



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2016-001

The Access Information Agency
Inc.

v.

Department of Global Affairs

*Order and reasons issued
Tuesday, April 10, 2018*

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IN THE MATTER OF a complaint filed by The Access Information Agency Inc. 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 decision made by the Canadian International Trade Tribunal, pursuant to subsection 30.15(4) of the *Canadian International Trade Tribunal Act*, awarding The Access Information Agency Inc. its reasonable costs incurred in preparing its bid in response to the request for availability titled “DCP Advanced Privacy ATIP Officer – May 2, 2016”.

BETWEEN

THE ACCESS INFORMATION AGENCY INC.

Complainant

AND

THE DEPARTMENT OF GLOBAL AFFAIRS

**Government
Institution**

ORDER

The Canadian International Trade Tribunal hereby awards The Access Information Agency Inc. an amount of \$400, which represents the reasonable costs it incurred in preparing its bid in response to the request for availability titled “DCP Advanced Privacy ATIP Officer – May 2, 2016”, and directs the Department of Global Affairs to take appropriate action to ensure prompt payment.

Each party will bear its own costs in relation to these proceedings.

Jean Bédard
Jean Bédard, Q.C.
Presiding Member

STATEMENT OF REASONS

INTRODUCTION

1. In its decision dated August 19, 2016, the Canadian International Trade Tribunal (the Tribunal), pursuant to subsection 30.15(4) of the *Canadian International Trade Tribunal Act*,¹ awarded The Access Information Agency Inc. (AIA) its reasonable costs incurred in preparing its bid in response to the request for availability titled “DCP Advanced Privacy ATIP Officer – May 2, 2016”.
2. As the parties failed to agree on the amount of costs, on September 21, 2016, AIA submitted its claim for bid preparation costs to the Tribunal. On October 7, 2016, the Department of Global Affairs (GAC) filed its submissions.
3. On October 25, 2016, the decision regarding the amount of costs was put in abeyance pending the outcome of the requests for judicial review filed by both parties with the Federal Court of Appeal concerning the merits of the Tribunal’s decision. The Federal Court of Appeal rejected both requests for judicial review on January 18, 2018.²
4. As such, the question of the amount of bid preparation costs remains pending before the Tribunal.
5. On March 5, 2018, in response to a question by the Tribunal, AIA filed additional submissions. GAC filed its reply submissions on March 7, 2018.

ANALYSIS

6. To determine the amount to be awarded as reasonable bid preparation costs, the Tribunal considers its *Procurement Costs Guidelines* (the *Guidelines*).³
7. The *Guidelines* set out the following guiding principles:
 - 3.1.1 A claimant may recover bid preparation costs which the Tribunal considers to be reasonable. . . .
 - 3.3.2 All bid preparation costs claimed, whether direct or indirect, must be supported. Copies of invoices, receipts, timecards and other documentation necessary to support a claim are to be submitted when the claim is filed. . . .

3.4 Direct Costs . . .

(b) labour costs – that portion of gross wages or salaries incurred for work which can be specifically identified and measured as having been performed in the preparation of the bid and which is so identified and measured in the complainant’s cost accounting system;

. . .

3.8 Profit

 - 3.8.1 Profit must not be included in any form as part of a claim for bid preparation costs.

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

2. *The Access Information Agency Inc. v. Canada (Attorney General)*, 2018 CAF 17 (CanLII); *Canada (Attorney General) v. The Access Information Agency Inc.*, 2018 CAF 18 (CanLII).

3. Available at: http://www.citt-tcce.gc.ca/en/Procurement_costs_guidelines_e.

8. AIA claimed an amount of \$1,252.07, which essentially represents the labour costs for 9 hours and 40 minutes devoted to preparing its bid in response to the request for availability titled “DCP Advanced Privacy ATIP Officer – May 2, 2016”. AIA also requested its costs incurred in these proceedings to determine the amount of bid preparation costs.

9. GAC disputed the amount claimed by AIA on the basis of it being unreasonable.

Time Spent on Bid Preparation and Hourly Rate

10. In support of its claim, AIA filed the affidavit of Ms. Lorraine Turcotte, Executive Director, AIA, in which Ms. Turcotte states that she prepared AIA’s bid in reply to the request for availability titled “DCP Advanced Privacy ATIP Officer – May 2, 2016”. Ms. Turcotte also states that she spent a total of 9 hours and 40 minutes preparing the bid, as described in a time and activity sheet that she prepared. AIA also filed the following documents to support its claim: the time and activity sheet prepared by Ms. Turcotte, certain related documents supporting said sheet, as well as a notice of assessment stating Ms. Turcotte’s revenues for a tax year.

11. The Tribunal examined the time sheet filed by AIA, as well as the related supporting documents. Since the vast majority of the relevant information was designated as confidential by AIA, the Tribunal will provide its conclusions in a general manner.

12. Upon review of the evidence, the time assigned to certain activities included in the time sheet seems to have been counted twice; as a result, it does not represent the time actually spent on the activities in question. Similarly, the time that AIA claims it spent on certain activities cannot reasonably correspond to the tasks described and the underlying supporting documents. The time claimed must reflect the time actually spent on the task and cannot include any profit. Any claim that does not respect these two conditions is in breach of the *Guidelines*.⁴ For another of the activities described, no supporting details were provided. Lastly, no justification was provided for the calculation method for the hourly rate applied to determine the total labour cost.⁵

13. In light of the evidence, the Tribunal concludes that the time sheet either lacks credibility, or the time spent preparing this submission is out of proportion with what would reasonably be expected in the circumstances. Moreover, the calculation of the hourly rate used was not justified to the Tribunal’s satisfaction. Therefore, the Tribunal cannot conclude that the claim presented by AIA reflects reasonable costs actually incurred in preparing its bid.

14. In these circumstances, the Tribunal considers it reasonable to award AIA the amount of \$400, which represents the amount obtained by multiplying the number of hours the Tribunal allowed by the

4. In this regard, the time AIA claimed for the majority of its activities evokes [REDACTED]

5. The Tribunal accepts the notice of assessment submitted as evidence for these purposes. However, the calculation method AIA used, [REDACTED], is not credible [REDACTED].

hourly rate determined by the Tribunal. The details of the Tribunal's calculation in connection with the number of hours are provided in the Appendix.

Sales Tax

15. AIA also alleged that the amount awarded above is subject to the payment of the goods and services tax (GST) and the harmonized sales tax (HST) (Ontario). As a result, AIA alleged that the amount awarded should be increased to account for GST/HST. AIA relied on subsection 182(1) of the *Excise Tax Act*⁶ and various excerpts from the Canada Revenue Agency document titled "General Information for GST/HST Registrants" (RC4022).

16. AIA referred to the following provision of the *Excise Tax Act*:

182 (1) For the purposes of this Part, where at any time, as a consequence of the breach, modification or termination after 1990 of an agreement for the making of a taxable supply (other than a zero-rated supply) of property or a service in Canada by a registrant to a person, an amount is paid or forfeited to the registrant otherwise than as consideration for the supply, or a debt or other obligation of the registrant is reduced or extinguished without payment on account of the debt or obligation,

(a) the person is deemed to have paid, at that time, an amount of consideration for the supply equal to the amount determined by the formula

$$(A/B) \times C$$

where

A is 100%,

B is

(i) if tax under subsection 165(2) was payable in respect of the supply, the total of 100%, the rate set out in subsection 165(1) and the tax rate for the participating province in which the supply was made, and

(ii) in any other case, the total of 100% and the rate set out in subsection 165(1), and

C is the amount paid, forfeited or extinguished, or by which the debt or obligation was reduced, as the case may be; and

(b) the registrant is deemed to have collected, and the person is deemed to have paid, at that time, all tax in respect of the supply that is calculated on that consideration, which is deemed to be equal to

(i) where tax under subsection 165(2) was payable in respect of the supply, the total of the tax under that subsection and under subsection 165(1) calculated on that consideration, and

(ii) in any other case, tax under subsection 165(1) calculated on that consideration.

17. The following definitions are also relevant (AIA referred to the descriptions of the terms "taxable supply" and "commercial activity" as found in the Canada Revenue Agency document submitted by AIA):

123 (1) In section 121, this Part and Schedules V to X,

...

commercial activity of a person means

(a) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which

6. R.S.C., 1985, c. E-15 [Act].

are individuals), except to the extent to which the business involves the making of exempt supplies by the person,

(b) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and

(c) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply; (*activité commerciale*)

...

supply means, subject to sections 133 and 134, the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition; (*fourniture*)

...

taxable supply means a supply that is made in the course of a commercial activity; (*fourniture taxable*)

18. GAC alleged that costs incurred to send a bid do not constitute a “taxable supply” within the meaning of the *Act*, but rather a general business cost that AIA must incur, and that the amount awarded to AIA in lieu of these costs is therefore not subject to GST/HST. GAC submitted that according to the *surrogatum* principle that governs the tax treatment of damages awarded by a court, it must be determined what the compensation awarded is intended to replace and then determine the tax treatment of the amount replaced.⁷

19. Under its terms, subsection 182(1) of the *Excise Tax Act* applies if, among other conditions, a registrant receives a payment “as a consequence of the breach, modification or termination” of “an agreement for the making of a taxable supply . . . in Canada by a registrant to a person”. These conditions are not met in the present case.

20. In addition to general references to subsection 182(1) of the *Excise Tax Act*, and various passages from the Canada Revenue Agency document, AIA did not explain how this provision applies to the amount it was awarded to compensate for its bid preparation costs. At best, in an email between the parties submitted to the Tribunal, AIA stated the following: “[T]he payment is taxable because the payment was further to the provision of a service, namely, preparing a bid”⁸ [translation].

21. AIA’s position cannot be accepted. The Tribunal agrees with GAC that preparing a bid in response to a request for availability is not a “taxable supply” within the meaning of the *Act*. In fact, responding to a solicitation does not constitute the provision of a service to the government. Responding to a solicitation is part of AIA’s operations and the general cost of doing business.

22. As a result, in this case, there is also no “agreement for the making of a taxable supply” or any payment made “as a consequence of the breach, modification or cancellation” of such an agreement.

23. The Tribunal’s decision is supported by procurement case law established by the civil courts. In *Force Construction Limited v. Queen Elizabeth II Health Sciences Centre*,⁹ the Nova Scotia Supreme Court

7. AMC referred to the Federal Court of Appeal decision *Tesainer v. Canada*, 2009 FCA 33 (CanLII) at para. 17.

8. AIA’s email dated September 15, 2016.

9. 2008 NSSC 405 (CanLII) at paras. 3-10.

refused to add an amount for HST to damages awarded to a bidder found to have been treated unfairly by a procuring entity in breach of “Contract A”.¹⁰ According to the Supreme Court of Nova Scotia, “Contract A” is not an agreement for the making of a “supply” of property or a service within the meaning of the *Excise Tax Act*:

[7] Is Contract A an agreement for the making of a supply of property or a service?

[8] The principal terms of Contract A were described by Estey, J. in giving the Court’s judgment in *R. v. Ron Engineering & Construction (Eastern) Ltd.*, supra, at p. 122 as follows:

... The principal term of contract A is the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a contract (contract B) upon the acceptance of the tender. ...

[9] Contract A is not an agreement for the making of a supply of property or a service, but rather a contract giving rise to certain obligations as to how the parties are to conduct themselves in the tendering process. Contract B is the contract for the supply of property or a service.

[10] Contract A, not being for a supply of property or a service, HST is not payable as a result of the breach of Contract A.

24. Inasmuch as the request for availability titled “DCP Advanced Privacy ATIP Officer – May 2, 2016” is considered a “Contract A”, the same reasoning applies in the present case.

25. As a result, the amount awarded to AIA will not be increased by an amount for HST.

CONCLUSION

26. Pursuant to subsection 30.15(4) of the *CITT Act*, the Tribunal hereby awards AIA an amount of \$400, which represents the reasonable costs it incurred in preparing its bid in response to the request for availability titled “DCP Advanced Privacy ATIP Officer – May 2, 2016”, and directs the Department of Global Affairs to take appropriate action to ensure prompt payment.

27. Each party will bear its own costs in relation to these proceedings. Since the amount awarded by the Tribunal is significantly lower than that claimed by AIA, though nonetheless higher than that offered by GAC, success in these proceedings was divided.

Jean Bédard
Jean Bédard, Q.C.
Presiding Member

10. According to the “Contract A” and “Contract B” paradigm adopted by the Supreme Court of Canada in *The Queen (Ont.) v. Ron Engineering*, [1981] 1 SCR 111, 1981 CanLII 17 (SCC), and its subsequent decisions regarding the law of procurement, “Contract A” represents the contract that is sometimes formed when a bid is presented in response to a solicitation and which governs the solicitation process, whereas Contract B represents the contract for the goods or services concluded between the purchasing entity and the successful bidder.

APPENDIX

1. The amount of \$400 awarded as reasonable costs incurred by AIA to prepare its bid was estimated as follows:

Calculation of time

Activity	Time claimed	Time allowed
[REDACTED]	[REDACTED]	[REDACTED] ¹
[REDACTED]	[REDACTED]	[REDACTED] ²
[REDACTED]	[REDACTED]	0 ³
[REDACTED]	[REDACTED]	[REDACTED] ⁴
[REDACTED]	[REDACTED]	[REDACTED] ⁴
[REDACTED]	[REDACTED]	[REDACTED] ⁴
[REDACTED]	[REDACTED]	[REDACTED] ⁴
[REDACTED]	[REDACTED]	[REDACTED] ⁴
[REDACTED]	[REDACTED]	[REDACTED] ⁴
[REDACTED]	[REDACTED]	[REDACTED] ⁵
[REDACTED]	[REDACTED]	[REDACTED] ⁶
[REDACTED]	[REDACTED]	[REDACTED] ⁶
[REDACTED]	[REDACTED]	[REDACTED] ⁶
Total	9.6	[REDACTED] ⁷

1. Reflects time indicated between the start of the activity and the start of the next activity.
2. This period is consistent with the supporting evidence – [REDACTED]
3. Included in preceding activity.
4. Reasonable time based on the content of the supporting evidence.
5. No detail about this activity was provided. The Tribunal would be justified in awarding nothing. In the circumstances, [REDACTED] will be granted, allowing that the activity likely took place as mentioned in the evidence.
6. Total reasonable time for the activities in question considering the details provided by AIA and the supporting evidence.
7. Rounded total hours allowed by the Tribunal.