



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2007-004

Ecosfera Inc.

v.

Department of the Environment

*Order and reasons issued
Wednesday, October 3, 2007*

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

AND FURTHER TO the Canadian International Trade Tribunal's preliminary indication of the level of complexity of the complaint case and the amount of its cost award.

BETWEEN

ECOSFERA INC.

Complainant

AND

THE DEPARTMENT OF THE ENVIRONMENT

**Government
Institution**

ORDER

In its determination of July 11, 2007, the Canadian International Trade Tribunal, under section 30.16 of the *Canadian International Trade Tribunal Act*, awarded Ecosfera Inc. its reasonable costs incurred in preparing and proceeding with the complaint. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case was Level 1, and its preliminary indication of the amount of the cost award was \$1,000. After considering the submissions of the parties concerning that determination, the Canadian International Trade Tribunal considers it appropriate to amend the preliminary indication of the level of complexity for this complaint case and to fix the final indication at Level 2. The amount of the cost award made by the Canadian International Trade Tribunal is therefore \$2,400. The Canadian International Trade Tribunal directs the Department of the Environment to take appropriate action to ensure prompt payment.

Serge Fréchette
Serge Fréchette
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

STATEMENT OF REASONS

INTRODUCTION

1. In a determination issued on July 11, 2007, the Canadian International Trade Tribunal (the Tribunal), under section 30.16 of the *Canadian International Trade Tribunal Act*,¹ awarded Ecosfera Inc. (Ecosfera) its reasonable costs incurred in preparing and proceeding with the complaint. In its determination, the Tribunal's preliminary indication of the level of complexity for the complaint was Level 1, and its preliminary indication of the cost award was \$1,000, in accordance with its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*).

2. On July 18, 2007, the Tribunal received Ecosfera's submissions concerning its disagreement with the preliminary indication of the level of complexity for the complaint. On August 7, 2007, the Department of the Environment (EC) responded to those submissions. On August 13, 2007, Ecosfera filed its response to EC's comments. The Tribunal reviewed the submissions of the parties and determined that its preliminary indication of the level of complexity for the complaint, namely Level 1, was not appropriate.

POSITIONS OF THE PARTIES

Ecosfera's Position

3. Ecosfera made submissions seeking an award above \$1,000, arguing that the Tribunal fetters its discretion in not departing from the *Guideline* and that this complaint justifies such a departure. According to Ecosfera, the fixed rates set in the *Guideline* are too low in comparison with costs awarded in the past, before the application of the *Guideline*, and with common practice in Ontario. In support of this assertion, Ecosfera filed a copy of a publication by the Costs Subcommittee of the Civil Rules Committee of Ontario entitled "Information for the Profession".

4. Ecosfera submits that, in this complaint, the Tribunal intends to follow a rigid practice in the award of costs, similar to that explicitly condemned by the Federal Court of Appeal in *Canada (Attorney General) v. Georgian College of Applied Arts and Technology (C.A.)*.² In that connection, Ecosfera requests that the Tribunal depart from the *Guideline* and exercise its discretion "judicially" in awarding costs, which means, according to Ecosfera, that the Tribunal's discretion should not be exercised in an automatic or arbitrary manner, but in accordance with the facts of this case and the general principles governing the awarding of costs by judicial tribunals. In this regard, Ecosfera suggests that, in applying the *Guideline*, the Tribunal has adopted automatic practices that fetter its discretion.

5. Ecosfera further contested the validity of the *Guideline*, submitting that the rates corresponding to the three categories of complaint are not representative of the costs and expenses awarded by the Federal Court of Canada or other Canadian tribunals. Ecosfera also argues that the Tribunal does not have the authority to establish guidelines for the awarding of costs in procurement complaints, since no legislative basis exists for doing so.

6. As to the complexity of the complaint and proceedings, Ecosfera notes that it has had to argue many issues and that some of the documents that it filed dealt with highly controversial and highly complex issues.

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

2. [2003] 4 F.C. 525 [*Georgian College*].

7. In response to EC's comments, Ecosfera reaffirmed that the Tribunal did not have the authority to adopt the *Guideline*. It added that the discretion that EC is seeking to confer on the Tribunal in the awarding of costs is expressly excluded by the wording of paragraph 40(l) of the *CITT Act*.

8. With regard to its argument that the rates set in the *Guideline* are not representative of the "... costs granted by most courts of justice in Canada",³ Ecosfera noted that EC did not submit evidence to show that these rates were in line with the costs granted by "... most courts of justice in Canada." Although the *Guideline* states its intent "... to bring the level of the awards more in line with the costs granted by most courts of justice in Canada", Ecosfera points out that most judicial tribunals in Canada are located in Ontario, which demonstrates the relevance of the publication by the Costs Subcommittee of the Civil Rules Committee of Ontario that it filed.

9. In response to EC's comments concerning the complexity of the procurement, the complaint and the proceedings, Ecosfera maintains that EC is seeking to minimize this case, that the Tribunal's request to make submissions regarding the extent of EC's obligations led Ecosfera to submit a highly complex argument and that the procurement in question and the consideration of Ecosfera's complaint were not simple matters with a low level of complexity. Lastly, Ecosfera maintains that its claim for fees and costs of at least \$15,400.85 is more than reasonable in the context of its complaint and the issues that it has had to argue.

EC's Position

10. With regard to the validity of the *Guideline*, EC affirmed that it disagreed with Ecosfera's argument that the rates in the *Guideline* are not representative of the costs and expenses granted by other Canadian courts. According to EC, the document submitted by Ecosfera in support of its claim on this point has no relevance to this case. EC further notes that Ecosfera's argument that the Tribunal does not have the authority to establish the *Guideline* is not valid, since the authority to issue directives is inferred from the discretion bestowed upon an administrative authority.

11. With regard to the Tribunal's exercise of discretion, EC submitted that the Tribunal is free to depart from the levels of complexity set in the *Guideline*, a provision which is also expressly included in the *Guideline*, and that the decision not to do so also implies the exercise of discretion. EC is of the view that the Tribunal does not fetter its discretion in applying the *Guideline* and giving a preliminary indication of the level of complexity for this case of Level 1.

12. With regard to the complexity of the procurement, EC maintains that the degree of complexity was low, since it involved consulting services, the purpose of which was not at issue. With regard to the complexity of the complaint, EC observes that there were two elements (i.e. the evaluation of a criterion not mentioned in the evaluation grid and the scope of the debriefing exercise) and submitted that the preliminary indication of the level of complexity given by the Tribunal was appropriate to the case. With regard to the first element of the complaint, the only issue was to determine, in light of the facts, whether the "experience" criterion had actually been considered in evaluating the "knowledge" criterion of Ecosfera's bid, whereas it should not have been. A complaint based on a purely factual issue corresponds to a low level of complexity that does not justify the assignment of a level of complexity above Level 1. With regard to the second element of the complaint, although the matter of the scope of the debriefing exercise required legal analysis, the analysis was not very complex and required only a brief survey of the applicable case law. According to EC, this issue merely involved the application of the law in respect of the scope of such a debriefing exercise to a specific case.

3. *Guideline*, para. 1.2.

13. With regard to the complexity of the proceedings, EC noted that the Tribunal considered it average, given the motion for production of documents. Although a motion was made, EC submitted that it was, however, low in complexity, given that its only purpose was to obtain the production of documents and that EC had not opposed it.

14. EC added that the 90-day time limit set out in section 12 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* had been observed by the Tribunal, which had determined that it did not require a hearing in order to make its decision. With regard to the responses submitted by the parties, EC does not believe that they add to the complexity of the proceedings. The main purpose of these responses was to clarify new facts.

15. For all these reasons, EC believes that the facts of the case do not justify a departure from the *Guideline*, since Level 1 was appropriate in this case.

TRIBUNAL'S ANALYSIS

16. First, the Tribunal notes that, at this stage, its analysis must be restricted to the amount of the cost award, as the determination on costs was issued on July 11, 2007. The Tribunal has carefully reviewed all the submissions by the parties on this matter.

17. Pursuant to subsection 30.16(1) of the *CITT Act*, the Tribunal can award costs of proceedings before it, and the costs may be fixed at a sum certain or may be taxed. This power is discretionary. Although this provision states that this power is “[s]ubject to the regulations . . .”, and although paragraph 40(*l*) states that “[t]he Governor in Council may make regulations . . . respecting the awarding of costs by the Tribunal under section 30.16 . . .”, there is no regulatory provision on this point. Thus, the Tribunal believes that the matter of costs in inquiry proceedings is left to its sole discretion. Contrary to Ecosfera’s argument, there is nothing in the wording of the *CITT Act*, including paragraph 40(*l*), that prevents the Tribunal from exercising its discretion in making decisions on costs with respect to procurement complaints.

18. In the exercise of its discretion under the *CITT Act*, the Tribunal issued the *Guideline* in order to “... provide guidance to parties seeking to recover the costs of participating in procurement complaint proceedings.”⁴ Ecosfera argues that the *Guideline* is not valid because the Tribunal does not have the authority to adopt it. The Tribunal is of the view that it is clearly established in Canadian law that administrative tribunals may issue such guidelines or directives in the exercise of their discretion, provided that, in so doing, they do not abandon, limit or detract from the exercise of the discretion given to them by law. The Tribunal is further of the view that, while some statutes expressly authorize the issuance of directives, the authority to issue directives can be inferred from the discretion bestowed upon an administrative authority.⁵

19. Ecosfera also contests the validity of the *Guideline* on the basis of its argument that the rates set in the *Guideline* are not reasonably representative of the costs and expenses granted by the Federal Court of Canada or other Canadian courts of justice. The Tribunal is not convinced that the publication entitled “Information for the Profession”, filed by Ecosfera, proves that the rates set in the *Guideline* are unrepresentative of costs granted by the majority of courts of justice in Canada. In this respect, the document in question merely provides rates which represent “... the maximums that were available under the costs grid”, which “... would apply only to the more complicated matters . . .” [translation] Thus, the rates

4. *Guideline*, para. 1.3.

5. Brown and Evans, *Judicial Review of Administrative Action in Canada*, Vol. 3, Chapter 12, paragraph 12:4421 at 12 - 43; Patrice Garant, *Droit administratif*, 5th ed., Les Éditions Yvon Blais, 2004 at 294.

indicated are not necessarily those that are awarded in most cases. In any case, even if the level of compensation set in the *Guideline* were not representative of those granted by the majority of courts of justice in Canada, the Tribunal does not see how that would render the *Guideline* invalid. Consequently, there is nothing that, in itself, casts doubt on the validity of the *Guideline*.

20. In *Georgian College*,⁶ the Federal Court of Appeal held that the Tribunal could not fetter its discretion by adhering to an automatic practice of following guidelines in awarding costs of proceedings, under subsection 30.16(1) of the *CITT Act*. Thus, the Tribunal will fix the costs of the proceedings and issue its cost order in this case in light of this reminder from the Federal Court of Appeal.

21. In giving its preliminary indication, the Tribunal considered that the level of complexity of the complaint was Level 1, which corresponds to an award of \$1,000 under the *Guideline*. Ecosfera made submissions expressing disagreement with this preliminary indication and requested that the Tribunal depart from the *Guideline* by awarding it compensation in the amount of \$15,400.85. Taking those submissions into consideration, the Tribunal must now determine whether it is appropriate to depart from the *Guideline* or amend its preliminary indication of the level of complexity and the amount of compensation.

22. In this connection, the Tribunal points out that it does not consider itself bound by the *Guideline* and believes that it is free to depart from the levels of complexity and the rates set out in the *Guideline*, where circumstances justify it. Moreover, as paragraph 1.3 of the *Guideline* states, "... each case will be considered individually, and the guideline is not intended to replace, limit or detract from the discretion of the Tribunal" Furthermore, paragraph 4.2.2 allows parties to make submissions on, among other things, "... the reason why the guideline should not be followed." A decision not to accept such submissions does not constitute evidence that the Tribunal has adopted a rigid practice in awarding costs.

23. Thus, in this case, the Tribunal reviewed Ecosfera's submissions, in particular as to whether, in light of the relevant facts, there was a reason to depart from the *Guideline*. The Tribunal therefore did not follow an "automatic" or "inflexible" practice in applying the principles stated in the *Guideline*. On the contrary, it considered whether they should apply in this case. In short, the Tribunal did not fetter its discretion, since a decision on whether or not to apply the principles stated in the *Guideline* implies the exercise of discretion.

24. Having considered the parties' submissions, the Tribunal believes that Ecosfera's complaint, the Tribunal's inquiry and the complaint proceedings did not present an unusually high level of complexity that would justify the Tribunal exceeding the compensation thresholds set out in the *Guideline*. As noted above, the Tribunal also finds that Ecosfera has not demonstrated that these thresholds do not correspond to those of most courts of justice in Canada. The Tribunal is further of the opinion that Ecosfera's submissions do not cast doubt on the relevance of the principles and criteria for the awarding of costs stated in the *Guideline*.

25. However, taking into account all the relevant circumstances, the Tribunal does consider it appropriate to review the preliminary indication of the level of complexity and the amount of the cost award given in its determination of July 11, 2007.

26. Paragraph 2.1 of the *Guideline* states certain principles that the Tribunal considers relevant to the exercise of its discretion in awarding costs in proceedings of this kind. Paragraph 2.1 states the following:

- the costs awarded normally represent a partial indemnity;
- the costs awarded are not intended to be a source of profit for the claimant; and
- the assessment and taxation should be efficient and fair to all parties.

6. *Supra* note 2.

27. The Tribunal generally applies three criteria in determining the level of complexity of a complaint: (i) the complexity of the procurement, (ii) the complexity of the complaint and (iii) the complexity of the proceedings. In the Tribunal's view, these criteria are appropriate, and there is no reason to depart from them in this case. These criteria are generally recognized as carrying great weight in the award of costs in judicial proceedings.

28. The Tribunal will now examine what it considers to be the submissions made by Ecosfera on the correctness of the preliminary indication. In general, Ecosfera claims that the rates set in the *Guideline* are too low in relation to the awards that were made under the 1999 guidelines. In this connection, the Tribunal must note that, in fact, the costs awarded were sometimes higher under the 1999 guidelines. These, however, are no longer in force, and the Tribunal has since reconsidered the matter of costs and adopted an approach that it considers more representative of that generally followed by Canadian courts of justice.⁷ In the Tribunal's view, there is nothing in Ecosfera's submissions concerning a comparison between the awards under the 1999 guidelines and those under the *Guideline* to justify the Tribunal reverting to the approach followed in the past.

29. Ecosfera made submissions which the Tribunal considers to be related to the criteria used to determine the complexity of the complaint and the complexity of the proceedings. In paragraph 5 of its submissions of July 16, 2007, Ecosfera first refers to the various actions that it had to take in order to file its objection. It also refers to the various procedural steps that it then had to follow in relation to the Tribunal's inquiry. In this connection, in addition to the normal procedural steps, Ecosfera notes that it had to make a motion for production of documents, respond to specific requests from the Tribunal on matters of interpretation and submit additional briefs in response to EC's submissions. In paragraph 6, Ecosfera submits that it had to make submissions relating to issues that it describes as "highly controversial and highly complex" [translation].

30. Having considered the submissions mentioned in the previous paragraph, the Tribunal considers that, with regard to the criterion of the complexity of the complaint, some of the matters of interpretation raised in the complaint required more thorough discussion than usual. However, the Tribunal would not go so far as to use Ecosfera description of these matters of interpretation as being "highly controversial and highly complex". At most, these matters required the parties and the Tribunal to clarify their thinking on the scope of the provisions applicable to the facts in this case.

31. As to the criterion of complexity of the proceedings, the Tribunal is of the view that the facts indeed demonstrate that Ecosfera had to follow numerous steps in order to file, in an appropriate manner, its objection to the way in which its proposal was evaluated. The Tribunal also accepts Ecosfera's submission that certain proceedings undertaken during the inquiry itself exceeded the normal scope of inquiries conducted by the Tribunal. The Tribunal therefore finds that the complexity of the proceedings was average.

32. Lastly, the Tribunal confirms the preliminary indication given in its determination of July 11, 2007, that the complexity of the procurement in this case was low, since it involved consulting services, the purpose of which was not at issue.

7. The *Guideline* includes the following comment on how the rates were set: "The flat rates were determined after a survey of the existing rates in other courts of justice in Canada and were based on the consideration that indemnification was to be partial only. The initial figure was established at a level generally consistent with the Federal Court of Canada tariff for fees and was then increased by 50 percent to allow for disbursements."

33. In light of the foregoing, the Tribunal considers it appropriate to amend the preliminary indication of the level of complexity for the complaint case and to fix the final indication at Level 2. The amount of the cost award made by the Tribunal is therefore \$2,400.

CONCLUSION

34. In its determination of July 11, 2007, the Tribunal, under section 30.16 of the *CITT Act*, awarded Ecosfera its reasonable costs incurred in preparing and proceeding with the complaint. The Tribunal's preliminary indication of the level of complexity for this complaint case was Level 1, and its preliminary indication of the amount of the cost award was \$1,000. After considering the submissions of the parties concerning that determination, the Tribunal considers it appropriate to amend the preliminary indication of the level of complexity for this complaint case and to fix the final indication at Level 2. The amount of the cost award made by the Tribunal is therefore \$2,400. The Tribunal directs EC to take appropriate action to ensure prompt payment

Serge Fréchette
Serge Fréchette
Presiding Member