

Internal Relativity Study of the LP Group relative to comparator Groups in the Core Public Administration

RE: AJC Request for Expert Review of Contractor's Recommendation with respect to use of contextual information relating to the LP group

External Third-Party Expert: Elizabeth "Joy" Noonan

Submissions Received: May 26, 2022 [AJC]; August 22, 2022 [Employer]; September 21, 2022 [AJC Reply]

Decision: October 24, 2022

Introduction

[1] This review and decision has been somewhat prolonged given the timing of the delivery of submissions and, recently, the undersigned being out of the country. The undersigned has now reviewed all of the materials shared, including the detailed written submissions. In the interests of getting this internal relativity study moving again, this decision is written in a relatively informal manner.

The Issue

[2] The current internal relativity study [the "Study"] is intended to assess the LP Group against five [5] comparator groups in the Core Public Administration ["CPA"] based on (1) skills, effort, responsibility and working conditions; and (2) the total annual compensation of each group.

[3] The parties disagree on the interpretation of the language of the Statement of Work ["SOW"] regarding the appropriate use of 'contextual information' for the Study – with the focus on whether the Study will be based on an evaluation of job descriptions alone or "job capsules" consisting of job descriptions and the additional contextual information. In that regard, the Employer supports the Contractor recommendation dated December 12, 2021 [the "Contractor's Recommendation"] that its consultants ought to have absolute discretion as to whether or not to they will use contextual information and the extent to which it will be used in the Study. The AJC takes the position that the Contractor Recommendation is not compatible with the requirements of the SOW for the Study and that it risks creating and/or furthering a process that is unfairly weighted in favour of the Employer.

The Decision of the Third Party Expert

[4] For the reasons set out below, the undersigned in the role of Third-Party Expert finds that the language of SOW supports the AJC's interpretation and is therefore inconsistent with the Contractor's Recommendation. The undersigned rejects the Contractor's Recommendation and directs that it actively include and consider the agreed upon added contextual data¹ relating to the

LR Group in the Study. Specifically, the Contractor is directed to evaluate the skills, effort, responsibility and working conditions based on the referenced 'job capsules' consisting of LP job descriptions and the additional contextual information set out in the agreed upon contextual information document. To proceed otherwise risks injecting a bias or, at the very least, a perception of bias to the advantage of the Employer thus leaving the parties in the same unfortunate place that they found themselves following the 2018 Brault Conciliation Decision²

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[5] The Contractor retained is highly experienced in executing this work and the undersigned has confidence that it can and will properly assess the nature in which the added contextual data, once considered, ought to impact its ultimate results. In short, the data exists and it has been agreed upon; to have it considered by the Contractor is entirely consistent with the SOW for the Study and the MOU and it can only be helpful in keeping this collaborative effort on course.

Discussion/Reasons

[6] In making the assessment that the contextual data ought to properly be included and considered by the Contractor in its process, the undersigned as Expert asked the following:

- (i) What does parties agreement require for the internal relativity study?
- (ii) Is the Contractor's recommendation consistent with the requirements of the agreement between the parties?

[7] Additionally, the undersigned has considered:

- (i) the reasonableness of the Contractor's Recommendation, in the context of best practices for the conduct of comparability studies and more specifically for this Study; and
- (ii) while understanding that best practices do allow for different methodologies, whether

the Contractor's Recommendation could significantly influence the outcome of the study to the advantage of one party, and whether an alternate methodology would yield more balanced results.

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It is my understanding from the submissions that the contextual information document was finalized and

agreement upon in February 2022.

2 See July 10, 2018 Decision generally and at paras 65 and 80.

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[8] Judicial guidance has been taken from *Sattva Capital Corp. v. Creston Moly Corp.* (2014) which directs parties to a practical, common sense interpretation of contracts. It is also an interpretation supported by and usefully framed by the Ontario Court of Appeal:

- a. Determine the intention of the parties in accordance with the language they have used in the written document, based upon the cardinal presumption that they have intended what they have said;
- b. Read the text of the written agreement as a whole, giving the words used their ordinary and grammatical meaning;
- c. Read the contract in the context of the surrounding circumstances known to the parties at the time of the formation of the contract (i.e., the "factual matrix"*)¹; and
- d. Read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed.

[*emphasis added]

[9] The first two steps referenced above involve examining the language of the written documents as a whole to determine the intention of the parties. Having done so, the undersigned concludes that the parties in the SOW intended the internal relativity study be based on an evaluation of "job capsules" consisting of job descriptions and additional contextual information. [*underlining added]

[10] Reference to "contextual information" appears three times in the SOW. It is first mentioned

in the “Scope of Work” section of the SOW and provides that for the purpose of the internal relativity study:

The value of a job [is] to be determined on an established job evaluation process conducted by the contractor to assess the skills, effort responsibility and working conditions associated with the job. The contractor will evaluate jobs based on job descriptions, and additional contextual information when available (after assessing the job description’s sufficiency, accuracy and currency). The Contractor will devise appropriate methodology, in consultation with the Project Authority, to perform that assessment. (* emphasis added)

[11] As asserted by the AJC, this language is mandatory: the contractor will evaluate jobs based on job descriptions and additional contextual information. The second mention of contextual information is in “Tasks” section of the SOW where the contractor is obligated in Step 1 of 4

the tasks to “Receive contextual information on the nature of the work performed by the LP group within the CPA.” The third mention of contextual information is in the “Deliverables” section of the SOW where under “Deliverable A” the contractor must “submit the project plan to the Project Authority [AJC-TBS working group] and receive job descriptions and contextual information.” (* emphasis added)

[12] The position of the Contractor and the Employer is that contextual information will only be used in the internal relativity study if LP job descriptions are not sufficient, accurate and current. However, this ignores the extensive use of the expression “job capsule” (i.e., job description + contextual information) – rather than job description – elsewhere in the SOW indicating the intention of the parties was that the job evaluation would be based on job capsules.

[13] In summary, the Employer’s interpretation and the Contractor’s Recommendation does not reflect the intention of the parties when the agreement was made and does not, in the view of the undersigned, give effect to the ordinary and intended meaning of the language of the agreement.

[14] The third stage of the judicial guidance for the proper interpretation of agreements involves

reading the agreement in the context of the surrounding circumstances known to the parties at the time of the formation of the agreement (i.e., the “factual matrix”).

[15] The following facts surrounding the agreement for the internal relativity study were known to the parties at the time the agreement was made:

(i) The Brault Conciliation Decision expressed concern with the opposite conclusions reached in the AJC and Employer pay studies. The Decision urged the parties to use joint pay studies, strongly recommending “that for future negotiations, steps be taken to provide a reliable, thorough, and nonpartisan study on the lawyers overall compensation; this would include complete data on the relevant comparators and their justification.”³

(ii) It has been well known between the parties that the AJC feels the LP job descriptions are inadequate and do not capture the full scope of their work, that the 2017 job evaluation of the LP Group was flawed, and that the proposed internal relativity study would have to be conducted in a way to ensure these concerns were addressed. To an outside reader, it appears clear that the understanding arrived upon between the parties was that of an assessment based on “job capsules” (i.e., job descriptions + additional contextual information).

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Brault Conciliation Decision at paras. 65 and 80.

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[16] In conclusion, when the agreement for the Study is read as a whole and assessed objectively, the language, the factual matrix and a sensible result supports the AJC’s position that the parties intended the internal relativity study to be based on an evaluation of job capsules. Those job capsules include the contextual data. The Employer’s current interpretation risks eliminating the very rationale for a new internal relativity study (a fresh analysis based on more fulsome information) and is simply not consistent with the parties’ agreement.

[17] For these reasons, as stated in paragraph 4 above, the undersigned rejects the Contractor Recommendation regarding the appropriate use of contextual information for the purposes of the Study. The undersigned proposes the following alternate approach for the appropriate

use of contextual information for the purposes of the Study:

- i. That the Contractor evaluate jobs based on job descriptions and the additional contextual information, referred to elsewhere in the SOW as “job capsules.”
- ii. That the Contractor use and fully consider the agreed upon contextual information for the purposes of the separate exercise of assessing the sufficiency, accuracy and currency of LP job descriptions. Put another way, the contextual information document will be used and fully considered for the purposes of conducting the job evaluation of the LP Group for the Study.
- iii. If invited by the Contractor, the parties may also provide a briefing on the content of the agreed upon contextual information document. This added piece ought to remain at the Contractor’s discretion.

(1740 words)