

Tuesday, April 27, 1999

File No.: PR-98-028

IN THE MATTER OF a complaint filed by Spacesaver Corporation 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 January 11, 1999, the Canadian International Trade Tribunal (the Tribunal), pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> (the CITT Act), awarded Spacesaver Corporation (Spacesaver) its reasonable costs incurred in relation to filing and proceeding with its complaint. Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommended, as a remedy, that the Department of Public Works and Government Services (the Department) pay Spacesaver compensation for the opportunity that it lost and the ability to profit therefrom.

On February 8, 1999, Spacesaver submitted to the Tribunal its claim for costs related to its complaint in the amount of \$2,393.57, for compensation for lost opportunity in the amount of \$11,667.90 and for compensation for lost opportunity by its agent in regard to the agent's commission and installation labour in the amount of \$7,416.08. On February 26, 1999, the Department sent written comments to the Tribunal with respect to Spacesaver's claim. On March 19, 1999, Spacesaver responded to the Department's comments.

### **COSTS RELATED TO THE COMPLAINT**

In its claim of February 8, 1999, Spacesaver submitted that "related costs" are associated with the attendance of a meeting with the Department in Edmonton, Alberta, and the subsequent time devoted to prepare the claim. The related costs include \$1,200, which represents three daily fees of \$400, and disbursements of \$1,193.57.

Spacesaver's claim of three days at \$400 a day, contrary to the Department's assertion, does not relate solely to the trip to Edmonton. This represents Spacesaver's entire time spent in relation to filing and proceeding with the complaint.

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

Spacesaver has withdrawn a portion of the related costs, that of office supplies in the amount of \$182.48. Spacesaver's argument regarding its utilization of the most economical airfare is convincing and the Tribunal allows the full travel costs.

In summary, the Tribunal awards Spacesaver the amount of \$2,211.09 as it relates to reasonable costs incurred in relation to filing and proceeding with its complaint.

### **COMPENSATION FOR LOST OPPORTUNITY**

In deciding what is a reasonable amount of compensation, the Tribunal is mindful that such an assessment is difficult. As McEachern C.J.B.C. stated in *Begusic v. Clark, Wilson & Co.*, "[t]he assessment of damages is not a precise science; it is not even a calculation."<sup>2</sup>

In considering what principles should guide the Tribunal in assessing compensation, reference is 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 in this case.<sup>3</sup>

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 cases of breach of contract.<sup>4</sup> The Tribunal notes that the general burden of proof lies upon Spacesaver to establish and prove the loss of profit for which compensation is claimed "on a reasonable preponderance of evidence."<sup>5</sup>

In this case, Spacesaver argues that its losses are those set out in its submission of February 8, 1999, namely, its claim for compensation for lost opportunity in the amount \$11,667.90 and for compensation for lost opportunity by its agent for commission and installation labour in the amount \$7,416.08.

Dealing, first, with the lost opportunity by its agent for commission and installation labour, the Tribunal notes that, in its determination of January 11, 1999, it recommended, as a remedy, that Spacesaver Corporation be compensated for the opportunity that it lost and the ability to profit therefrom. Spacesaver's claim for compensation on behalf of its agent is, in the Tribunal's opinion, outside of the purview of its recommendation. In fact, this amount relates to costs that were not incurred by Spacesaver. Therefore, this item of compensation is not allowed.

Concern was expressed by the Department with respect to the level of gross margin claimed by Spacesaver. The Department's position was that the accepted standard for a reasonable profit margin in non-competitive acquisitions or following a competitive process with negotiated prices under \$50,000, which can be found in paragraph 10.122(c)(ii) of the Department's Supply Policy Manual, is no more than 10 percent. Spacesaver responded by stating that 32.5 percent "is below any standard margin that any manufacturer would like to achieve." No other evidence was presented by Spacesaver to support this level of gross margin. However, in support of its claim for the lost opportunity by its agent, Spacesaver submitted a

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2. (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.).

3. *The Queen (Ont.) v. Ron Engineering*, [1981] S.C.R. 111. See, also, *Canamerican Auto Lease and Rental Ltd. v. Canada* [1987] 3 F.C. 144.

4. *Ibid.*

5. *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.* (1978), 88 D.L.R. (3d) 1 at 22. See, also, *Cotter v. General Petroleum Limited* [1951] S.C.R. 154.

confidential document used by its agent in preparing the bid. The Tribunal views the bid and the complaint, whether or not an agent was involved, to be submitted by Spacesaver. Taking into consideration the evidence and given the absence of risks normally associated with the performance of this type of contract, the Tribunal determines that the compensation for lost opportunity on the basis of profit should be set at 10 percent and calculated as specified in the Department's submission. Accordingly, the recommended compensation for lost opportunity to profit is established at \$4,140.82.

### **CONCLUSION**

The Tribunal hereby awards Spacesaver costs in the amount \$2,211.09 in relation to proceeding with its complaint and directs that the Department take appropriate action to ensure prompt payment. The Tribunal hereby recommends that the Department pay compensation to Spacesaver in the amount of \$4,140.82.

Peter F. Thalheimer

Peter F. Thalheimer

Member

Michel P. Granger

Michel P. Granger

Secretary