



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2012-035

Mistral Security Inc.

v.

Department of Public Works and
Government Services

*Order and reasons issued
Monday, June 24, 2013*

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

AND FURTHER TO the Canadian International Trade Tribunal's preliminary indication of the amount of the cost award.

BETWEEN

MISTRAL SECURITY INC.

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

ORDER

In its order of May 3, 2013, the Canadian International Trade Tribunal, pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, awarded Mistral Security Inc. its reasonable costs incurred in preparing and proceeding with the complaint. The Canadian International Trade Tribunal's preliminary indication of the amount of the cost award was \$10,000. After considering Mistral Security Inc.'s submissions, the Canadian International Trade Tribunal hereby confirms its preliminary indication by awarding Mistral Security Inc. its costs in the amount of \$10,000 for preparing and proceeding with the complaint and directs the Department of Public Works and Government Services to take appropriate action to ensure prompt payment.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

STATEMENT OF REASONS

INTRODUCTION

1. In an order issued on May 3, 2013, the Canadian International Trade Tribunal (the Tribunal), under section 30.16 of the *Canadian International Trade Tribunal Act*,¹ awarded Mistral Security Inc. (Mistral) its reasonable costs incurred in preparing and proceeding with the complaint. The Tribunal's preliminary indication of the cost award was \$10,000.

2. In its statement of reasons, the Tribunal explained that Mistral pursued its complaint at the Tribunal in good faith and that the inquiry process involved numerous submissions, including a motion for production brought by Mistral, which was ultimately granted by the Tribunal. The Tribunal also found that the invocation of the national security exception by the Department of Public Works and Government Services (PWGSC) at such a late stage of the inquiry process significantly impacted Mistral's rights and caused Mistral to expend considerable resources in pursuing a remedy that was no longer available to it.

3. On May 22, 2013, the Tribunal received submissions from Mistral wherein it requested costs in the amount of \$38,735.22. In its submissions, Mistral indicated that the amount of its request represented full indemnification of Mistral's legal fees and staff costs, which Mistral argued is reasonable and appropriate in the context of this case.

4. Mistral submitted that PWGSC's decision to invoke the national security exception of the trade agreements in this case was unnecessary, as PWGSC's objectives could have been achieved through other means. Mistral argued that PWGSC's decision to invoke the national security exception unnecessarily and at such a late stage in the inquiry process should be taken into consideration when determining the appropriate cost award. Mistral reaffirmed its belief that it had acted reasonably in defending its interests by filing a complaint with the Tribunal since no claim of national security had been made at that time. Mistral also submitted that it incurred costs in so pursuing its complaint and that it should be reimbursed for those costs, as it reasonably believed that the Tribunal had the jurisdiction to inquire into its complaint, which encouraged Mistral to incur the legal expenses that accompany such a process.

5. On June 5, 2013, PWGSC responded to Mistral's submissions by indicating that it did not intend to comment.

TRIBUNAL'S ANALYSIS

6. Pursuant to subsection 30.16(1) of the *CITT Act*, the Tribunal can award costs of proceedings before it, and the costs may be fixed at a sum certain or may be taxed. This power is discretionary. Although this provision states that this power is "[s]ubject to the regulations . . .", and although paragraph 40(l) states that "[t]he Governor in Council may make regulations . . . respecting the awarding of costs by the Tribunal under section 30.16 . . .", there is no regulatory provision on this point.

7. In the exercise of its discretion under the *CITT Act*, the Tribunal issued the *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*) in order to ". . . provide guidance to parties seeking to recover the costs of participating in procurement complaint proceedings."² However, the Tribunal does not consider itself bound by the *Guideline* and believes that it is free to depart from the levels

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

2. *Guideline*, para. 1.3.

of complexity and the rates set out in the *Guideline* where circumstances justify it. Moreover, as paragraph 1.3 of the *Guideline* states, “. . . each case will be considered individually, and the guideline is not intended to replace, limit or detract from the discretion of the Tribunal” Furthermore, paragraph 4.2.2 allows parties to make submissions on, among other things, “. . . the reason why the guideline should not be followed.”

8. Having considered the circumstances of this case as well as Mistral’s submissions, the Tribunal believes that a departure from the levels of complexity and the rates set out in the *Guideline* is justified. However, despite the exceptional circumstances surrounding the cost award in this inquiry, the Tribunal does not consider this to be a situation where full indemnification of costs is warranted.

9. It is true that the invocation of the national security exception by PWGSC at such a late stage of the inquiry process left Mistral in the position where it had expended considerable resources in pursuing a remedy that was no longer available to it. The Tribunal acknowledged this in its statement of reasons accompanying its preliminary indication of the amount of the cost award. On the other hand, while the eventual invocation of the national security exception by PWGSC may not have been clearly foreseeable or even necessary in this case, the potential for a government institution to invoke this exception prior to the end of the procurement process is always present. This implies that there is a certain amount of risk associated with pursuing a remedy at the Tribunal, particularly prior to the awarding of a contract, which must be accepted by the complainant. This is in line with the Tribunal’s view that, in exercising its discretion concerning the awarding of costs in a procurement inquiry, “[t]he costs awarded normally represent a partial indemnity.”³

10. Therefore, on the basis of the foregoing, the Tribunal confirms its preliminary indication of the amount of the cost award and awards Mistral its costs in the amount of \$10,000.

CONCLUSION

11. In its order of May 3, 2013, the Tribunal, pursuant to section 30.16 of the *CITT Act*, awarded Mistral its reasonable costs incurred in preparing and proceeding with the complaint. The Tribunal’s preliminary indication of the amount of the cost award was \$10,000. After considering Mistral’s submissions, the Tribunal hereby confirms its preliminary indication by awarding Mistral its costs in the amount of \$10,000 for preparing and proceeding with the complaint and directs PWGSC to take appropriate action to ensure prompt payment.

Serge Fréchette
Serge Fréchette
Presiding Member

3. *Ibid.*, para. 2.1.