

Ottawa, Monday, September 14, 1998

File No.: PR-97-033

IN THE MATTER OF a complaint filed by IBM Canada Ltd., 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 April 24, 1998, the Canadian International Trade Tribunal (the Tribunal), pursuant to subsections 30.15(4) and 30.16(1) of the *Canadian International Trade Tribunal Act*,¹ awarded IBM Canada Ltd. (IBM) its reasonable costs incurred in relation to preparing a response to the solicitation and in relation to filing and proceeding with its complaint.

On May 25, 1998, IBM submitted to the Tribunal its claim for complaint costs and bid preparation costs in the amount of \$230,607.57. The Department of Public Works and Government Services (the Department) sent comments on IBM's claim on June 17, 1998. In response to the Tribunal's request of June 26, 1998, IBM responded to these comments on July 6, 1998. The Tribunal wrote to IBM on July 10 and 31, 1998, requesting specific and additional supporting information, to which IBM responded with a number of communications, the last of which was received on August 31, 1998.

COMPLAINT COSTS

IBM has claimed \$32,635 as representative's fees incurred by it in relation to proceeding with its complaint. That amount was calculated by multiplying the number of hours that IBM's representative worked (122 hours) by an hourly rate of \$250 and then adding GST to that amount. The Tribunal, having considered the complexity of the case and the degree of experience and skill of the representative, is of the view that the number of hours claimed is reasonable in the circumstances. However, the Tribunal considers the hourly rate claimed for the representative to be excessive. The Tribunal's *Procurement Costs Guidelines* (the Guidelines) set out a rate of \$125/hour for senior representatives. The Tribunal is, of course, not bound by the Guidelines. In light of the representative's years of experience as a consultant and, in particular, his background in the procurement area, the Tribunal considers that a rate of \$150/hour is appropriate. Accordingly, the total amount allowed for representative's fees is \$18,300, plus an amount of \$1,281 for GST.

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

IBM has also claimed internal costs of \$37,878.00 (including overhead and GST) in relation to proceeding with the complaint and related disbursements of \$664.25, specifically, expenses in respect of travel, accommodation and long distance calls and other costs. With respect to internal personnel time, the Tribunal notes that IBM retained independent counsel to act on its behalf in proceeding with the complaint before the Tribunal and that IBM personnel who participated in the proceedings were acting in their capacity as employees, not as legal counsel or representatives. The Tribunal is of the view that, absent a situation where an in-house counsel or other employee represents a litigant in a proceeding, the power to award costs does not include the power to compensate a litigant for the time spent by its employee in connection with the proceedings.² Similarly, the Tribunal has not generally awarded a litigant its disbursement costs incurred in association with an employee's participation in proceedings unless associated with an employee's attendance and/or appearance as a witness at a hearing in the proceedings.³ Accordingly, the Tribunal does not allow these costs.

BID PREPARATION COSTS

IBM has claimed personnel costs in relation to preparing its response to the solicitation and to clarifying its bid at the Department's request in the amount \$153,852.00 (including overhead and GST). It has also claimed \$5,778.32 for related disbursements. The Notice of Proposed Procurement was not published until August 29, 1997, and IBM was notified on November 27, 1997, that its proposal would not be considered further and would remain non-compliant; therefore, IBM will not be entitled to costs incurred outside these dates.⁴ Moreover, certain portions of the claim were left unsupported. For example, no supporting documentation in the way of time sheets or agenda excerpts was provided for the hours claimed for four individuals. These amounts will not be allowed. GST will not be permitted on hours claimed by in-house representatives and only on the disbursements where the payment of GST is clearly supported. The rate of \$400.00 per day for IBM employees does appear reasonable based on the salary information submitted. Finally, the allocation of overhead will be allowed at the lower rate submitted of 76 percent for all in-house representatives. Taking into account the Department's submission, as well as IBM's response and supporting information submitted, and applying the principles laid out in the Guidelines, the Tribunal is prepared to allow costs in the amount of \$90,021.06 (including \$38,872.73 as overhead charges and no GST) and \$3,126.80 as disbursements.

2. See, for example, *Energy Absorption Systems Inc. v. Y. Boissonneault & Fils Inc.*, unreported, Federal Court of Canada - Trial Division, Court File No. T-2263-86, January 30, 1991; and *Wellcome Foundation Ltd. v. Apotex Inc.* (1992), 52 F.T.R. 241.

3. See, for example, *Aerlinte Eireann Teoranta v. Canada*, unreported, Federal Court of Canada - Trial Division, Court File No. T-1250-80, December 14, 1993; and *Bayliner Marine Corp. v. Doral Boats Ltd.* (1987), 15 C.P.R. (3rd) 201.

4. In its response to the Department's comments on the cost claim, IBM states that the Request for Proposal was issued on June 20, 1997. The Tribunal notes, however, that, in the chronology listing in its complaint, IBM states that the Request for Proposal was issued on August 22, 1997.

CONCLUSION

The Tribunal hereby awards IBM costs in the amount of \$19,581.00 in relation to proceeding with the complaint and costs in the amount of \$93,147.86 in relation to preparing a response to the solicitation and directs the Department to take appropriate action to ensure prompt payment.

Charles A. Gracey

Charles A. Gracey
Presiding Member

Michel P. Granger

Michel P. Granger
Secretary