



Ottawa, Monday, February 10, 2003

File No. PR-2002-037

IN THE MATTER OF a complaint filed by Huron Consulting under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Department of Public Works and Government Services not exercise the option for the additional year in the standing offer and that it tender a new solicitation for the period from November 1, 2003, to October 31, 2004. In addition, the Canadian International Trade Tribunal recommends that Huron Consulting be compensated one fourth of the profit that it reasonably would have made, based on 130 training days, as indicated in the standing offer, for the period from November 1, 2002, to October 31, 2003.

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Huron Consulting its reasonable costs incurred in preparing and proceeding with the complaint.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination and Reasons: February 10, 2003

Tribunal Member: Zdenek Kvarda, Presiding Member

Senior Investigation Officer: Cathy Turner

Counsel for the Tribunal: John Dodsworth

Complainant: Huron Consulting

Intervener: CTC Computer Training & Consulting

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Ian McLeod
Christianne M. Laizner
Susan D. Clarke



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STATEMENT OF REASONS

COMPLAINT

On November 13, 2002, Huron Consulting (Huron) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of *Canadian International Trade Tribunal Act*¹ concerning the procurement (Solicitation No. W0113-02A064/A) by the Department of Public Works and Government Services (PWGSC) for the provision of computer software training services for the Department of National Defence (DND).

Huron alleged that PWGSC had applied an unfair evaluation process, given preferential treatment to certain bidders and improperly applied the contractor selection formula.

Huron submitted that Annex B to the original solicitation had only provided space for a per diem rate for one year, even though the standing offer would have been for a duration of one year plus a one-year option. It further submitted that a solicitation amendment had been sent from MERX by regular mail asking for a corrected bid broken down into a per diem rate for the first year and another per diem rate for a second year; however, it submitted that it had only received the amendment on October 22, 2002, i.e. one day after the solicitation process closed on October 21, 2002.

Huron requested, as a remedy, that the Tribunal recommend that the requirement be retendered, that it be awarded compensation for lost profit opportunity and that it be awarded its costs for preparing and proceeding with the complaint.

On November 18, 2002, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the CITT Act and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² On November 21, 2002, PWGSC informed the Tribunal, in writing, that a contract³ in the amount of \$90,950 had been issued to CTC Computer Training & Consulting (CTC). On December 16, 2002, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian*

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
 2. S.O.R./93-602 [hereinafter Regulations].
 3. Although referred to as a contract, this is in fact a standing offer.

International Trade Tribunal Rules.⁴ On December 19, 2002, the Tribunal granted intervener status to CTC. Huron filed its confidential comments on the GIR with the Tribunal on December 29, 2002, and its public comments on January 6, 2003. CTC filed its comments on the GIR with the Tribunal on December 31, 2002. On January 10, 2003, PWGSC requested permission to respond to new matters regarding the terms of the contract raised in CTC's comments on the GIR and provided those comments with its request. On January 16, 2003, the Tribunal granted PWGSC's request and sent the comments to the parties for their information.

Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on the record.

PROCUREMENT PROCESS

A Request for a Standing Offer (RFSO) was issued and published on MERX, Canada's Electronic Tendering Service, on September 9, 2002, for the provision of computer software training services for DND on an as and when requested basis.

The RFSO reads, in part, as follows:

Standing Offer, Period of

The period for placing call-ups and rendering services against the standing offer shall be from date of issuance to 31 October 2003.

Standing Offer, Extension of,

Should the Standing Offer be authorized for use beyond the initial period, the Offeror hereby offers to provide the goods/services herein for an additional period of twelve months from 01 November 2003 to 31 October 2004, under the same conditions and at the rates/prices specified herein or at the rates/prices calculated in accordance with the Basis of Payment specified herein.

Basis of Payment

Charges for service rendered shall be calculated in accordance with Annex "B", copy attached hereto.

Basis of Selection

Determination of the lowest priced bid shall be based on the total aggregate cost as detailed in Annex "B", Basis of Payment, including any applicable options.

CONTRACTOR SELECTION METHOD

The successful bidder will be the firm proposing "*Best Value*" based on the lowest price per rated point.

The price per rated point will be calculated by dividing your bid price including options, by your point score for the Rated Criteria.

3. The bid representing best value will be issued a Standing Offer for the items that they can fill. An example of the Contractor Selection Method is attached as Annex "C".

4. S.O.R./91-499.

Annex “B” to the RFSO reads, in part, as follows:

Basis of Payment
(for the period effective from date of award to 31 August 2002⁵)

Basis of Payment

1. The Contractor shall be paid the following firm per diem rates for work and services performed pursuant to any contract resulting from this Standing Offer.

Qualified Instructor Firm Per Diem Rate \$ _____. (*Estimated number of Training days – 130*)

Annex “C” to the RFSO reads as follows:

Example of Best Value Determination

Assuming three valid bids are received (each meets the mandatory criteria/requirements and the minimum required delivery score) Best value determination based on a maximum score of 100. Note point ratings (score) used in the example are not intended to reflect the total points assigned to delivery in this solicitation. They are an example only.

	Bid # 1	Bid # 2	Bid # 3
Delivery score	130 points	118 points	105 points
Bid Price	60,000	55,000	50,000
Calculation:	Technical Points	Price Points	Total Points
Bid # 1	$\frac{130}{130} \times 65 = 65$ points	$\frac{50}{60} \times 35 = 29.17$ points	94.17 points
Bid # 2	$\frac{118}{130} \times 65 = 59$ points	$\frac{50}{55} \times 35 = 31.82$ points	90.82 points
Bid # 3	$\frac{105}{130} \times 65 = 52.5$ points	$\frac{50}{50} \times 35 = 35$ points	87.50 points

* Highest Delivery Score

** Lowest price proposal

Contract would be awarded to Bid # 1 based best value (highest score considering delivery criteria and price)

Amendment No. 003 to the RFSO was issued on October 17, 2002. It amended paragraph 1 of Annex “B” in order to provide that, instead of bidding a single rate, a bidder could bid one rate for the initial year and a different rate for the option year.

Revised Annex “B”, as per amendment No. 003 to the RFSO, reads, in part, as follows:

Basis of Payment

1. The Contractor shall be paid the following firm per diem rates for work and services performed pursuant to any contract resulting from this Standing Offer.

(for the period effective from date of award to 31 October 2003)

Qualified Instructor Firm Per Diem Rate \$ _____. (*Estimated number of Training days – 130*)

(for the period effective from 01 November 2003 to 31 October 2003⁶)

Qualified Instructor Firm Per Diem Rate \$ _____. (*Estimated number of Training days – 130*)

5. The correct date should have been shown as 31 October 2003.

6. The correct date should have been shown as 31 October 2004.

The closing date for the submission of offers was October 21, 2002. According to PWGSC, 10 proposals were received and submitted to the Technical Authority at DND for evaluation. Four proposals were found to be compliant with the mandatory and rated criteria of the RFSO. On October 31, 2002, the offerors, including Huron, were notified that a standing offer had been issued to CTC.

On October 31, 2002, Huron objected orally to PWGSC with respect to the issuance of the standing offer to CTC and was denied relief by PWGSC. On November 13, 2002, Huron filed its complaint with the Tribunal.

POSITION OF PARTIES

PWGSC's Position

With respect to the concerns raised in the complaint regarding the timing of the issuance of amendment No. 003 to the RFSO, PWGSC submitted that the amendment had been circulated by MERX on October 17, 2002, in advance of the October 21, 2002, closing date. It submitted that, when a potential supplier signs on with MERX, it gives the potential supplier the option of receiving solicitation amendments and other notices from MERX either by fax or by mail. It further submitted that Huron chose to be notified by mail.

PWGSC submitted that Huron had contacted it on October 22, 2002, and spoken to the contracting officer. It admitted that it had advised Huron that it had been aware that some of the potential suppliers had received the solicitation amendment by mail and others by fax and that it assumed that, where a single rate was bid, the rate applied to both years. It further confirmed that it had advised Huron at that time that the matter could not be re-opened, since the bid period had closed.

PWGSC admitted that it had advised Huron that, after the evaluation had been completed, it had obtained confirmation that CTC's single rate applied to both the initial and option years. It also confirmed that only the successful offeror, CTC, had been contacted for clarification in this regard.

However, PWGSC submitted that it was concerned that some perceived or actual unfairness might have arisen from the timing of the issuance of amendment No. 003 to the RFSO, particularly in view of the fact that Huron had not been aware of the amendment until after the bid closing date. Similarly, PWGSC also submitted that it was concerned about the perception of unfairness in the procurement process that had arisen from the fact that it had sought clarification from CTC regarding the application of the bid price.

With respect to Huron's allegation that PWGSC had miscalculated its "Best Value" score, PWGSC submitted that Huron was mistaken and that, to obtain a full 65 points for the rated criteria portion of the formula in Annex "C" to the RFSO, a bid needed only to have obtained the highest score in the rated criteria evaluation. Contrary to Huron's suggestion, it submitted that a bidder did not need to have received a perfect score of 130 for the rated criteria to have gotten a full 65 points for the formula in Annex "C". Accordingly, it submitted that there was no basis for this aspect of the complaint.

According to PWGSC, Huron's proposal received a score of 105 with respect to the rated criteria. PWGSC further submitted that this was the highest score obtained by any proposal. It also submitted that, for the purposes of the formula to determine "Best Value", as set out in Annex "C" to the RFSO, the fact that Huron's proposal had received the highest score for the rated criteria meant that Huron had received a full 65 points for that part of the formula. However, PWGSC submitted that Huron's bid price was not the lowest price offered and, hence, that Huron was awarded 33.48 points for its bid price out of a potential

35 points. According to PWGSC, when the calculation of total points (rated criteria and price) for each of the compliant proposals was completed, it was determined that the highest total went to CTC, and that Huron was second.

PWGSC admitted that it was not clear as to how both the formulae under the RFSO, "Contractor Selection Method", and Annex "C" were to be applied; in fact, it submitted that both were applied in the evaluation of the successful offeror.

Consequently, in view of these concerns, PWGSC submitted that the Crown would not exercise the option for the additional year in the standing offer issued to CTC but rather that it would commence a new solicitation for the period beginning November 1, 2003, and ending October 31, 2004. In addition, PWGSC is prepared to compensate Huron for its complaint costs and to provide additional compensation to Huron. PWGSC submitted that the amount of \$1,430 would be appropriate, based on a loss of opportunity for profit calculation. In this regard, PWGSC submitted that the potential value of the standing offer issued to CTC for the initial period of one year is \$57,200 (130 days at \$440/day). PWGSC also submitted that Huron alleges that it would have considered a different pricing strategy if it had been aware of amendment No. 003 to the RFSO. In addition, it submitted that other bidders may have been unaware of amendment No. 003 when they submitted their proposals. In these circumstances, PWGSC submitted that it is entirely speculative whether Huron's resulting proposal would have been the winning proposal. Therefore, it submitted that the appropriate measure of compensation is lost opportunity, calculated as a one in four opportunity, by virtue of the fact that there were four compliant bids, and a reasonable profit margin of 10 percent.

In response to CTC's comments on the GIR regarding the terms of the contract, the Crown claimed that at no time did it suggest that it would, in fact, exercise the potential option year and, further, that CTC's "understanding" that it could rely on having a two-year period for the contract was based entirely on an unjustified assumption on the part of CTC alone.

CTC's Position

With respect to the late notification of amendment No. 003 to the RFSO, CTC submitted that it also received the amendment after the bid closing date and that it interpreted the amendment as a confirmation of the RFSO compliance and, therefore, confirmed its intention to honour its price for a further 12 months.

Regarding the interpretation of the per diem rate as stated in the RFSO at the section titled "Standing Offer, Extension of", CTC submitted that bidders were required to acknowledge understanding of and compliance with the terms of the RFSO by providing their initials in accordance with the requirements of the RFSO and that therefore, it provided its initials.

Regarding the preferential treatment of one of the bidders, CTC submitted that it understood that qualifying bidders were required to confirm that their per diem rate would remain the same for the second year.

CTC submitted that it believes that Huron's complaint is unfounded. It also submitted that it feels that the RFSO was fair, that the criteria were fair and that it was selected on the basis of merit.

In its response to the GIR, CTC submitted that, if the contract is retendered for the second year, as proposed by PWGSC, it will claim for costs and expenses incurred in preparation for services that were not part of the statement of work.

Huron's Position

Huron submitted in its comments on the GIR that the choice of method for the communication of amendments offered on MERX should not affect the responsibility of delivering amendments to the bidders prior to the closing date. Huron further submitted that the amendment was posted so late that, even if a bidder discovered it on MERX immediately after it was posted, there would have only been one business day to make significant changes to a major pricing strategy and to make sure that the new pricing strategy was sent by courier that same day so that it arrived in PWGSC's office by the bid closing date. It further submitted that, as a result of a telephone conversation with PWGSC, it understood that some bidders received the amendment in time to rebid, while others like itself did not. It submitted that this amendment would have caused it to consider an entirely new strategy for the per diem bidding rate and that this situation alone would have probably changed the result of the solicitation. In addition, Huron submitted that it is not unreasonable to assume that a major change to a pricing strategy that comprised 35 percent of the final best value score would have affected the outcome of the procurement.

Huron submitted that, according to PWGSC, for any bidder that did not receive the amendment in time, it was assumed that the figure in the initial bid represented both years of the bid. It submitted that this was not a correct assumption in its case. In addition, it submitted that, as a result of a telephone conversation with PWGSC, it understood that only one bidder was contacted after the bid process closed to confirm that the one-year figure that was submitted on the original Annex "B" to the RFSO was indeed meant to be the same figure for both years. Huron submitted that this action indicated that PWGSC was not comfortable with the way that the amendment was ultimately carried out and further submitted that this action has itself made the procurement process unfair.

After reviewing PWGSC's response concerning the calculation of best value, which was in the GIR, Huron withdrew only the part of its complaint regarding the formulae used in the calculation of the best value score.

In its comments on the GIR, Huron submitted that the compensation proposed by PWGSC is not acceptable. Huron objected to the "one in four" lost opportunity factor suggested by PWGSC. It further proposed one of the following compensations:

A

The RFSO be retendered immediately to the four companies whose proposals were found to be compliant with the Mandatory and Rated criteria of the RFSO. . . . The four proposals would maintain their technical scores from the previous RFSO, as there is no complaint regarding these technical scores. The RFSO should then be rebid using [amendment No. 003 to the RFSO] for price score only as this is where all of the procurement complaints have originated.

Huron Consulting is compensated for its complaint costs plus its lost profit opportunity from November 1, 2002 until a new contract is awarded.

OR

B

The Crown will not exercise the option for the additional year in the current contract awarded to CTC and a new solicitation will be posted on MERX for the period of November 1, 2003 to October 31, 2004.

Huron Consulting [will also be] compensated for its complaint costs [and in addition will be compensated for its lost profit opportunity].

TRIBUNAL'S DECISION

Subsection 30.14(1) of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, is the *North American Free Trade Agreement*⁷ and the *Agreement on Internal Trade*.⁸

Article 1008 of NAFTA provides, in part, that “[e]ach Party shall ensure that the tendering procedures of its entities are: (a) applied in a non-discriminatory manner”.

Article 1012(1) of NAFTA provides, in part, that “[a]n entity shall: (b) in determining a time limit, consistent with its own reasonable needs, take into account such factors as the complexity of the procurement, the extent of subcontracting anticipated, and the time normally required for transmitting tenders by mail from foreign as well as domestic points”.

Article 506(5) of the AIT provides that “[e]ach Party shall provide suppliers with a reasonable period of time to submit a bid, taking into account the time needed to disseminate the information and the complexity of the procurement.”

Article 506(6) of the AIT provides, in part, that “[t]he tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.”

Huron alleged that PWGSC applied an unfair evaluation process, gave preferential treatment to certain bidders and improperly applied the contractor selection formula.

The Tribunal must determine whether, in evaluating the proposals, PWGSC conducted a fair evaluation process and properly applied the evaluation criteria and selection formula set out in the RFSO.

Regarding the timing of the issuance of amendment No. 003 to the RFSO, the Tribunal is of the opinion that PWGSC had a responsibility to ensure that the amendment was issued in a reasonable amount of time before bid closing in order to afford potential bidders the opportunity to receive the amendment and to prepare and submit their bids before the closing date. In the Tribunal's view, it is unreasonable to allow only one business day for potential bidders to receive the amendment, prepare their bids and ensure that the bids are received at the bid receiving unit before the bid closing date and time. Alternatively, should PWGSC have found it necessary to issue a contract amendment so close to the bid closing date, it should have extended the bidding deadline accordingly.

The Tribunal notes that, of the 10 proposals received, 4 were found to be compliant. The Tribunal also notes that both Huron and CTC stated in their submissions that they did not receive amendment No. 003 to the RFSO until after the bid closing date. PWGSC admitted that it advised Huron on October 22, 2002, that it would assume that, where a single rate was bid, the rate applied to both years.

7. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].

8. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].

However, the Tribunal notes that, with the issuance of amendment No. 003, PWGSC clearly expected bidders to submit two rates. The Tribunal also notes that only CTC was contacted to confirm its bid in which it submitted only one rate.

The Tribunal is of the view that contacting CTC to obtain additional information in relation to its bid after bid closing was contrary to the terms of the RFSO. To have afforded CTC the opportunity, after bid closing, to provide additional information regarding its per diem rate for the option year, without providing the same opportunity to the other compliant bidders, favoured CTC to the detriment of the other bidders. In this regard, the Tribunal is of the opinion that PWGSC breached the provisions of the trade agreements and, therefore, finds the grounds of complaint to be valid.

With regard to Huron's ground of complaint concerning the application of the contractor selection formula, the Tribunal notes that Huron has withdrawn this portion of its complaint; therefore, the Tribunal no longer considers this matter to be before it.

The Tribunal notes that, in CTC's response to the GIR, it makes comments regarding a potential claim for costs that it incurred if the option year of the standing offer is not exercised by PWGSC. According to CTC, the increased costs in question relate to additional tasks that it agreed to perform for the Crown that were not mentioned in the RFSO. Consequently, the Tribunal does not consider this to be a matter before it, but rather an issue relating to contract administration between PWGSC and CTC.

For the above reasons, the Tribunal finds that PWGSC did not conduct a fair evaluation process, gave preferential treatment to a bidder and, in doing so, breached the provisions of Articles 1008 and 1012 of NAFTA and Articles 506(5) and (6) of the AIT.

In light of the forgoing, the Tribunal finds that the complaint is valid.

Huron requested, as a remedy, that the Tribunal recommend that the requirement be retendered, that it be awarded compensation for lost profit opportunity and that it be awarded its costs for preparing and proceeding with the complaint.

The Tribunal notes that a standing offer has already been issued to CTC, that it will expire on October 31, 2003, and that it contemplates a second year that may be exercised at PWGSC's option. The Tribunal recommends that PWGSC not exercise the option for the additional year and that it tender a new solicitation for the period from November 1, 2003, to October 31, 2004.

With respect to compensation, it is clear to the Tribunal that, in view of PWGSC's actions, Huron was deprived of an opportunity to amend its pricing that, had it had the chance to do so, could have resulted in it being declared the successful bidder. However, the Tribunal notes that, of the four bidders declared compliant on the rated requirements, only one was provided the opportunity to revise its pricing in accordance with amendment No. 003 to the RFSO. As such, the Tribunal cannot determine whether Huron would have been issued the standing offer but for the breach. In these circumstances, the Tribunal recommends that Huron be compensated for its lost opportunity. On this basis, the Tribunal is of the opinion that an appropriate compensation for loss of opportunity would be one fourth of the profit that Huron would have made, had it been issued the standing offer for the initial period of November 1, 2002, to October 31, 2003, and had the use of the standing offer matched the estimate.

Finally, the Tribunal awards Huron its reasonable costs incurred in preparing and proceeding with the complaint.

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the CITT Act, the Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that PWGSC not exercise the option for the additional year in the standing offer issued to CTC and that it tender a new solicitation for the period from November 1, 2003, to October 31, 2004. In addition, the Tribunal recommends that Huron be compensated one fourth of the profit that it reasonably would have made, based on 130 training days, as indicated in the standing offer, for the period from November 1, 2002, to October 31, 2003.

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards Huron its reasonable costs incurred in preparing and proceeding with the complaint.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member