

Ottawa, Tuesday, November 28, 2000

File No.: PR-99-035

IN THE MATTER OF a complaint filed by Dr. John C. Luik 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 determination made by the Canadian International Trade Tribunal on March 28, 2000, recommending a remedy, pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, in the form of monetary compensation to Dr. John C. Luik.

ORDER

BACKGROUND

In its determination of March 28, 2000, the Canadian International Trade Tribunal (the Tribunal) recommended as a remedy, pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, that the Department of Public Works and Government Services (the Department) present to the Tribunal a proposal for compensation, developed jointly with Dr. John C. Luik, that recognized: (a) the opportunity that he lost by being unable to make a responsive bid in this case and the possibility that he may have been awarded this solicitation; (b) the prejudice caused to the integrity and efficiency of the competitive procurement system; and (c) the lack of good faith in conducting this procurement shown by the Department and the Department of Health (Health Canada). The proposal was to be presented to the Tribunal within 30 days of receipt of the statement of reasons.

As the parties were unable to come to an agreement on a proposal for compensation, the Tribunal requested that Dr. Luik submit his claim for compensation. On July 5, 2000, Dr. Luik submitted to the Tribunal his claim for compensation. The Department filed comments on the claim on August 2, 2000, in which it suggested an all-inclusive compensation of \$50,000. Dr. Luik filed comments in response on August 14, 2000, in which he increased his claim to \$85,000 for lost opportunity (representing 85 percent of the estimated value of the procurement) and maintained his claim of \$50,000 for other factors.

COMPENSATION FOR LOST PROFIT

In arriving at the suggested compensation in his final submission, Dr. Luik argued that his lost opportunity should be based on the estimated value of the procurement that was published at the time of the Advance Contract Award Notice, that is, \$100,000, and not on the actual amount spent on the contract by Health Canada. Dr. Luik applied a profit margin of 85 percent to the \$100,000 estimated value of the contract, since, according to Dr. Luik, the expenses associated with performing this type of contract are minimal. The \$50,000 for other factors is based on \$25,000 for the prejudice caused to the integrity and efficiency of the competitive procurement system and \$25,000 for the lack of good faith in conducting this procurement shown by the Department and Health Canada.

The Department presented its own version of calculating compensation, which involved starting with the actual value of the contract, applying a profit margin of 44.25 percent, which factored in the cost of labour in performing the services, and then dividing the amount by three to account for potential bidders on

this contract. Taking into consideration the additional bases of compensation, the Department proposed an all-inclusive compensation of \$50,000 and submitted that a compensation award greater than that would constitute a windfall for Dr. Luik.

The Tribunal finds that the basis of compensation that relates to the lost opportunity has to begin with the amount actually spent by Health Canada on the contract and has to take into account that there would have been at least two bidders competing for the contract. However, the Tribunal was not persuaded by the arguments of either party relating to the final calculation of a value for the lost opportunity. Therefore, the Tribunal has decided to take the original amount requested by Dr. Luik, which was based on the actual amount of the contract, and the amount suggested by the Department and to resolve the matter by “splitting the difference”. The two amounts have been added and divided by two. Therefore, the Tribunal recommends that Dr. Luik receive \$28,508.71 in compensation for lost opportunity.

With respect to the amount of compensation that pertains to the prejudice caused to the integrity and efficiency of the competitive procurement system and the lack of good faith in conducting this procurement shown by the Department and Health Canada, the sum of \$50,000 suggested by Dr. Luik and the sum proposed by the Department differ by less than 20 percent. The Tribunal accepts the arguments of Dr. Luik and establishes the compensation amount pertaining to the other factors at \$50,000.

Accordingly, the recommended compensation amount is \$78,508.71. In this case, given the severity of the impact of these transgressions on the integrity of the competitive procurement system and the lack of good faith shown by the Department and Health Canada in dealing with Dr. Luik and in conducting the procurement, the Tribunal does not view this recommended compensation as excessive nor as a windfall.

CONCLUSION

The Tribunal hereby establishes the amount of \$78,508.71 as the recommended compensation to Dr. Luik based upon: (a) the opportunity that he lost by being unable to make a responsive bid in this case and the possibility that he may have been awarded this solicitation; (b) the prejudice caused to the integrity and efficiency of the competitive procurement system; and (c) the lack of good faith in conducting this procurement shown by the Department and Health Canada.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Richard Lafontaine
Richard Lafontaine
Member

Zdenek Kvarda
Zdenek Kvarda
Member

Michel P. Granger
Michel P. Granger
Secretary