

Ottawa, Friday, November 16, 2001

File No. PR-2000-060

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

AND IN THE MATTER OF a determination made pursuant to subsections 30.15(2) and (3) and 30.16(1) of the *Canadian International Trade Tribunal Act* to award Foundry Networks compensation for the lost opportunity to compete in the solicitation and its reasonable costs incurred in relation to filing and proceeding with the complaint.

ORDER

INTRODUCTION

In a determination made on May 23, 2001, the Canadian International Trade Tribunal (the Tribunal), pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*,¹ awarded Foundry Networks (Foundry) its reasonable costs incurred in relation to filing and proceeding with the complaint. Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommended, as a remedy, that Foundry be compensated one seventh of the profit that it would have made if it had submitted a proposal for a price one dollar lower than that of the successful bidder, MTT (Halifax).

In its submission of July 25, 2001, Foundry indicated to the Tribunal that it would not file a claim for costs incurred in relation to filing and proceeding with the complaint. However, it submitted, based on the company's annual report for 2000, that its average net profit for 2000 was approximately 23 percent and that compensation for lost profit should, therefore, be based on that percentage.

In a subsequent submission dated August 27, 2001, Foundry reiterated that its net profit margin in 2000 was 23 percent and that compensation for lost profit should be based on that percentage. In addition, based on that percentage, Foundry claimed that its lost profit amounted to \$36,648.57.

The Department of Public Works and Government Services (PWGSC) sent comments on Foundry's claim on September 17, 2001. Foundry did not respond to these comments.

COMPLAINT COSTS

No claim for costs was filed by Foundry. Therefore, the Tribunal will not award Foundry any costs in relation to filing and proceeding with the complaint.

COMPENSATION FOR LOST OPPORTUNITY

Foundry has claimed \$36,648.57 for lost profit based on an average net profit of 23 percent applied to an estimated proposal value of \$159,341.60, if it had had the opportunity to compete.

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

With respect to compensation for lost opportunity, PWGSC submitted that the Tribunal's award, based on its May 23, 2001, determination, should be calculated as follows:

$$\begin{aligned}\text{Foundry's lost opportunity} &= \frac{[\text{MTT (Halifax) bid price} - \$1.00] \times \text{Foundry's profit margin}}{7} \\ &= \frac{[\$145,850.70 - \$1.00] \times 0.1937}{7} \\ &= \$4,035.87\end{aligned}$$

PWGSC submitted that a profit margin of 19.37 percent was more appropriate for determining compensation for Foundry's lost opportunity. PWGSC submitted that Foundry's financial statements for the three months ending December 31, 2000, revealed an average profit margin of 19.37 percent and that this three-month period is a more appropriate period to calculate earned profits, as it coincides more closely with the bidding period than with the year 2000 as a whole. Therefore, PWGSC submitted that Foundry was entitled to compensation for lost opportunity in the amount of \$4,035.87.

In this instance, the Tribunal finds that it is reasonable to use an average profit margin based on the total revenues for the year 2000, as provided by Foundry, to estimate compensation for lost opportunity. In its view, a 12-month period is more representative than a 3-month period.

Therefore, the Tribunal recommends that Foundry be compensated for its lost opportunity in the amount of \$4,792.20, calculated as follows:

$$\begin{aligned}\text{Foundry's lost opportunity} &= \frac{[\$145,850.70 - \$1.00] \times 0.23}{7} \\ &= \$4,792.20\end{aligned}$$

CONCLUSION

The Tribunal hereby recommends that PWGSC pay compensation to Foundry in the amount of \$4,792.20 and directs PWGSC to take appropriate action to ensure prompt payment.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Susanne Grimes
Susanne Grimes
Acting Secretary