



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2018-015

SoftSim Technologies Inc.

v.

National Research Council Canada

*Order and reasons issued
Monday, November 5, 2018*

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

AND FURTHER TO the Canadian International Trade Tribunal's preliminary indication of the level of complexity for the complaint case and its preliminary indication of the amount of the cost award.

BETWEEN

SOFTSIM TECHNOLOGIES INC.

Complainant

AND

NATIONAL RESEARCH COUNCIL CANADA

**Government
Institution**

ORDER

In its determination of October 3, 2018, the Canadian International Trade Tribunal, pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, awarded the National Research Council Canada its reasonable costs incurred in responding to the complaint. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for the complaint case was Level 1, and its preliminary indication of the amount of the cost award was \$1,150. Having considered the submission of SoftSim Technologies Inc. regarding the preliminary indication of the amount of the cost award, the Canadian International Trade Tribunal hereby confirms its preliminary indication by awarding the National Research Council Canada its costs in the amount of \$1,150 for responding to the complaint and directs SoftSim Technologies Inc. to take appropriate action to ensure prompt payment.

Peter Burn

Peter Burn
Presiding Member

STATEMENT OF REASONS

INTRODUCTION

[1] In its determination of October 3, 2018, the Canadian International Trade Tribunal (the Tribunal), pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*,¹ awarded the National Research Council Canada (NRC) its reasonable costs incurred in responding to the complaint.

[2] The Tribunal's preliminary indication of the level of complexity in this case was Level 1, and its preliminary indication of the amount of the cost award was \$1,150.

[3] Having considered the submission of SoftSim Technologies Inc. (SoftSim) regarding the preliminary indication of the amount of the cost award, the Tribunal has decided to confirm its preliminary indication of the amount of the cost award. Accordingly, the Tribunal awards the NRC its costs in the amount of \$1,150.

[4] The reasons for the Tribunal's decision on the final amount of the cost award are provided below.

ANALYSIS

[5] Pursuant to section 30.16 of the *CITT Act*, the Tribunal has discretionary power to award costs of proceedings.

[6] As indicated in the *Procurement Costs Guideline* (the *Guideline*), the Tribunal applies the principle that, in general, costs should be awarded to the successful party, whether it be the complainant or the government institution.² The Tribunal may exercise its discretion to depart from this general principle on costs where the circumstances justify a departure.³ The Tribunal also notes that an award of costs is not intended to be a source of profit for the successful party, nor is it imposed as punishment on the party who pays it.⁴

[7] The *Guideline* sets out a flat rate system that is typically invoked for the purposes of fixing the amount of litigation costs incidental to procurement proceedings on the basis of the level of complexity according to three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.⁵

[8] As stated above, the Tribunal's preliminary indication of the level of complexity in this case was Level 1, which corresponds to a cost award in the amount of \$1,150, the lowest level of costs set out in the *Guideline*. The Tribunal provided the following reasons for its preliminary indications of complexity and the cost award amount:

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1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
 2. *Guideline* at para. 2.1; see also *Canada (Attorney General) v. Georgian College of Applied Arts and Technology*, [2003] 4 FCR 525 [*Georgian College*] at paras. 35-38.
 3. *Canada (Attorney General) v. M.D. Charlton Co. Ltd.*, 2017 FCA 179 (CanLII) at paras. 3-4; *Mistral Security Inc. v. Department of Public Works and Government Services* (24 June 2013), PR-2012-035 at para. 7.
 4. *Georgian College* at para. 25.
 5. *Guideline* at para. 4.1.

Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards the NRC its reasonable costs incurred in responding to the complaint, which costs are to be paid by SoftSim. In accordance with the *Procurement Costs Guideline* (the *Guideline*), the Tribunal's preliminary indication of the level of complexity for this complaint is Level 1, as the procurement involved personal services by one party and related only to three rated requirements. In addition, the proceedings were straightforward and did not involve complicated procedural issues. As such, the Tribunal's preliminary indication of the amount of the cost award is \$1,150.

[9] SoftSim wrote to the Tribunal on October 11, 2018, contesting the preliminary indication of the amount of the cost award. SoftSim submitted that it does not have the means to pay these costs, and that they are losing money because of the government's procurement practices. It asked the NRC to waive these costs. The NRC did not provide a response.

[10] When making a final cost order, the Tribunal is not bound by its preliminary indication of the level of complexity of the complaint case or the amount of the cost award set out in the determination. As stated in the *Guideline*, "[i]f one or more parties make submissions, the Tribunal will consider them, request additional information, if necessary, and then make whatever cost order it believes is warranted."⁶

[11] Having considered the submission filed by SoftSim, the Tribunal did not consider it necessary to request additional information from the parties before making its final cost order. Even if SoftSim had provided evidence that demonstrated its alleged financial hardship, which it did not, the financial situation or ability to pay of the unsuccessful party is not a relevant consideration for the Tribunal in assessing the amount of a cost award.⁷

[12] Given its determination that the complaint was not valid and that the NRC was entitled to its reasonable costs incurred in responding to the complaint, the Tribunal sees no basis on which to reduce the amount of the cost award in this case from what is already the lowest level contemplated in the *Guideline*. As indicated in the *Guideline*, an unsuccessful party should be prepared to be subject to an order for costs to the successful party. In the Tribunal's view, SoftSim was or ought to have been aware of this possibility when it filed its complaint.

[13] In light of the above, the Tribunal finds that no change is warranted with respect to its preliminary indications of the level of complexity of the complaint or the amount of the cost award.

CONCLUSION

[14] The Tribunal confirms its preliminary indication of the amount of the cost award by awarding the NRC its costs in the amount of \$1,150 for responding to the complaint and directs SoftSim to take appropriate action to ensure prompt payment.

6. *Guideline* at para. 4.2.5.

7. Similarly, it is well established that the Federal Courts do not consider economic or financial hardship when assessing costs pursuant to rule 400(1) of the *Federal Court Rules*, SOR/98-106. See, for example, *Kassam v. Canada (Attorney General)*, 2005 FCA 169 (CanLII) at para. 4; *Chiu v. Canada (National Parole Board)*, 2007 FC 1353 (CanLII) at para. 7; *Latham v. Canada*, 2007 FCA 179 (CanLII) at para. 8.

Peter Burn

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Presiding Member