Canadian International Trade Tribunal

Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

COMPENSATION GUIDELINES

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PROCUREMENT COMPENSATION GUIDELINES

1. INTRODUCTION

1.1.1 The *Canadian International Trade Tribunal Act* (the Act) provides that, where the Canadian International Trade Tribunal (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.

1.1.2 Where the Tribunal decides to recommend the payment of compensation, neither the Act nor the *Canadian International Trade Tribunal Procurement Inquiry Regulations* provide guidance as to how the precise amount of compensation should be determined.

1.1.3 These guidelines have been adopted by the Tribunal to assist parties in cases where the Tribunal has recommended that compensation be paid, and to inform them as to the substantive principles that may guide the Tribunal in arriving at the appropriate amount of compensation.

1.1.4 These guidelines do not limit or detract from the discretion provided to the Tribunal under the Act. To the extent that the process or the substantive principles set forth herein are not appropriate or not applicable, as the case may be, the Tribunal may depart from that process or those principles.

2. GUIDING PRINCIPLES

2.1.1 Compensation recommendations will be determined in application of section 30.15 of the Act.

2.1.2 Compensation recommendations will not be based on speculation or conjecture. The Tribunal recognizes that inherent in certain compensation recommendations will be the requirement to project into the future. However, in all circumstances, claims for compensation must be accompanied by credible economic, financial or other evidence.

2.1.3 The Tribunal acknowledges that some information required to establish claims may be of a highly confidential and business-sensitive nature. Nevertheless, such information will have to be provided to the Tribunal to support claims being made. Details concerning the Tribunal's practice and procedures with respect to confidential information can be found in sections 46 to 48 of the Act, and are explained in the Tribunal's *Confidentiality Guidelines* which can be found on the Tribunal's Web site at www.citt-tcce.gc.ca/en/Confidentiality_guidelines_e.

3. GUIDELINES

3.1 Determination of Compensation Recommendations

3.1.1 These guidelines explain the principles that the Tribunal considers appropriate, with respect to damages for lost profits or lost opportunity.

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.

3.1.4 Compensation may 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 the complainant be compensated for the lost opportunity. Compensation for lost opportunity may also be recommended with relation to the terms of any option periods contained in the contract. However, the Tribunal will not recommend compensation for lost opportunity in respect of the prospective renewal of a contract or exercise option if, on a balance of probabilities, there was no reasonable probability of a profitable renewal.

3.1.5 In calculating compensation for lost opportunity, the Tribunal will take the profits that a complainant would have earned on a contract and divide it by the number of potential bidders. In doing so, the aim is to reflect the actual loss suffered as a result of the government's breach, as opposed to a windfall.

3.1.6 The Tribunal may increase the amount of compensation recommended to account for the time value of money. If the Tribunal finds that the complainant would have begun to earn a profit at the time the contract was awarded, it may take into consideration that the complainant could have invested and used the profit earned following the contract award. In such circumstances, the amount of compensation may be increased accordingly.

3.1.7 In exceptional cases, the Tribunal may recommend compensation for damages to the integrity of the procurement regime. Generally, such compensation will only be recommended in circumstances where there has been serious prejudice to the procurement system, and a lack of good faith in conducting the procurement.

3.2 Reductions in Recommended Compensation

3.2.1 Compensation for lost profit and lost opportunity may be reduced in accordance with the principles outlined herein.

3.2.2 **Remoteness of Damages -** A complainant may not receive compensation for a loss that is considered too remote by the Tribunal. A breach may cause the complainant to lose some anticipated gain which is not the immediate result of the breach and which arises from a separate transaction. In general, a loss may be considered too remote where it does not flow naturally from the government's breach or breaches or where the government could not reasonably have been expected to know that a loss of that kind would be suffered by the complainant in the event of the government's breach of its obligations.

3.2.3 **Mitigation of Damages** – The Tribunal will also consider whether the claimant could have avoided losses suffered as a result of the government's breach or breaches. This principle is often referred to as the plaintiff's "duty to mitigate" loss. In deciding what amount of compensation to recommend, the Tribunal will require the complainant to describe the steps that it has taken to limit or mitigate the lost profit that it suffered or may suffer as a result of the government's breach or breaches. The Tribunal's compensation recommendation may be reduced where a complainant has not acted reasonably in this regard.

3.2.4 **Amount for Contingency** – Despite the fact that complainants anticipate earning a profit in performing a designated contract, few, if any, business undertakings are without risk and few have a guaranteed level of profit. The Tribunal's recommendation may be adjusted downwards to reflect a variety of risks that might be involved in the performance of the contract, including contractual, business and human resource risks, for example. The amount of this downward adjustment will depend on the relative risk associated with the performance of the designated contract in question.

3.2.5 **Time Value of Money** – Many contracts are performed over a period of time, with payment made accordingly. By contrast, a compensation payment recommended by the Tribunal is made in a lump sum at a specific point of time, usually soon after the government's breach or breaches and before performance under the contract would have taken place. In order to determine the appropriate compensation recommendation where the contract in question involves future payment, the Tribunal will request submissions from the parties regarding what assumptions should be made in undertaking a "present value calculation" in that particular case. The purpose of a "present value calculation" is to determine the appropriate amount a complainant should receive today to accurately compensate for the profits that would have been earned in future periods, but for the government's breach or breaches. However, the time value of money may also result in an increase in the amount of compensation, as set out in 3.1.6 above.

3.2.6 **Failure to Substantiate Profit Margin** – In cases where a complainant fails to substantiate its profit margin, the Tribunal may reduce the compensation suggested by a profit margin percentage rate that it deems to be appropriate in the circumstances.

4. PROCEDURE

4.1 The complainant bears the onus of proof in establishing a compensation claim.

4.1.1 Where the Tribunal recommends that a complainant be compensated, the complainant must file a submission with the Tribunal within 30 days of being notified of the Tribunal's recommendation. The submission must indicate the amount of compensation that the complainant considers appropriate in the circumstances and must include the following:

- a narrative section, setting out in detail the basis upon which the complainant considers the requested compensation to be appropriate;
- such financial statements, reports, records, projections and other economic information or data as are necessary to substantiate the complainant's requested level of compensation;
- a detailed description of the steps, if any, that the complainant has taken to limit or mitigate any losses that, but for those actions, may have been associated with the government's breach or breaches of the applicable agreements;

- where the Tribunal has recommended that compensation for lost profits be paid by the government, one section addressing any contingency amount that should be deducted from lost profits and another addressing the time value of money that should also be deducted; and
- any other information that the complainant considers relevant to the determination of the appropriate amount of compensation.

4.1.2 Where the complainant relies upon a profit formula to establish its compensation claim, it may submit, *inter alia*, its financial statements, or contracts of similar size to that in issue. Affidavit evidence from a third party (e.g. an external accountant) may also prove helpful.

4.1.3 The Tribunal may at any time request that the complainant provide further information or documentation in connection with a compensation claim. In the event that further information is requested, the appropriate government department will be provided with a copy and will be given five days in which to provide further submissions with respect to such information.

4.1.4 The Tribunal may request that any information provided by a complainant be verified by an independent third party expert, deposed to in an affidavit, or authenticated in another manner. While the complainant shall initially bear the cost of any such expertise required to substantiate the claim, the Tribunal may include in a compensation recommendation an amount to compensate the complainant for such cost, in whole or in part.

4.1.5 Immediately upon receiving a submission under paragraph 4.2 or any additional submissions or documentation under paragraph 4.3, or otherwise, the Tribunal shall send a copy to the appropriate government institution.

4.1.6 Within 20 days of receiving submissions or documentation sent pursuant to paragraph 4.6, the government institution involved shall file a response, if any, with the Tribunal and the Tribunal will forthwith provide a copy to the complainant.

4.1.7 Subject to the need for additional information and as soon as is practicable following the receipt of the government's submission under paragraph 4.7, the Tribunal shall notify the parties of the amount of the compensation award that it recommends.