



Ottawa, Wednesday, April 17, 2002

File No. PR-99-051

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

AND FURTHER TO a determination made pursuant to subsections 30.15(2), (3) and (4) and subsection 30.16(1) of the *Canadian International Trade Tribunal Act* recommending compensation for the lost opportunity to make a responsive bid and the award to ACE/ClearDefense Inc. of its reasonable costs incurred in preparing a response to the solicitation and in relation to preparing and proceeding with the complaint.

ORDER AND RECOMMENDATION

INTRODUCTION

In a determination made on June 30, 2000, the Canadian International Trade Tribunal (the Tribunal) recommended, pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*,¹ that the National Gallery of Canada (NGC) present to the Tribunal a proposal for compensation, developed jointly with ACE/ClearDefense Inc. (ACE), that recognized the lost opportunity that ACE experienced by being unable to make a responsive bid and the possibility that it might have been awarded the contract for the solicitation and profited therefrom. Pursuant to subsections 30.15(4) and 30.16(1) of the CITT Act, the Tribunal awarded ACE its reasonable costs incurred in preparing a response to the solicitation and in relation to preparing and proceeding with its complaint.

On July 31, 2000, the NGC filed an application for judicial review of the Tribunal's determination with the Federal Court of Appeal.

On August 1, 2000, ACE submitted to the Tribunal its claim for costs in the amounts of \$16,709.47 for complaint costs and \$7,367.91 for bid preparation costs. On September 12, 2000, the Tribunal advised the parties that it would wait for the decision of the Federal Court of Appeal before proceeding further with the claim for costs.

The application for judicial review at the Federal Court of Appeal was dismissed on May 3, 2001.² On June 4, 2001, the Tribunal established July 4, 2001, as the deadline for the parties to submit a joint proposal relating to costs and compensation. The parties requested a number of extensions to present the joint proposal, which the Tribunal granted. The NGC requested additional information with regard to ACE's claim for complaint costs and bid preparation costs on June 5 and July 17 and 31, 2001. Replies were filed by ACE on August 1 and 3, 2001. Final comments were received from the NGC on August 31, 2001. ACE provided final comments on September 28, 2001.

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. *National Gallery of Canada v. ACE/ClearDefense*, A-481-00 (FCA).

On August 30, 2001, the Tribunal was advised that the parties were unable to reach an agreement with respect to a proposal for compensation to be paid to ACE for the lost opportunity to bid on the contract. The Tribunal requested that ACE submit a claim for compensation by September 28, 2001. The Tribunal also advised the parties that it would assess all claims once final comments had been received on the claim for compensation. ACE filed a confidential version of its submissions for compensation for lost opportunity on September 28, 2001, and public versions on October 15 and November 6, 2001. A request for an extension to October 26, 2001, was granted by the Tribunal. Comments from the NGC were received on October 18, 2001, and final comments by ACE were provided on October 26, 2001.

COMPLAINT COSTS

ACE submitted that the complaint required an unusual amount of consideration as a consequence of two interveners providing comments during the inquiry process, as well as the filing of additional submissions by the NGC to ACE's reply, which required a further response from ACE. It further submitted that its reply required lengthy research and submissions on the procurement policies of the Treasury Board Secretariat.

ACE has claimed \$14,980 in legal fees, for a total of 125.7 hours. That amount represents 23.9 hours at \$200/hour for the senior counsel, 79.7 hours at \$100/hour for the second counsel, 14.6 hours at \$85/hour for the third counsel and less than 1.0 hour for an articling student.³ It also claimed \$963 for a representative⁴ in the procurement proceeding. That amount represents 7.2 hours at \$125/hour. ACE has also claimed \$766.47 in disbursements incurred in connection with its participation in the complaint.

The NGC submitted that the hourly rates of \$200 and \$100 claimed by ACE do not conform to the Tribunal's *Procurement Cost Guidelines* (Cost Guidelines) and that an hourly rate of between \$125 and \$150 for the senior counsel and of between \$60 and \$85 for the second counsel would be more appropriate, as there is no reason to deviate from the hourly rates established in the Cost Guidelines. With regard to ACE's representative, the NGC submitted that ACE should be entitled to the rate established in the Cost Guidelines for a representative with between 0 and 5 years of experience, that is, at \$85/hour. ACE did not respond to the comments made by the NGC.

The Tribunal is of the view that there is no reason to deviate from the hourly rates established in the Cost Guidelines. Therefore, the Tribunal will allow an hourly rate of \$150 for the senior counsel, \$85 for the second counsel and \$60 for the third counsel. With respect to the number of hours claimed, the Tribunal notes that a few hours appear to have been claimed by counsel for work relating to compensation and not only to preparing and proceeding with the complaint. The Tribunal, therefore, reduces the number of hours claimed for the senior counsel to 22.4 hours and for the second counsel, to 77.7 hours. Accordingly, the Tribunal will allow legal fees in the amount of \$11,608.97, representing 22.4 hours at \$150/hour for the senior counsel, 77.7 hours at \$85/hour for the second counsel and 14.6 hours at \$60/hour for the third counsel. There is no change to the claim for the articling student. Contrary to the representation made by ACE that the representative has acted in this capacity for over 16 years, the Tribunal finds that, given the definition of "representative", the individual in question has acted in the capacity of representative between 0 and 5 years and, thus, an hourly rate of \$85 is appropriate. Therefore, the Tribunal allows a claim for fees in the amount of \$654.84 for the representative. As to the disbursements, the Tribunal will allow the

3. The amount claimed was \$9.63.

4. In the *Procurement Cost Guidelines*, "representative" means a person who represents a party to a procurement proceeding, but who is not a legal counsel. "Procurement proceeding" means a Tribunal proceeding in respect of a complaint.

full amount of \$766.47 on the basis of the documentation provided. Therefore, the total amount of complaint costs allowed is \$13,030.28.

BID PREPARATION COSTS

ACE has claimed \$7,367.91 in fees for the work performed by management and staff in relation to preparing a response to the solicitation. ACE claimed \$3,246.53 for necessary administrative and management expenses, \$3,387.63 for office salary and wages, \$311.86 in fixed/period charges (rent for 14 days) and \$421.89 for general and administrative expenses.

With respect to the bid preparation costs, the NGC submitted that the list for the hourly rate claimed for Mr. Harry Kater, Vice-President of ACE, did not constitute “supporting documentation”, as required by paragraph 4.1.2 of the Cost Guidelines nor was the hourly rate substantiated by Mr. Kater. Therefore, the NGC argued that Mr. Kater’s claim should be disregarded. With respect to the claim for fixed/period charges, i.e. rent for the premises, the NGC submitted that it should also be discounted, as there was no evidence that the rent was for space used exclusively for the preparation of the bid. With respect to the claim for “office salary and wages”, the NGC submitted that there is no supporting documentation for the hourly rates claimed or the number of hours spent by each employee on the preparation of the bid. In addition, the NGC noted that some employees appear to have worked on the preparation of the bid after the solicitation closed.

ACE submitted that the claim is reasonable and appropriately supported by documentation and that the requests by the NGC for additional information are unreasonable, would be burdensome and involve excessive staff time and cost.

The Tribunal notes that there is no indication of hourly rates for individual employees. However, the Tribunal finds that there is evidence, such as the time sheets and handwritten notations on the time sheets identifying work on the NGC project, that ACE employees participated in the preparation of the bid. The Tribunal will accept the handwritten notations on the time sheets as supporting documentation pursuant to paragraph 4.1.2 of the Cost Guidelines. The Tribunal accepts that the time sheets give a reasonable indication of the time spent by individual employees on the preparation of the bid. Although ACE should have provided a detailed hourly rate for each employee, the Tribunal will rely, in this instance, on the document entitled “Indirect Costs—Office Salary & Wages”, which provides the aggregate amount of salary for each employee.⁵ Therefore, the Tribunal finds that the claim of \$3,387.63 for “office salary and wages” is not excessive, and it will allow the claim in this instance.

The Tribunal agrees with the NGC’s submission that the claim for Mr. Kater should have been supported by documentation. The Tribunal will not grant the amount claimed for Mr. Kater, as ACE did not offer any reasonable substantiation of this claim, such as time sheets, accounting documents or a signed statement by Mr. Kater, such as the statement provided by Mr. Peter Fabian, President and CEO of ACE, on July 31, 2001, where Mr. Fabian confirmed the number of hours and his salary, which could have provided evidence of the number of hours that Mr. Kater worked on the preparation of the bid, as well as an hourly rate or salary.

The Tribunal also agrees with the NGC that there is no substantiation of the amount of \$311.86 claimed for rent. The Tribunal will not allow the claim for rent. The Tribunal will allow the claim for the general and administrative expenses of \$421.89, as ACE provided invoices and receipts as documentary

5. See protected attachment to ACE’s letter of August 1, 2000.

evidence, which the Tribunal accepts. Accordingly, the Tribunal grants ACE costs for preparing a response to the solicitation in the amount of \$4,146.05. While the Tribunal accepts the documentary evidence tendered, it reminds parties that, in future, if they wish to be compensated, they must provide supporting documentation in sufficient detail to support their claims.

COMPENSATION FOR LOST OPPORTUNITY

ACE submitted a claim for compensation totalling \$269,057.54, composed of \$195,937.50 for compensation for lost opportunity and lost profits, \$70,892.19 for a number of “other items” and \$2,227.85 for costs associated with the preparation of ACE’s submissions for compensation to the Tribunal.

In response to the comments made by the NGC, ACE reiterated that the Tribunal contemplated both Ace’s lost opportunity and lost chance to profit in its determination. ACE also made submissions on damages for the loss of future business. ACE submitted its claim based on the calculation of lost profits on the immediate installation of the window film, the value of the contract based on the sale of the film and the installation of the film, its usual and reasonable profit margins, maintenance and repair revenue, and interest and costs. It also submitted that the total paid price of the contract should not be considered, in that the contract would not have necessarily been awarded to the lowest bidder in the solicitation and that it stood to win the solicitation, at least as much as any of the other bidders. ACE argued that, in past cases, the Tribunal had recommended compensation based on the number of competitors and bids received. According to ACE, as there were only three bids received by the NGC, it, as a potential bidder, had one chance in four of being awarded the contract. In response to the NGC’s argument that compensation should be recommended based on the actual square footage of security film installed, ACE offered an amount of \$97,854.32 as the value of its lost opportunity. In response to the NGC’s assertion of the existence of an “industry standard” relating to net profit ranges, ACE submitted that, with respect to pricing, no such standard exists in the industry. Finally, ACE submitted that the Tribunal has the discretion to consider the additional expenses set out in its submissions in making its final recommendation.

In response to the claim for compensation, the NGC submitted that the Tribunal recommend compensation for lost opportunity and not recommend compensation for lost profits. The NGC submitted that ACE would not have won the contract, as it did not submit a proposal. The NGC further submitted that the approach taken by the Tribunal to quantify compensation for lost opportunity in File No. PR-98-050⁶ is to be followed in this case. This approach calculates lost opportunity by dividing the profit on the actual contract by the number of bidders. In this case, according to the NGC, four bidders submitted proposals. Under this method, compensation is calculated as one quarter of the profit that ACE would have made, if any, if it had submitted a proposal for a price one dollar lower than that of the successful bidder. The NGC also argued that the recommendation for compensation for lost opportunity must reflect the value of the actual contract that was performed. The NGC submitted that, having regard to the nature of the goods and services and the size of the contract, as well as the absence of risk, a net profit on the contract of 10 to 12 percent is a reasonable industry standard. Based on this approach, the NGC submitted that the amount for compensation should be no greater than \$10,356.58. It also submitted that the Tribunal has the discretion to reduce the amount for compensation for lost opportunity where the evidence shows that a complainant would not have won a contract. In this case, the NGC submitted that, based on the prices quoted by ACE in support of its claim for compensation, ACE would not have been the successful bidder, as its bid price was considerably higher than that of the successful financial proposal. The NGC submitted that the approach taken by ACE to quantify its compensation was inconsistent with the principles used by the Tribunal to calculate lost opportunity. In reviewing the claim for compensation for “other items”, the NGC submitted

6. *Re Complaint Filed by Douglas Bartlett Associates* (7 June 1999) (CITT).

that this claim should be entirely discounted, as the actual contract did not include some of the costs for services claimed by ACE, and that some of these costs were not legitimate or provided for in the Tribunal's *Procurement Compensation Guidelines* (Compensation Guidelines). Finally, the NGC submitted that the claim for additional legal fees for work performed in relation to preparing the submissions for compensation should be denied.

The Tribunal has carefully reviewed the submissions and supporting documents. Contrary to the submissions made by ACE, the Tribunal recommended compensation for lost opportunity experienced by being unable to make a responsive bid, not for lost profits. Paragraph 3.1.4 of the Compensation Guidelines states, in part, that "[c]ompensation will be awarded for lost opportunity in situations where it is uncertain whether the complainant or other bidders would have won the contract, but for the government's breach or breaches. Where the Tribunal is unable to conclude that the complainant would have been awarded the designated contract, but concludes that the complainant lost the opportunity to participate actively or meaningfully in the procurement process as a result of the government's breach or breaches, the Tribunal may recommend that compensation be awarded for the lost opportunity." In this case, the Tribunal could not determine with certainty whether ACE would have won the contract, but for the NGC's breach. Accordingly, the Tribunal recommended compensation for lost opportunity.

The Tribunal finds here, as in File No. PR-99-035,⁷ that the basis for compensation for lost opportunity has to begin with the actual amount spent on the contract and the number of bidders competing for the contract. In this case, the NGC stated that the total contract value was \$517,829.96, excluding tax. In addition, the evidence before the Tribunal during its inquiry process was that proposals from four bidders had been received by the NGC by bid closing. While the number of bidders appears to be in dispute, Ace has not provided any substantiation for its claim. Accordingly, the Tribunal will use the number of bidders, that is, four, as stated in its determination, and add ACE, as a potential bidder, to come up with the number of bidders which may have competed for this requirement.

A number of submissions were made with respect to the appropriate level of profit to be used in calculating the compensation for lost opportunity. The Tribunal is not convinced by the calculation of lost profits done by ACE nor does it find persuasive the evidence presented to substantiate some of its claims. The Compensation Guidelines clearly state that claims for compensation must be accompanied by credible economic, financial or other evidence. In this case, the Tribunal would have welcomed a reasonable indication of ACE's profit margins by examining, for example, audited or pro forma financial statements or contracts similar in size. The Tribunal notes that ACE did not offer any other evidence in response to the NGC's reply that a profit margin of 10 to 12 percent is a reasonable industry standard. In the absence of any other credible information and in view of the fact that the NGC's claim that the industry standard for a profit margin is between 10 and 12 percent was not disputed by ACE, the Tribunal determines that a margin of 10 percent is reasonable in this case. Based on the foregoing, the Tribunal recommends compensation in the amount of \$10,356.58. The Tribunal does not see any reason for which this amount should be reduced.

As for the claim for the "other items", the Tribunal will only recommend compensation for the 93 hours of work done by "senior staff" for the preparation of the submissions for compensation on the basis of the affidavit presented to the Tribunal. However, the Tribunal finds that the number of hours claimed is excessive and, therefore, will reduce the hours by half, to 46.5 hours. Accordingly, the Tribunal recommends compensation in the amount of \$2,139.00. In addition, the Tribunal recommends compensation for the additional legal costs incurred in relation to the preparation of the submissions for compensation at the prescribed rates, totalling \$2,119.35. With respect to the submissions on damages for

7. *Re Complaint Filed by Dr. John C. Luik* (28 March 2000) (CITT).

loss of future business and contingencies, the Tribunal has carefully reviewed those submissions and is not persuaded by the arguments made by ACE.

CONCLUSION

The Tribunal hereby awards ACE costs in the amount of \$13,030.28 in relation to preparing and proceeding with the complaint and \$4,146.05 incurred in preparing a response to the solicitation. Further, the Tribunal recommends that ACE be compensated in the amount of \$14,614.93 for lost opportunity and the additional costs incurred in preparing the submissions for compensation. The Tribunal directs the NGC to take appropriate action to ensure prompt payment.

Pierre Gosselin
Pierre Gosselin
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary