

Bitter Bidders: How the Numbers Stack Up

Increasingly, bidders are litigating when they feel they have been unfairly treated in the bidding process for major contracts. The damages claimed in their litigation follow the nature of the breach or wrong. But the method of calculating the damages can have a significant effect on the amount of the damages, both sought and awarded.

Recent examples include:

- Amertek Inc. v. Canadian Commercial Corporation
- Med-Emerg International Inc. v. the Department of Public Works and Government Services
- AgustaWestland Inc. consortium v. Canada (Minister of Public Works and Government Services)

This article will discuss each of the cases in turn, with a focus on the treatment of damages in each case.

Amertek v. CCC

Introduction

In this case, it is interesting to understand how the judge was able to work up to such a large award in favour of Amertek: over CDN\$90 million.

1. Because the judge found CCC to be liable on four bases (the tort of deceit, breach of fiduciary duty, breach of contract and unjust enrichment), he based the amount of his award on a disgorgement of CCC's profit, rather than a loss of Amertek's profit. The award based on disgorgement was over CDN\$35 million, whereas Amertek estimated their net cash deficiency on the project to be CDN\$4.4 million (before contribution to interest, selling, administrative expenses, and profit);
2. The judge calculated the interest on the award starting in 1985, the date of the breach, rather than 1996, the date the statement of claim was filed. Therefore, the "interest clock" runs for an additional 11 years, thus adding approximately CDN\$40 million to the award. Interest from 1996 would have been approximately CDN\$15 million, whereas the interest from 1985 was approximately CDN\$55 million. The difference would have been even larger if interest had been calculated on a compound basis;
3. The determination of the disgorgement amount was based on selecting a re-procurement penalty that was at the high end of the range;

4. Costs were awarded on a substantial indemnity basis. The award would have been lower if the costs were awarded on a party-and-party basis; and
5. The CDN\$2.0 million cost premium and punitive damages of CDN\$0.5 million increased the award.

The Court of Appeal took a different view of liability, and reversed the award.

Case Summary

- Since 1956, Canadian Commercial Corporation (“CCC”), a federal crown corporation, has functioned as the conduit through which Canadian companies are awarded contracts with the United States Government (“USG”)
- In 1984, King Seagrave (“KS”) contracted through CCC to provide 362 fire crash trucks to the U.S. Army
- Later in 1984, KS ran into financial difficulties
- CCC was liable for a re-procurement penalty to USG if the 362 fire crash trucks were not delivered
- In 1985, CCC contracted with a second Canadian firm, Amertek, to provide the 362 fire crash trucks
- As part of the negotiation between CCC and Amertek, a senior CCC official said that this was a profitable contract
- In 1986, Amertek, through CCC, was awarded a contract for 68 fire crash trucks for the U.S. Department of Transportation, and successfully completed this contract
- By the end of 1989, Amertek had delivered 320 of the 362 fire crash trucks, and had been paid for them
- In November 1989, through CCC, Amertek was awarded a contract for 118 fire crash trucks for the U.S. Navy, and successfully completed this contract
- In early 1990, Amertek discovered it was losing money on the 362 fire crash truck contract. Amertek claimed USD\$18 million from the USG based on change orders. Amertek was awarded \$375,000
- In 1996, Amertek commenced a legal action against CCC

“The trial judge held that Amertek had established CCC’s liability on four bases – the tort of deceit, breach of fiduciary duty, breach of contract and unjust enrichment.”

“The trial judge did not award damages because Amertek did not seek them. He accepted Amertek’s submission that the appropriate remedy was disgorgement by CCC of the re-procurement penalty it would have had to pay to USG if it had not improperly seduced Amertek into stepping into the contract when KS could not fulfil the initial contract. He fixed the amount CCC had to disgorge to Amertek at US\$26,507,000.”

The trial judge also awarded:

- Punitive damages of CDN\$500,000 to Amertek
- Costs to the plaintiff on a substantial indemnity basis fixed at CDN\$3,284,508.50
- Disbursements of CDN\$792,457.80
- Cost premium of CDN\$2.0 million
- Pre-judgment simple interest on the amount of US\$26.5 million from the date that Amertek's cause of action arose, namely, October 3, 1985

The Court of Appeal for Ontario found that, amongst other things, "Amertek relied throughout on its own analysis of profits", and was not liable on any of the four bases: the tort of deceit, breach of fiduciary duty, breach of contract or unjust enrichment. As a result, there was no basis for ordering a disgorgement by CCC.

See *Amertek Inc. v. Canadian Commercial Corp.*, 2005 CanLII 23220 (ON C.A.) and 2003 CanLII 49369 (ON S.C.)

Med-Emerg

Introduction

If Med-Emerg is successful in challenging the awarding of the contract, they will presumably claim their financial damages. Broadly, their damages will be the difference between: a) the profit that they would have earned as the winning bidder, and b) the profit that they earned as the unsuccessful bidder. This would encompass the profits on the contract, and the costs of the complaint. Calculating the loss of profits would include a determination of the variable costs to be deducted from the lost revenue. Broadly, these variable costs are the costs that Med-Emerg did not incur as the unsuccessful bidder, yet would have incurred as the winning bidder.

Case Summary

In 2004, Med-Emerg International Inc. ("Med-Emerg") was an unsuccessful bidder on a CDN\$400 million contract to provide and manage a workforce of health service providers to supplement Department of National Defense resources in Canada. Med-Emerg submitted its complaint to the Canadian International Trade Tribunal ("CITT") at the end of January 2005.

Med-Emerg requested that the contract as awarded be terminated, and awarded to Med-Emerg, or that a new solicitation be conducted. Alternatively, Med-Emerg claimed lost profit, costs of the complaint, and cost of bid production.

CITT awarded Med-Emerg its reasonable costs incurred in preparing and proceeding with the complaint, \$4,100.00, in June 2005. Med-Emerg has asked the Federal Court of Appeal to review the CITT's ruling.

See CITT File No. PR 2004-050 Determination and reasons issued June 15, 2005, and Orders issued March 11, 2005 and August 3, 2005.

AgustaWestland Inc.

Introduction

If AgustaWestland is successful in challenging the awarding of the contract, they will presumably claim their financial damages. Broadly, their damages will be the difference between: a) the profit that they would have earned as the winning bidder, and b) the profit that they earned as the unsuccessful bidder. This would encompass: a) the profits on the contract to sell the helicopters, b) profits on the sale of spare parts and maintenance services over the lifetime of the helicopters, and c) the costs of the complaint.

Case Summary

AgustaWestland (previously E.H. Helicopters) has a history of selling helicopters to the federal government.

On August 17, 2000, the Minister of National Defense announced Canada's intention to replace the Canadian Forces 28 CH124 Sea King helicopters. On October 11, 2000, AgustaWestland filed a complaint with CITT alleging the structure of the procurement procedure was discriminatory. On October 31, 2000, CITT advised AgustaWestland that, amongst other things, the complaint was premature.

Following the announcement on July 23, 2004, that the contract had been awarded to Sikorsky, AgustaWestland sought answers to a number of questions about this decision. On November 17, 2004, AgustaWestland filed a complaint with CITT. On November 24, 2004, CITT advised AgustaWestland that the complaint had not been filed within the prescribed time limit and that CITT would not conduct an inquiry into this complaint.

AgustaWestland is currently seeking a judicial review of the CITT decision.

See *AgustaWestland International Ltd. v. Canada (Minister of Public Works and Government Services)* 2005 FC 1 CanLII, 2004 FC 1545 CanLII, and 2001 FCA 48 CanLII, and CITT File No. PR 2004-041 Letter dated November 24, 2004.

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Peter Macaulay is a Chartered Accountant and has been recognized as a specialist in Investigative and Forensic Accounting by the CICA. His practice focuses on quantifying damages in the context of commercial disputes. www.pmacaulay-assoc.com