

Ottawa, Wednesday, July 21, 1999

File No.: PR-97-008

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

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

## **ORDER**

### **INTRODUCTION**

In a determination made on September 10, 1997, the Canadian International Trade Tribunal (the Tribunal) awarded Symtron Systems Inc. (Symtron), pursuant to subsections 30.15(4) and 30.16(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> (the CITT Act), its reasonable costs incurred in preparing a response to the Request for Proposal (RFP) and in relation to filing and proceeding with this complaint.

On October 6, 1997, Defence Construction Canada (Defence Construction) filed an application with the Federal Court of Appeal for judicial review of the Tribunal's determination in File No. PR-97-008. On October 23, 1997, Symtron submitted to the Tribunal its claim for complaint costs in the amount of \$109,746.79 for preparing a response to the RFP and \$84,663.71 in relation to filing and proceeding with this complaint. These claims were sent to Defence Construction for its comments, but, on November 24, 1997, the Tribunal advised the parties that the claim would be held in abeyance until the Federal Court of Appeal heard the application filed by Defence Construction. On December 1, 1998, the Federal Court of Appeal dismissed the application. The Tribunal subsequently renewed the action of the cost claim and on April 12, 1999, Defence Construction filed its comments on the claim. On May 6 and 11, 1999, Symtron filed its response to the comments by Defence Construction.

### **COMPLAINT COSTS**

Symtron has claimed an amount of \$74,306.35 in fees and \$10,357.36 in disbursements incurred in pursuing this complaint. These amounts can be further broken down as follows: \$40,765.50 in legal fees and \$2,006.88 in disbursements for Morris/Rose/Ledgett; \$8,239.60 in legal fees and \$861.21 in disbursements for Dunhill Madden Butler; \$9,707.50 in fees and \$1,278.67 in disbursements for Intellisec; and \$15,593.75 in fees and \$6,210.60 in disbursements for ISS International.

Dealing first with the fees and disbursements for Dunhill Madden Butler, Intellisec and ISS International, all three of these firms are located in Australia and were engaged by the complainant to determine the level of involvement of I.C.S. International Code Fire Services Inc. (ICS), the eventual contract awardee, in a particular project in Australia. The Tribunal's inquiry into Symtron's complaint was not a review of the actions of ICS in formulating its proposal nor even whether ICS's proposal accurately reflected its experience. The Tribunal's inquiry, as stated in its determination of September 10, 1997, was a review of

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1. R.S.C. 1985, c. 47 (4th Supp.).

“the approach adopted by Defence Construction in order to determine whether ICS and Symtron met the minimum mandatory qualification requirements and its subsequent reliance on the [Morrison Hershfield<sup>2</sup>] Report in deciding to award the contract to ICS. The Tribunal must determine whether this part of the procurement process was conducted in accordance with the requirements set out in the relevant provisions of NAFTA”<sup>3</sup> [emphasis added]. The cost of hiring the Australian firms was, in the Tribunal’s opinion, beyond those reasonable costs incurred in filing and proceeding with this complaint. An inquiry that arises from a procurement complaint is limited to a review of the conduct of the government entity during the procurement process and whether the entity fulfilled its duties and obligations under, *inter alia*, the *North American Free Trade Agreement*<sup>4</sup> (NAFTA) in relation to the subject procurement. The Tribunal must determine whether, based on the solicitation documents and the information contained in the bids, the government entity awarded the contract in accordance with the requirements of NAFTA. The scope of the inquiry does not include verifying the veracity of a potential supplier’s proposal. While Symtron is not prevented from conducting research in an attempt to verify the statements of ICS in its proposal, it is the opinion of the Tribunal that such research was not necessary for Symtron to file and proceed with its complaint nor was it relevant to the Tribunal’s inquiry as to the conduct of the government department. As such, these costs are not allowed.

With respect to the legal fees incurred with Morris/Rose/Ledgett, the Tribunal has examined each invoice with respect to the services provided and finds that some of the charges do not reasonably relate to filing and proceeding with the subject complaint. Those charges that relate to (1) the cost claims arising out of Tribunal File No. PR-96-030, (2) the research done in Australia, (3) the research on contract security, (4) the research on tortious interference with contractual relations and (5) the application to the Federal Court of Appeal for judicial review are, in the opinion of the Tribunal, beyond the scope of filing and proceeding with the subject complaint before the Tribunal. It is also the Tribunal’s opinion that, once Symtron’s final submission was filed on August 8, 1997, until the Tribunal’s determination of September 10, 1997, there was no requirement to expend resources in relation to the proceedings. These costs have therefore also been disallowed. What remains is \$24,400.00 in legal fees. With respect to the disbursements claimed, the Tribunal finds that the amount of \$2,006.88 is not unreasonable and thus allows this amount.

### **BID PREPARATION COSTS**

Symtron has claimed \$109,746.79 for preparing a response to the RFP. Defence Construction responded to the claim by expressing concern about possible overlap or double charging between the labour, overhead and general and administrative components of the claim. Symtron responded with a memorandum explaining the breakdown of the components and stating that no redundancy exists. The Tribunal is satisfied with Symtron’s response. The Tribunal finds that, in relation to a contract value of just under \$8 million, bid preparation costs in the order of \$109,746.79, or 1.25 percent, are quite reasonable. A careful review of Symtron’s submission has revealed nothing that would indicate to the Tribunal that these charges were not actually incurred. Accordingly, Symtron’s claim for preparing a response to the RFP is allowed in its entirety.

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2. Engineering consulting firm engaged by Defence Construction to conduct an independent verification of ICS’s minimum qualifications to compete for this requirement.
  3. *Symtron Systems Inc.* (September 10, 1997) PR-97-008 (C.I.T.T.) at 7.
  4. Done at Ottawa, Ontario, on December 11 and 17, 1992, at Mexico, D.F., on December 14 and 17, 1992, and at Washington, D.C., on December 8 and 17, 1992 (in force for Canada on January 1, 1994).

**CONCLUSION**

The Tribunal hereby awards Symtron costs in the amount of \$26,406.88 in relation to proceeding with its complaint and \$109,746.79 in relation to preparing a response to the RFP. The Tribunal directs Defence Construction to take appropriate action to ensure prompt payment.

Patricia M. Close

Patricia M. Close  
Presiding Member

Michel P. Granger

Michel P. Granger  
Secretary