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CANADIAN INTERNATIONAL TRADE TRIBUNAL

PROCUREMENT COMPENSATION GUIDELINES

1. INTRODUCTION

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.

1.2 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 the compensation should be determined.

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.

1.4 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 Compensation awards will be determined in application of section 30.15 of the Act.

2.2 Compensation awards 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.

2.3 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 *Procedural Guidelines for the Designation and Use of Confidential Information in Canadian International Trade Tribunal Proceedings*, which can be found on the Tribunal's Web site (www.citt.gc.ca).

3. GUIDELINES

3.1 Determination of Compensation Award

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.

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 awarded 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 will 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 compensation be awarded for the lost opportunity. Subject to 3.1.5 below, compensation for lost opportunity may also be awarded with relation to the terms of any option periods contained in the contract.

3.1.5 In assessing the value of a lost opportunity, the Tribunal may take into account any factor it considers relevant, including:

- the number of bidders in respect of the designated contract;
- the number of bidders whose bids were determined to be compliant by the government, if that information is available; and
- the likelihood that, but for the government's breach or breaches, the complainant would have been awarded the designated contract.

3.2 Reductions in Compensation Award

3.2.1 Compensation awards 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 award 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 award 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.

4. PROCEDURE

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

4.2 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.

4.3 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.

4.4 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 award an amount to compensate the complainant for such cost, in whole or in part.

4.5 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 department.

4.6 Within 20 days of receiving submissions or documentation sent pursuant to paragraph 4.5, the government department involved shall file a response, if any, with the Tribunal and the Tribunal will forthwith provide a copy to the complainant.

4.7 Subject to the need for additional information and as soon as is practicable following the receipt of the government's submission under paragraph 4.6, the Tribunal shall notify the parties of the amount of the compensation award that it recommends.