

Ottawa, Friday, January 7, 2000

File No.: PR-98-050

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

AND IN THE MATTER OF a decision made by the Canadian International Trade Tribunal pursuant to sections 30.15 and 30.16 of the *Canadian International Trade Tribunal Act*, awarding Douglas Barlett Associates Inc. its reasonable costs incurred in relation to preparing a response to Solicitation No. EF937-8-0022/A and in relation to filing and proceeding with the complaint, as well as recommending that Douglas Barlett Associates Inc. be compensated one third of the profit that it would have made, if any, if it had submitted a proposal for a price one dollar lower than that of Roy & Breton Inc.

ORDER

In a determination made on June 7, 1999, the Canadian International Trade Tribunal (the Tribunal) awarded Douglas Barlett Associates Inc. (DBA), pursuant to subsections 30.15(4) and 30.16(1) of the *Canadian International Trade Tribunal Act*,¹ its reasonable costs incurred in preparing a response to Solicitation No. EF937-8-0022/A and in relation to filing and proceeding with its complaint. Furthermore, pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommended that DBA be compensated one third of the profit that it would have made, if any, if it had submitted a proposal for a price one dollar lower than that of Roy & Breton Inc. (Roy & Breton).

On August 13, 1999, DBA submitted to the Tribunal its claim in the amounts of \$2,177.99 for filing and proceeding with the complaint, \$16,000.00 for preparing a response to Solicitation No. EF937-8-0022/A and \$63,718.63 for one third of the profit that it would have made if the price of its proposal had been one dollar lower than that of Roy & Breton. The Department of Public Works and Government Services (the Department) filed comments and additional information on this claim on September 7 and October 7 and 26, 1999. DBA filed comments in response and additional information on September 22, October 26 and November 12, 16 and 22, 1999. DBA's claim for costs incurred for its complaint was revised to \$3,172.55 on October 26, 1999.

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

COMPLAINT COSTS

DBA has claimed \$3,172.55 for filing and proceeding with its complaint. The Department made no comments with respect to this claim. A careful review of DBA's submission has revealed nothing that would indicate to the Tribunal that these charges were not actually incurred, and the Tribunal finds these costs to be reasonable in the circumstances. Accordingly, DBA's claim for costs incurred for its complaint is allowed in its entirety.

BID PREPARATION COSTS

DBA has claimed \$16,000.00 for preparing a response to the Department's request for proposal (RFP). The Department responded to the claim by expressing concern about the rates being claimed for the various employees, for site visits that took place prior to the beginning of the project and for the services of an installation subcontractor. The Tribunal finds that there is limited evidence to support the hourly rates indicated, that the dates of the site visits mentioned were December 10, 1998, for Montréal, Quebec, and December 17, 1998, for Shawinigan, Quebec, and that there is no supporting evidence, such as an invoice or bill, with respect to the expense claimed for the installing dealer's principal.

Appendix A of the *Procurement Cost Guidelines* indicates that "[b]id preparation costs are the direct and indirect costs incurred by a claimant in preparing a bid" [emphasis added] and sets out guiding principles for determining what those costs should include. The Tribunal normally accepts reasonable costs claimed for bid preparation that were actually incurred by the claimant in preparing a bid for the contract in question. As such, these costs reflect actual salaries or invoiced charges and do not generally include costs incurred prior to the publication of the Notice of Proposed Procurement (NPP).

With the removal from DBA's claim of all costs associated with the site visits to Shawinigan and Montréal, which took place prior to the publication of the NPP, and all costs associated with the installing dealer's principal and the reduction of the hourly rates in order to reflect more closely the actual rate of remuneration, or a more reasonable one, DBA's claim can be summarized as follows:

Mr. B	85 hours @ \$75.00	\$6,375.00
Mr. M	5 hours @ \$19.00	95.00
	+ disbursements	<u>15.35</u>
		\$6,485.35

Accordingly, DBA's claim for preparing a response to the RFP is awarded in the amount of \$6,485.35.

COMPENSATION FOR LOST PROFIT

In this case, DBA argues in its August 13, 1999, submission that its lost profit equalled \$191,155.91. As the Tribunal recommended that DBA be compensated one third of the profit that it would have made if it had submitted a proposal for a price one dollar lower than that of Roy & Breton, this amounts to a compensation claim of \$63,718.63. The alleged losses of \$191,155.91 include \$49,007.39, which represents the difference between the total proposal value of Roy & Breton and DBA's cost of goods sold, \$35,781.52, which represents a 6 percent commission on DBA's cost of goods sold, and \$106,367.00, which represents the profit on an additional 200 workstations required for Shawinigan.

The Department raised some concerns about the number of workstations on which DBA's claim is based (some 211 units for Montréal instead of 208); the calculation of DBA's cost of goods sold; the failure to include installation and delivery in DBA's costs; the failure of DBA to take into consideration other costs, such as the cost of bid preparation, in its calculation of lost profit; the claim of a 6 percent commission on the cost of goods; and the alleged lost profits on an additional 200 workstations for Shawinigan.

The Tribunal finds that the issue of units in Montréal is a relatively minor one and accepts DBA's version of quantities that it bid in relation to the RFP. The Tribunal also finds that there is sufficient evidence to believe that DBA receives a 6 percent commission on sales from the manufacturer and to accept DBA's figures in terms of the cost of goods from the manufacturer.

The issue of applying other costs is a difficult one. DBA has not subtracted any costs other than the cost of goods sold to arrive at its expected profit. Nor has DBA argued that the project was over and above normal work and that, therefore, all overhead had been previously assigned. Even bid preparation costs were not removed as a cost. DBA has submitted that its overhead rate is 3.2 percent of sales; however, it did not explain how that rate is calculated. Based on the financial statements submitted, the Tribunal is of the view that it would be reasonable to apply a 10 percent overhead allocation to sales for the contract at issue. With that allocation, one could assume that bid preparation costs are taken into account with the general overhead allocation.

With respect to the alleged procurement of 200 additional workstations, the Tribunal notes that these additional workstations were not mentioned in the RFP. This alleged procurement, to the extent that it, in fact, took place and that it was not conducted according to the provisions of the applicable agreements, could be, or should have been, the subject of a separate complaint. The profit associated with this alleged procurement will not be allowed as claimed in this case.

Accordingly, the recommended compensation amount is calculated as follows:

Roy & Breton's proposal amount less one dollar		\$645,365.00
Deduct cost of goods		<u>596,358.61</u>
		\$49,006.39
Add 6 percent commission		<u>35,781.52</u>
		\$84,787.91
Deduct overhead allocation	(10 percent of sales)	<u>64,536.50</u>
Lost profits		\$20,251.41
Recommended compensation	1/3 of lost profit	\$6,750.47

The Tribunal does not expect its recommendation to be a windfall to DBA; rather, the recommended compensation is intended to compensate DBA for the opportunity that it lost to be awarded the contract and to profit therefrom. The amount of compensation that the Tribunal recommends be paid to DBA is therefore \$6,750.47. In comparison to the financial statements submitted by DBA, the estimated amount of lost profits used to calculate the recommended compensation is in line with the historical profit margin of the company.

CONCLUSION

The Tribunal hereby awards DBA costs in the amount of \$3,172.55 in relation to proceeding with its complaint and \$6,485.35 in relation to preparing a response to Solicitation No. EF937-8-0022/A and directs that the Department take appropriate action to ensure prompt payment. The Tribunal also establishes at \$6,750.47 the recommended compensation to DBA, based upon one third of the profit that it would have made if it had submitted a proposal for a price one dollar lower than that of Roy & Breton.

Peter F. Thalheimer
Peter F. Thalheimer
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary