expenses for contract employees and expenses incurred by employees, e.g. travel costs, meals.

11. Envoy submitted that, regarding certain of its management employees, the actual compensation is substantially higher than its claimed hourly rate of \$-----. It argued that the employees in question had in excess of 30 years experience and were considered by their peers to be at the top of their profession. It argued that the rates allowed in Appendix B to the *Guidelines* that were formerly used by the Tribunal for the calculation of complaint costs were based on the principles of partial indemnity and not cost recovery.³ It submitted that its hourly rate of \$----- was developed by comparing rates charged by management consultants who might have been retained by Envoy to perform comparable tasks. It also submitted that this rate was used as the benchmark to establish a fair cost burden for the other members of the management team.

12. PWGSC submitted that it had been unable to identify the actual costs, whether in terms of an hourly rate or otherwise, for the five management employees listed by Envoy in its claim. PWGSC submitted that, despite the lack of information, it was willing to agree to the claims for which Envoy claimed \$--- an hour. However, regarding those employees for whom Envoy claimed \$----- an hour, it argued that an hourly rate of \$----- was more appropriate, as it was in keeping with the rate formerly allowed, under Appendix B to the *Guidelines*, for similarly experienced representatives of a claimant in the calculation of complaint costs.

13. In deciding what hourly rate should be applied to the management employees, the Tribunal considered subsection 1.2 of Appendix A to the *Guidelines*, which indicates that all bid preparation costs claimed must be supported by evidence. In this case, the Tribunal does not find that either of these claimed hourly rates, \$----- or \$---, is supported by the evidence provided by Envoy. Therefore, the Tribunal accepts PWGSC's submission and will allow these claims at hourly rates of \$----- and \$---. However, the Tribunal emphasizes that the accepted hourly rate of \$----- reflects the circumstances of the present case only and is not intended to indicate that it considers that the rates listed in Appendix B to the *Guidelines* should have general application for these purposes.

14. Regarding the salaries of other full-time employees of the two firms, Envoy claimed the actual salary costs of the employees based on the estimated amount of time actually spent working within the bidding process. It submitted that its proposals had been prepared in Oakville (the location of one of the two companies comprising Envoy), but that the other firm was based in Quebec, necessitating travel expenses, including meals, and the conduct of focus groups on three DND bases.

3. Prior to the February 2004 introduction of the Tribunal's *Guideline for Fixing Costs in Procurement Complaint Proceedings*, costs for preparing a complaint were calculated on a case-by-case basis. The rates found at Appendix B to the *Guidelines* dealt with recoverable costs relating to *complaint* costs as opposed to *bid preparation* costs, which are at issue in this case.

15. Envoy also submitted that it had retained a number of contract employees to augment the full-time staff assigned to the project. Envoy claimed both their employment fees and the out-of-pocket expenses that it approved at the time.

16. PWGSC submitted that it accepted the monthly salary figure for the employees and that Envoy should receive a pro-rated share of their monthly salaries based on the following:

- April 2004: - 25 percent of the monthly salary—based on the period from April 20, 2004, the date on which the RFP was released and the bidding period started, to the end of the month
- May 2004: - 100 percent of the monthly salary—as the bidding period was open for the entire month
- June 2004: - 50 percent of the monthly salary—based on the period from the beginning of the month to June 14, 2004, the date on which the bidding period closed.

17. Regarding the contract employees and their expenses, PWGSC submitted that Envoy should be able to recover only those costs relating to the Approved Bidding Period and not the extended period claimed by Envoy.

18. The Tribunal, in keeping with its decision regarding the time frame of the Approved Bidding Period, will only allow claims for costs incurred during that period. Regarding the salaries of Envoy's full-time employees, the Tribunal will allow the monthly salary rates claimed, pro-rated as follows: 33.33 percent of the monthly salaries for April 2004, 100 percent of the monthly salaries for May 2004 and 46.67 percent of the monthly salaries for June 2004.⁴ In cases where Envoy claimed less for an employee than the foregoing percentages allowed by the Tribunal, the lesser percentage was used. In one instance, an employee, who was generally working 100 percent of the time on the proposal, was otherwise engaged for two weeks in May 2004. The Tribunal therefore applied a 50 percent salary level for that employee for May 2004.

19. Regarding contract employees, general operating expenses and expenses incurred by employees and contractors (travel, meals, etc.), the Tribunal will allow only those claims for costs that were properly supported, that related to the preparation of the proposals and that occurred during the Approved Bidding Period. The Tribunal disallowed a significant amount of costs claimed that, on a reasonable reading of the information submitted, appeared to be unrelated to the complaint. For example, the Tribunal did not allow claims relating to a trip that one of the employees took to the 2004 National Relocation Conference in Las Vegas, Nevada, as there was no evidence of a direct link between that trip and Envoy's preparation of the proposals. Similarly, claims for registration or attendance at Canadian Employee Relocation Council (CERC) functions were disallowed. Other claims that were not accepted by the Tribunal include the following: meals that, although paid for by Envoy employees, involved people who did not have any apparent link to Envoy's proposals; car washes for rental cars; multiple lunches or dinners claimed by the same person on the same day; and, in one instance, a claim that appeared to indicate that an employee was in two places at once.⁵ The Tribunal also noted claims for other items, e.g. flowers, alcohol that would not have been allowed had those costs been incurred during the Approved Bidding Period.

20. The Tribunal's calculation regarding these costs can be found in Appendix I.

4. The Tribunal arrived at these figures by dividing the number of days allowed by the number of days in the month in question, i.e. for April, 10 days out of 30 or 33.33 percent; for May, 31 out of 31 days or 100 percent; and for June, 14 out of 30 days or 46.67 percent.

5. An employee claimed a taxi ride occurring in Oakville, Ontario, when, on the day in question, that employee was attending the conference in Las Vegas.

Outside Firms

21. In addition to contract employees, Envoy engaged the services of several legal and consulting firms. i.e. Gowling Lafleur Henderson LLP (Gowlings), Hill & Knowlton (H&K), Lansdowne Consulting, and Raymond Chabot Grant Thornton, to assist it during the bid preparation period that it claimed. Envoy submitted the following:

- Gowlings provided legal advisory services in connection with the initial decision to re-bid after the cancellation of the 2002 bidding process, as well as to prepare and attend Envoy's debriefing meeting following the contract award announcement. It also noted that the details of the services rendered had been redacted on the basis of solicitor-client privilege.
- H&K provided advisory services in connection with the initial decision to re-bid, attendance at bidders' conferences, proposal preparation that included coordination of various correspondence with PWGSC, and preparation and attendance at Envoy's debriefing meeting following the contract award announcement.
- Lansdowne Consulting provided advice and assistance in the preparation of Envoy's proposals.
- Raymond Chabot Grant Thornton provided proposal cost analysis and audit services.

22. As indicated above, PWGSC challenged all expenses that occurred outside of the Approved Bidding Period. It submitted that Raymond Chabot Grant Thornton's invoice was for services that were rendered after that period and that this cost should therefore not be compensated at all. PWGSC also argued that costs shown on invoices from Gowlings should not be compensated, as it doubted that Gowlings played any direct role in the preparation of Envoy's proposals. PWGSC also noted that the information contained in Gowlings' and H&K's invoices provided insufficient detail about what services were provided, in H&K's case noting that they were for "professional services".

23. The Tribunal finds that Raymond Chabot Grant Thornton's services were clearly provided outside the Approved Bidding Period and that claimed costs relating to those services are therefore not allowable. The Tribunal also finds that any services that Gowlings provided (whether or not during the Approved Bidding Period) were not directly related to the preparation of the proposals, and it will therefore not allow any of those costs. Regarding H&K and Lansdowne Consulting, the Tribunal will allow the costs incurred during the Approved Bidding Period only and for expenses that were substantiated.

24. Envoy also engaged a number of companies to provide assistance directly related to the preparation of the proposals, e.g. translation services, copier rentals, renting of office space, preparation and design of the actual proposal packages. The Tribunal will allow all such expenses that were incurred during the Approved Bidding Period. PWGSC had challenged one specific invoice, claiming that it was for "gratuities for focus groups" and that, under the *Guidelines*, such amounts are not allowable. The Tribunal does not agree. PWGSC did not specify the section of the *Guidelines* on which it was relying, but the Tribunal assumes that PWGSC is challenging this invoice under paragraph 5.1(a) of the *Guidelines*, which prohibits entertainment expenses. The Tribunal does not believe that providing \$50 gratuities to members of a focus group would be classified as such. Accordingly, it will allow that claim.

25. The Tribunal's calculation regarding these costs can be found in Appendix II.

Return on Investment and Interest

26. Envoy submitted that it strives to achieve a minimum pre-tax return on investment of --- percent for its shareholders when pursuing business opportunities. It claimed that it expended a significant amount to pursue this business opportunity based on assurances contained in the RFP and statements made by

PWGSC at a bidders' conference held on May 5, 2007. These assurances and statements were essentially that its proposals would be evaluated in a fair, unbiased and transparent manner. It submitted that PWGSC, as a result of the FCA's decision not to allow a re-evaluation of its proposals, cannot live up to that commitment. Envoy submitted that the result is that it has been denied the opportunity to realize an investment made in bidding on the RFP and, therefore, considers the return on investment that might have been realized to be a claimable direct cost of these proceedings. Envoy also requested that the Tribunal award it pre- and post-judgement interest on the amount found to be owing to it.

27. PWGSC submitted that Envoy is not entitled to any such recovery. It claimed that paragraphs 5.1(e) and (h) the *Guidelines* specifically state that losses on investment and allowances for interest, etc., are non-recoverable. It also argues that the FCA, in its decision remitting the matter of appropriate remedy to the Tribunal for reconsideration, stated that Envoy, in effect, could not have been awarded any of the contracts in issue and that to allow compensation in the form of interest on an expense which would never have properly realized any return would be entirely inappropriate. It also noted that the Tribunal's recommended remedy did not include interest, whether pre- or post-judgement and that, accordingly, none is properly payable.

28. The Tribunal considered the *Guidelines*, which indicate that losses on investments and interest are considered non-recoverable costs for the purposes of a claim for bid preparation costs. The Tribunal does not see any reason to depart from this principle in the circumstances of this case and, hence, will not allow any such claims.

29. Based on the foregoing analysis and the calculations set out in Appendices I and II to this order, the Tribunal finds that the amount to be awarded to Envoy is one half of \$415,538.63.

CONCLUSION

30. The Tribunal hereby recommends that PWGSC compensate Envoy in the amount of \$207,769.31, which represents one half of the costs that it reasonably incurred in preparing its proposals for the subject solicitation.

Ellen Fry
Ellen Fry
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

James A. Ogilvy
James A. Ogilvy
Member

APPENDIX I

Management Personnel

	Rate Claimed	Hours Claimed	Rate Allowed	Hours Allowed	Amount Allowed
TOTAL					\$152,100.00

Full-time Employees

	April 2004			May 2004			June 2004		
	Total Salary	%*	Amount Allowed	Total Salary	%*	Amount Allowed	Total Salary	%*	Amount Allowed
Envoy									
		33.33			100			46.67	
		33.33			100			46.67	
		33.33			100			46.67	
		33.33			100			46.67	
		33.33			100			46.67	
Renolat									
		27			53			42	
		27			53			46.67	
		32			50**			46.67	
		32			100			22	
		33.33			100			46.67	
		Subtotal	\$12,627.14		Subtotal	\$32,312.33		Subtotal	\$27,727.94
TOTAL									\$72,667.41

* The Tribunal arrived at these figures by dividing the number of days allowed per month by the number of days in that month, i.e. for April, 10 days out of 30 or 33.33 percent; for May, 31 days out of 31 or 100 percent; and for June, 14 days out of 30 or 46.67 percent.

** This employee was otherwise engaged for two weeks during May 2004.

Contract Employees

	Invoice	Invoice Date	Services Claimed	Expenses Claimed	Amount Allowed
	04-014	26 Apr. 04			\$4,000.00
	04-015	10 May 04			\$10,000.00
	04-018	22 May 04			\$10,140.42
	04-019	06 June 04			\$10,000.00
	04-020	19 June 04			\$6,000.00
				Subtotal	\$40,140.42
	ERS008	26 Apr. 04			\$3,168.00
	ERS009	10 May 04			\$9,360.00
	ERS010	26 May 04			\$10,080.00
	ERS011	15 June 04			\$10,080.00
	ERS012	19 June 04			\$6,048.00
				Subtotal	\$38,736.00
	ERS0401	14 May 04			\$3,500.00
	41-4	17 May 04			\$600.00
	44-4	23 May 04			\$442.50
				Subtotal	\$1,042.50
	44-5	26 May 04			\$82.50
	55-15	21 June 04			\$1,132.50
				Subtotal	\$1,215.00
	Page 10-10	Dec. 03			\$0.00
	55-14	11 June 4			\$36.00
	55-13	17 June 04			\$504.00
				Subtotal	\$540.00
	51-1	14 June 04			\$285.00
				TOTAL	\$85,458.92

Employee Expenses

	Claim Number or Reference	Amount Claimed	Amount Allowed
	Inv. 46-3		\$414.15
	Inv. 46-8		\$661.28
	Inv. 60-18		\$2,494.64
	Inv. 55-4		\$0.00
	Inv. 55-5		\$0.00
	Inv. 55-6		\$0.00
	524		\$1,118.75
	DEP 2004/07		\$213.49
	494		\$1,338.61
	CERC/APPQ Conv.		\$398.72
	n/a		\$519.86
	108-11		\$531.13
	120-4		\$310.01
TOTAL			\$8,001.37

Operating Expenses

	April 2004	May 2004	June 2004	Total
Office Expenses				
Tribunal % Allowed*	33.33	100	46.67	
Allowable Costs				\$1,081.43
Postage				
Tribunal % Allowed*	33.33	100	46.67	
Allowable Costs				\$249.00
Purolater				
Tribunal % Allowed*	33.33	100	46.67	
Allowable Costs				\$492.46
Telecommunications				
Tribunal % Allowed*	33.33	100	46.67	
Allowable Costs				\$3,168.04
TOTAL				\$4,990.93

* The Tribunal arrived at these figures by dividing the number of days allowed per month by the number of days in that month, i.e. for April, 10 days out of 30 or 33.33 percent; for May, 31 days out of 31 or 100 percent; and for June, 14 days out of 30 or 46.67 percent.

** For those amounts where Envoy claimed a smaller percentage than the Tribunal allowed, the smaller percentage was used.

APPENDIX II

Legal and Consulting Firms

	Invoice Number	Service Fee	Expenses	Total Claimed	Amount Allowed
Gowlings					\$0.00
H&K	060035				\$19,000.00
	060251				\$20,000.00
Lansdowne	04-4204				\$12,000.00
Raymond Chabot Grant Thornton					\$0.00
				TOTAL	\$51,000.00

Other Outside Companies

	Invoice Number or Reference	Service Fee	Items Purchased	Total Claimed	Amount Allowed
Celine Richard Translation					\$1,537.20
Cofax Business Machines	20360				\$108.00
	30074				\$972.00
	30210				\$315.00
Colourtech	271867				\$1,296.00
	275038				\$6,480.00
H&L Keil Holdings					\$2,850.00
HTX	3115				\$3,706.13
	3156 Credit				-\$657.07
Ideasmiths Company	02004138				\$1,347.84
	02004137				\$1,598.40
Kelsey's International	Givex 1-9-03				\$900.00
Meta Wave	D40501				\$5,760.00
Micropad	1453				\$0.00
	1490				\$213.84
Overdrive Design	23232				\$7,020.00
	23237				\$7,872.66
				TOTAL	\$41,320.00