



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## ORDER AND REASONS

Files No. PR-2019-054 and  
PR-2019-055

Newland Canada Corporation

v.

Department of National Defence

*Order and reasons issued  
Thursday, December 10, 2020*

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IN THE MATTER OF two complaints filed by Newland Canada Corporation pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.);

AND FURTHER TO a recommendation of the Canadian International Trade Tribunal, made pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, that Newland Canada Corporation be compensated for the profits that it lost in not being awarded the contracts at issue.

**BETWEEN**

**NEWLAND CANADA CORPORATION**

**Complainant**

**AND**

**THE DEPARTMENT OF NATIONAL DEFENCE**

**Government  
Institution**

**ORDER**

The Canadian International Trade Tribunal hereby recommends that the Department of National Defence compensate Newland Canada Corporation in the amount of €23,591 for the profits that it lost in not being awarded the contracts at issue.

Jean Bédard  
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Jean Bédard, Q.C.  
Presiding Member

## STATEMENT OF REASONS

### INTRODUCTION

[1] In a decision made on April 29, 2020, the Canadian International Trade Tribunal determined, pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*,<sup>1</sup> that the two complaints filed by Newland Canada Corporation (Newland) were valid. The complaints concerned Requests for Proposals (the RFPs) issued by the Department of National Defence (DND) for the provision of hotel accommodations in Cologne, Germany, for Canadian Armed Forces (CAF) members returning from operations in the Middle East and undergoing third-location decompression prior to their return to Canada. DND acknowledged, and the Tribunal found, that Newland submitted the lowest-priced compliant bids and should have been awarded the two contracts.

[2] In terms of remedy, the Tribunal recommended, pursuant to subsections 30.15(2) and (3) of the *CITT Act*, that DND compensate Newland for the profits that it lost in not being awarded the contracts at issue. The Tribunal further recommended that, using the total bid amounts submitted by Newland in response to Solicitations No. W6775-20-0054 (the first RFP) and W6775-20-0055 (the second RFP) as a base, Newland and DND negotiate the amount of compensation.<sup>2</sup> The Tribunal indicated that, should the parties be unable to agree on the amount of compensation, they were to file submissions with the Tribunal on this issue.

[3] As the parties were unable to reach an agreement on the amount of compensation for lost profits, Newland filed submissions on this issue with the Tribunal on July 8, 2020. DND filed reply submissions on July 17, 2020, and Newland filed additional submissions on July 19, 2020.

[4] Newland claimed that it should receive compensation in the amount of €55,138.80 for its lost profits and out-of-pocket expenses. For its part, DND submitted that the documents provided by Newland only justified compensation in the amount of €27,460.

[5] The Tribunal must now determine the appropriate amount of compensation to recommend that DND pay to Newland for the profits that it lost in not being awarded the contracts at issue.

### COMPENSATION FOR LOST PROFITS

[6] The *CITT Act* and the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>3</sup> do not provide any guidance regarding the manner in which lost profits are to be quantified or regarding compensation matters generally.<sup>4</sup> The Tribunal's *Procurement Compensation Guidelines* (the *Guidelines*) do however set out a number of principles that will guide the Tribunal's determination in the present case. Most importantly, with respect to lost profits, the *Guidelines* provide as follows:

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

<sup>2</sup> The Tribunal also offered the parties the possibility of having a Member of the Tribunal, who was not involved in the adjudication of the matter, preside over a settlement conference in order to help the parties achieve a negotiated settlement. However, the parties did not take the Tribunal up on this offer.

<sup>3</sup> S.O.R./93-602.

<sup>4</sup> Subsection 30.15(2) of the *CITT Act* simply provides that, where the Tribunal determines that a procurement complaint is valid, it may recommend any remedy that it considers appropriate, including payment of compensation to the complainant in an amount specified by the Tribunal.

- 3.1.2 In determining the amount of compensation to recommend, the Tribunal will attempt, insofar as is appropriate in the circumstances and bearing in mind any other relief that it recommended, to place the complainant in the position in which it would have been, but for the government's breach or breaches. In doing so, the Tribunal may recommend prejudgment interest be included in the compensation amount.
- 3.1.3 Lost profit refers to the amount of profit that the complainant would have received pursuant to the designated contract, had it been awarded that contract. Compensation can be recommended for lost profit in situations where it is clear that the complainant would have won the contract, but for the government's breach or breaches.

[7] The *Guidelines* also provide that compensation recommendations will not be based on speculation or conjecture, that claims for compensation must be accompanied by credible economic, financial and other evidence, and that complainants ultimately bear the onus of proof in establishing their claims.<sup>5</sup>

[8] Thus, the *Guidelines* make it clear that the goal of the compensation exercise in the present case is to attempt to place Newland in the position in which it would have been if it had been awarded the contracts at issue.<sup>6</sup> The *Guidelines* make it equally clear that it is Newland that bears the burden of establishing its claim, and this, on the basis of evidence that is credible.

### **Profit formula**

[9] Newland claimed that, if it had been awarded the two contracts, they would have earned a profit margin of 40 percent. However, as explained further below, Newland failed to adequately substantiate such a profit margin.

[10] DND submitted that, based on the bid amounts submitted by Newland in response to the first and second RFPs and the hotel rates it provided to DND during initial settlement discussions (i.e. prior to the Tribunal accepting the complaints for inquiry), Newland would have earned profit margins of 12.5 percent and 21.3 percent for the first and second contracts, respectively. DND calculated these margins by subtracting the most obvious and significant costs (i.e. the hotel costs) from the revenue that Newland would have earned on each contract and dividing the results by that revenue. This is typically referred to as the revenue-less-costs, or revenue-less-expenses methodology.

[11] Given the absence of any evidence on the record pertaining to firm- and industry-specific profit margins for similar services (i.e. travel agent services), the Tribunal will utilize the revenue-less-costs methodology rather than a profit-margin approach for assessing the amount of profits that Newland lost by not being awarded the contracts. It will therefore proceed by estimating the revenue that Newland would have earned if it had been awarded the contracts and deducting

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<sup>5</sup>. See sections 2.1.2 and 4.1 of the *Guidelines*. In its order in *Spacesaver Corporation* (27 April 1999), PR-98-028 (CITT), the Tribunal stated that the burden on the complainant was "... to establish and prove the loss of profit for which compensation is claimed 'on a reasonable preponderance of evidence'" [footnote omitted].

<sup>6</sup>. As the Tribunal has stated on numerous occasions, recommendations should not represent a windfall, but should reflect the actual loss suffered as a result of the government's breach. See, for example, *Oshkosh Defense Canada Inc. v. Department of Public Works and Government Services* (29 December 2017), PR-2015-051 and PR-2015-067 (CITT) at paras. 71, 145; *Douglas Barlett Associates Inc.* (7 January 2000), PR-98-050 (CITT) at 3.

therefrom the costs that it would have reasonably incurred to earn that revenue (i.e. its incremental costs).

### Revenue

[12] Newland submitted bids in the amount of €62,620 and €74,077 in response to the first and second RFPs, respectively.<sup>7</sup> These amounts are not disputed. The Tribunal therefore finds that, had Newland been awarded the contracts, it would have earned a total of €136,697 in revenue.

### Costs

[13] The RFPs issued by DND were for the provision of hotel accommodations, including parking and the use of conference rooms, for CAF members in Cologne, Germany, at specific times during the months of February and March of 2020.<sup>8</sup>

[14] Using the hotel rates provided to it by Newland during initial settlement discussions, as well as publicly available information, DND calculated that Newland would have incurred total hotel costs of €54,817 and €58,289 for the first and second contracts, respectively.<sup>9</sup> These total amounts, which include the costs for the accommodations, parking and the required conference rooms, were not contested by Newland. The Tribunal also performed its own calculations using some of the hotel rates provided by Newland and was able to validate DND's results.

[15] However, throughout the inquiry and compensation phases of this case, and even during initial settlement discussions with DND prior to its complaints being accepted for inquiry, Newland repeatedly asserted that the documents it provided to DND were *pro forma* invoices that did not include additional discounts typically received when negotiating final prices with the hotels, as well as commissions received after final payments are made to the hotels.<sup>10</sup> In other words, Newland's position was that, while the total hotel costs calculated by DND properly reflected the rates listed on these *pro forma* invoices, had it been awarded the contracts, it would have obtained additional discounts and commissions that would have effectively reduced these costs.

[16] As stated above, it is Newland that bears the burden of establishing its claim, which it must do based on evidence that is credible. In its reasons for determination issued at the conclusion of the inquiry, the Tribunal noted that Newland had refused to provide DND with any evidence indicating that it had actually received such discounts.<sup>11</sup> The Tribunal also advised Newland that, when negotiating the amount of compensation with DND, it was expected to present the best available evidence, which was preferably in the form of documentary evidence, but could include affidavits supported by available documents.<sup>12</sup>

[17] Yet, despite the Tribunal's guidance and DND's numerous requests, Newland failed to provide any evidence to substantiate its claims that it would have received additional discounts and commissions such that its hotel costs would have been lower than those calculated by DND. In fact,

<sup>7</sup> Exhibit PR-2019-054-01B at 2; Exhibit PR-2019-055-01B at 2.

<sup>8</sup> Exhibit PR-2019-054-01A at 20, 26; Exhibit PR-2019-055-01A at 20, 26.

<sup>9</sup> Exhibit PR-2019-055-16 at 13-16.

<sup>10</sup> *Ibid.* at 12; Exhibit PR-2019-054-24 at 3; Exhibit PR-2019-054-30 at 1; Exhibit PR-2019-054-32 at 23.

<sup>11</sup> *Newland Canada Corporation v. Department of National Defence* (29 April 2020), PR-2019-054 and PR-2019-055 (CITT) at para. 76.

<sup>12</sup> *Ibid.* at para. 79.

Newland's claims appear to have been legitimately questioned by Military Travel Inc. (MTI), the firm that was awarded both contracts, which stated that it had never heard of a hotel agreeing to such discounts and commissions in the past, especially in Germany.<sup>13</sup> In these circumstances, the Tribunal can only reasonably accept the hotel costs as calculated by DND.

[18] DND submitted that its profit calculations did not account for any other form of administrative costs or overhead normally incurred in the conduct of business. However, given the nature of the contracts and the type of services rendered, the Tribunal is satisfied that, had it been awarded the contracts, Newland would not have incurred *additional* administrative costs or overhead or, if it had, these would not have been significant.<sup>14</sup>

[19] Therefore, the Tribunal finds that, had Newland been awarded the contracts, it would have incurred costs of €54,817 and €58,289 for the first and second contracts, respectively, resulting in total costs of €113,106.

### **Lost profit calculation**

[20] In light of the revenue and costs indicated above, the Tribunal considers that Newland would have made a profit of €7,803 on the first contract and €15,788 on the second, resulting in profit margins of 12.5 percent and 21.3 percent, respectively. In the aggregate, Newland would have made a profit of €23,591, resulting in an overall profit margin of 17.3 percent.

[21] Newland claimed that it would have earned a profit margin of 40 percent. This higher margin was largely, if not entirely, premised on Newland obtaining additional discounts and commissions from the hotels it proposed in its bids. As the Tribunal has already found, Newland failed to adduce any evidence to substantiate its claims in this regard. As such, the evidence on the record in this case supports a lost-profits finding of €23,591, no more and no less; the overall profit margin of 17.3 percent is entirely reasonable.

[22] The Tribunal notes that, when Newland engaged with DND on the issue of the quantum of compensation prior to its complaints being accepted for inquiry, DND offered to pay Newland €9,000 and €18,000 for the first and second contracts, respectively, as a gesture of good faith.<sup>15</sup> DND maintained this offer throughout the inquiry and compensation phases of this case.<sup>16</sup>

[23] Although it was certainly open to DND to make these types of offers, especially earlier in the process, as a settlement would have reduced the costs incurred by DND for responding to the complaints, the Tribunal is unable to recommend that Newland receive compensation in these higher amounts. As stated above, the objective of the compensation exercise in the present case is to attempt to place Newland in the position in which it would have been if it had been awarded the contracts at issue. Were the Tribunal to recommend the payment of these higher amounts, it would represent a windfall for Newland, rather than the actual loss suffered.

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<sup>13</sup> Exhibit PR-2019-054-30 at 3. The Tribunal notes that MTI had no apparent self-interest in making this statement and considers it as being a credible description of the relevant industry's practices.

<sup>14</sup> Existing administrative costs or overhead (i.e. fixed costs) need not be deducted as these would have been incurred regardless of whether Newland had been awarded the contracts. The deduction of these costs would therefore fail to place Newland in the position in which it would have been if it had been awarded the contracts.

<sup>15</sup> Exhibit PR-2019-055-16 at 13.

<sup>16</sup> *Ibid.* at 26, 44; Exhibit PR-2019-054-32 at 6, 24.

### Out-of-pocket expenses

[24] Newland claimed that it should receive compensation in the amount of €460 for expenses that appear to be related to the preparation of its bids.<sup>17</sup>

[25] The Tribunal disagrees as Newland was not awarded its bid preparation costs pursuant to subsection 30.15(4) of the *CITT Act*. These costs are typically not awarded by the Tribunal if compensation for lost profits or lost opportunity is recommended, as in the present case.<sup>18</sup> Moreover, neither the RFPs nor the contracts provided for the reimbursement of expenses incurred by bidders in the preparation of their bids. Therefore, had Newland been awarded the contracts, it would not have been reimbursed for its out-of-pocket expenses. In other words, Newland would have incurred these expenses regardless of whether it had been awarded the contracts.

[26] Although DND offered to pay Newland its out-of-pocket expenses prior to its complaints being accepted for inquiry, and throughout the inquiry and compensation phases of this case,<sup>19</sup> the Tribunal is unable to recommend that DND compensate Newland for these expenses as doing so would result in compensation that is greater than the loss suffered.

### Unfounded allegations of fraud

[27] In its submissions on compensation, Newland repeated allegations that were made during the inquiry, including the allegation that the award of the contracts to MTI was the result of fraudulent and intentional behaviour on DND's part.<sup>20</sup>

[28] While these allegations are not relevant to the issue of compensation, the Tribunal having already determined that Newland's complaints were valid and that the only appropriate remedy in the circumstances was for Newland to be compensated for its lost profits, allegations of fraud are nonetheless serious and should not be made lightly.

[29] As the Tribunal recently stated, “[a] complainant ought not question the actions of public servants on grounds purporting bad faith or worse unless it is in possession of evidence supported by hard facts.”<sup>21</sup> Newland did not provide any evidence of fraud or intentional misconduct in this instance. In fact, the evidence indicates that DND's conduct was rather exemplary. Even before the complaints were filed, DND acknowledged that it had made errors in the evaluation of the bids and that Newland should have been awarded the contracts, and made attempts to settle the matter by offering to compensate Newland for its reasonable lost profits.

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<sup>17</sup> Exhibit PR-2019-054-32 at 10.

<sup>18</sup> *The Masha Krupp Translation Group Ltd. v. Canada Revenue Agency* (15 March 2017), PR-2016-041 (CITT) at para. 88.

<sup>19</sup> Exhibit PR-2019-055-16 at 13, 26, 44; Exhibit PR-2019-054-32 at 6, 24. Although not always clearly stated, DND's offer for compensation in the amount of €27,460 was comprised of €27,000 for lost profits and €460 for out-of-pocket expenses.

<sup>20</sup> Exhibit PR-2019-055-24 at 6; Exhibit PR-2019-055-30 at 2; Exhibit PR-2019-055-32 at 20; Exhibit PR-2019-055-33 at 1.

<sup>21</sup> *SoftSim Technologies Inc.* (26 March 2020), PR-2019-068 (CITT) at para. 39.



**Applicable currency**

[30] The terms of the first and second RFPs, including the resulting contract clauses set out therein, provided that the bids and all payments made under the contracts would be in euros.<sup>22</sup> Hence, there is no need for the Tribunal to convert the recommended amount of compensation into Canadian dollars. DND will make the payment to Newland in euros, just as it would have if Newland had originally been awarded the contracts.

**CONCLUSION**

[31] The Tribunal hereby recommends that DND compensate Newland in the amount of €23,591 for the profits that it lost in not being awarded the contracts at issue.

Jean Bédard  

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Jean Bédard, Q.C.  
Presiding Member

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<sup>22</sup> Exhibit PR-2019-054-01A at 17, 26; Exhibit PR-2019-055-01A at 17, 26.