CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, October 26, 1995

File No.: PR-95-001

IN THE MATTER OF a complaint filed by Mechron Energy Ltd. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.), as amended by S.C. 1993, c. 44;

AND IN THE MATTER OF a determination made under section 30.14 of the *Canadian International Trade Tribunal Act.*

ORDER

INTRODUCTION

In a determination made on August 18, 1995, the Canadian International Trade Tribunal (the Tribunal) awarded Mechron Energy Ltd. (the complainant), pursuant to subsections 30.15(4) and 30.16(1) of the *Canadian International Trade Tribunal Act*[1] (the CITT Act), subject to the Tribunal's recommendations therein, its reasonable costs incurred in preparing a response to the solicitation and in relation to filing and proceeding with its complaint.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommended that the Department of Public Works and Government Services (the Department) terminate the contract awarded to Schneider Canada (the awardee) and award it to the complainant. If the contract was awarded to the complainant, the value thereof was to be reduced by any amount paid in compliance with the Tribunal's cost award for preparing a response to the solicitation.

Alternatively, if the contract was not awarded to the complainant, in addition to implementing the cost award for filing and proceeding with the complaint, the Tribunal recommended that the Department present to the Tribunal a proposal for compensation, developed jointly with the complainant, that recognized that the complainant should have been awarded the contract and would have had the opportunity to profit therefrom. This proposal was to be presented to the Tribunal within 30 days of the date of the determination.

On August 28, 1995, the Department submitted to the Tribunal a letter describing its intentions with respect to the Tribunal's recommendations. The Department stated that it would not terminate the contract with the awardee, but would instead attempt to negotiate, with the complainant, a proposal for compensation for lost opportunity to profit, based on the value of the contract with the awardee and not on the value of the complainant's proposal. Further to the above, the complainant submitted to the Tribunal, on September 19, 1995, its claim for proposal costs in the amount $116,226.00 and its claim for complaint costs in the amount of $168,212.00. On October 4 and 11, 1995, the Department sent written comments to the Tribunal with respect to the complainant's claims. Finally, on October 11 and 18, 1995, the complainant responded to the Department's comments.

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

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PROPOSAL COSTS

The Tribunal is of the view that, in preparing a response to the solicitation, the manufacturing overhead rate of 125.99 percent should not be applied to any labour hours not considered to be manufacturing or engineering and that the G&A rate of 8.96 percent should not be applied to sales and administrative hours. However, all of the hours should be allowed.

Consequently, the Tribunal awards proposal costs in the amount of $84,856.00.

COMPLAINT COSTS

With respect to the costs incurred in relation to filing and proceeding with the complaint, the Tribunal must consider several subheads of compensation. They are: (1) time spent by the complainant in proceeding with its complaint; (2) legal fees incurred by the complainant; and (3) consultant fees.

Regarding subhead (1), the Tribunal accepts the amount submitted by the complainant as reasonable. Therefore, the Tribunal awards costs in the amount of $6,907.00.

Regarding subhead (2), the Tribunal does not believe that the hours spent by counsel for the complainant were necessary, given the nature of the complaint. The Tribunal acknowledges that counsel were dealing with a complex case and appreciates the quality of their contribution.

The Tribunal has considered a number of factors in assessing what it believes to be a reasonable amount of time. These factors include the complexity of the case, the time frames within which the parties had to work, the nature of the results achieved and the degree of skill exhibited by counsel.[2]

The skill demonstrated by counsel warrants fair compensation which acknowledges the positive result achieved on behalf of their client, the complainant. Notwithstanding this view, the Tribunal believes that the 671 hours spent by counsel on this case are excessive. Rather, it feels that a reasonable figure is 80 percent of the hours claimed. These hours are apportioned between the legal staff working on the file in the proportions indicated in the complainant's letter of October 11, 1995.

The next item that the Tribunal must consider within this subhead is whether the hourly fees charged by counsel are reasonable. In assessing this question, it is helpful to consider the hourly rates permitted by other government authorities and adjudicative bodies. The Tribunal notes that, in a case involving fees for counsel involved in receivership activities, the following scale was permitted by the Ontario High Court:[3]

1 - 5 years' experience - $90 to $120 per hour
5 - 10 years' experience - $130 to $150 per hour
10 - 15 years' experience - $150 to $175 per hour
15 - 20 years' experience - $175 to $200 per hour
20 years and over - $225 to $275 per hour

2. *Solicitor, Re*, [1968] 1 O.R. 45 (Assessment Officer).
3. *Webber v. Coulter* (1990), 22 A.C.W.S. (3d) 6 (Ont. H.C.J.).

In another judicial forum, solicitors' fees of up to $350 per hour for senior counsel and up to $210 per hour for junior counsel were allowed in a complex case involving conspiracy to injure and interference with economic relations.[4]

The Tribunal also notes that the Department of Justice, when retaining the services of private counsel, pays according to the following schedule:

1 - 3 years' experience - $60 to $85 per hour
4 - 7 years' experience - $85 to $100 per hour
8 - 12 years' experience - $100 to $125 per hour
13 - 20 years' experience - $125 to $150 per hour
+ 20 years' experience - $150 to $200 per hour

The Canadian Radio-Television and Telecommunications Commission, a large adjudicative body similar to the Tribunal has a long history of assessing costs. Its recently developed tariff grid is as follows:

legal assistant - $30 per hour
articling student - $60 per hour
0-2 years' experience - $115 per hour
3-5 years' experience - $140 per hour
6-10 years' experience - $175 per hour
+ 11 years' experience - $230 per hour

Taking into account all of the above, the Tribunal feels, with respect to counsel in this case and given their years' experience at the bar, that a reasonable hourly rate for counsel with 12 or more years' experience is $230, for counsel with two years' experience, $115, and for a law student, $60.

The Tribunal does not have information to support the complainant's claim that the law clerk and librarian should be compensated at an hourly rate, as their work is usually considered within the law firm's overhead.[5]

Consequently, the Tribunal awards costs in the amount of $85,607.36 for this subhead.

Regarding subhead (3), the Tribunal is not prepared to recommend payment of the amount for consultant fees. The consultant's report was brought in very late, on July 11, 1995, and was not considered at all by the Tribunal. No value was added, in the Tribunal's opinion, by the preparation or submission of this report.

In summary, as it relates to the complaint costs, the Tribunal awards costs in the amount of $92,514.36.

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4. *131843 Canada Inc. v. Double "R" (Toronto) Ltd.* (1992), 11 C.P.C. (3d) 190 (Ont. Ct. (Gen. Div.)).
5. *Greenberg v. Hsia* (1993), 39 A.C.W.S. (3d) 1061 (Ont. Assessment Officer).

COMPENSATION FOR LOST PROFIT

It is apparent that the parties have not been able to jointly develop a proposal for compensation. Consequently, it falls to the Tribunal to fix the amount of the compensation based on the information submitted. Because of the difficulties that the parties were having in preparing a joint proposal for compensation, the Tribunal, on October 5, 1995, asked the complainant to submit its claim for compensation by October 13, 1995. The Department was given until October 18, 1995, to respond to the complainant's submission, and the complainant was to be given until October 20, 1995, to respond. On October 17, 1995, the Department informed the Tribunal that it could not respond until October 27, 1995. On October 19, 1995, the Department was advised that it had until October 23, 1995, to provide comments on the complainant's submission and make other submissions regarding compensation.

The determination of the measure of compensation in this case has been made difficult by the Department's unresponsiveness. In the Tribunal's view, sufficient time was provided to allow the Department to comment on the complainant's submission. It is important to remember that the Tribunal's procurement review mandate is an informal and expeditious[6] one, which results in recommendations being submitted to the Department.[7] The Tribunal can consider any information which it deems to be authentic in arriving at its recommendations.[8] Unfortunately, the Department has not provided the Tribunal with any information on the issue of compensation to date. This does not, however, relieve the Tribunal of its obligation to scrutinize that information which has been submitted by the complainant before coming to a decision on the appropriate level of compensation.

In deciding on a reasonable amount of compensation, the Tribunal is mindful that such an assessment is a difficult task. As McEachern C.J.B.C. stated in *Begusic v. Clark, Wilson & Co.*, "The assessment of damages is not a precise science: it is not even a calculation.[9]"

In considering the principles which should guide the Tribunal in assessing compensation, reference will be made to those which govern the assessment of damages in common law. It is evident that damages may be assessed in cases involving tenders, which, of course, parallel the procurement process at issue.[10]

The courts have held that, in cases involving tenders, the appropriate principles to be used in determining the measure of damages are those found in breach of contract.[11]

In the present case, it is clear that the complainant, had it been successful, expected to profit from the contract, and the Department should reasonably have foreseen or contemplated this. Consequently, the

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6. *Supra*, note 1, s. 35.
7. *Ibid.*, ss. 30.15(2).
8. *Ibid.*, s. 34.
9. [1991], 57 B.C.L.R. (2d) 273 at 290 (B.C.C.A.); additional reasons at [1992], 66 B.C.L.R. (2d) 253 (B.C.C.A.); leave to appeal to S.C.C. refused (1992), 62 B.C.L.R. (2d) xxii (note) (S.C.C).
10. *R. v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 119 D.L.R. (3d) 267 (S.C.C.); see also *R. v. Canamerican Auto Lease & Rental Ltd.*, [1987] 37 D.L.R. (4th) 591 (Fed. C.A.).
11. *Ibid.*

complainant's claim for compensation for lost profit is not too remote under the first branch of the rule in *Hadley v. Baxendale.*[12]

On the understanding that the complainant's loss of profit is not too remote, the complainant is entitled to "[insofar] as money can do it, be placed in the same situation, with respect to damages, as if the contract had been performed.[13]"

In this case, the complainant argues that its losses are those set out in paragraph 20 of its October 13, 1995, submission. But, would the contract price have been for the amount indicated by the complainant in its submission? It is apparent that the complainant has based its submission on the premise that all possible options that could have been exercised by the Department would have been exercised by it.

In any tender process, the contracting authority has budgetary limits within which it must work. If all tenders are for an amount greatly in excess of its budgetary capacity, it is reasonable to expect that it would rethink the need for the contract as originally proposed or see if it could raise the budgetary ceiling. This flexibility, if exercised fairly and in good faith, is a necessary part of any contracting authority's repertoire of options.

In the present case, the Department accepted a bid (albeit a non-compliant one) to perform the work for $10.9 million. The Department was, therefore, prepared to commit to at least that level of funding. The Tribunal is of the view, however, that the Department was not in a position to contract for the full price quoted by the complainant, which included all the options. This is supported by comments in the Department's letter to the Tribunal dated August 28, 1995, which states, in part, that the price bid by the complainant exceeded by far the funds which the Department of Transport had budgeted for the procurement. It would seem reasonable that the Department, in view of the stated government financial limitations in the circumstances and the express authority to reject all options,[14] would have done so.

Accordingly, on this basis and considering the information submitted by the complainant, the revised contract price less the options would be $15,474,021.00. Using the same method of calculation as that used by the complainant (adjusted for the removal of the options, the bid preparation costs awarded above and the incremental/variable costs relating to the performance of the contract), the expected profit would be $2,203,577.00. The Tribunal is of the view that this profit should be reduced by a contingency of 10 percent that reflects both the present value of a payment of profit now rather than in accordance with the terms of the solicitation and the absence of risks normally associated with the performance of a contract. Therefore, the Tribunal recommends that the complainant be compensated in the amount of $1,983,219.00.

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12. (1854), 9 Exch. 341.
13. *Robinson v. Harman* (1848), 1 Ex. 850.; *Northeast Marine Services Ltd. v. Atlantic Pilotage Authority*, (F.C.A. A.1520-92), Stone, Decary, LeTourneau, January 25, 1995.
14. Request for Proposal/Solicitation No. NG T8080-4-0166/000/A, clause 5.4.

CONCLUSION

The Tribunal hereby awards the complainant $84,856.00 in costs incurred in preparing a response to the solicitation and $92,514.36 in costs incurred in relation to filing and proceeding with its complaint and directs that the Department take the appropriate action to ensure prompt payment. The Tribunal hereby recommends that the Department pay compensation to the complainant in the amount of $1,983,219.00.

Charles A. Gracey
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Member

Michel P. Granger
Michel P. Granger
Secretary