

Ottawa, Thursday, October 10, 2002

File No. PR-2001-048

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

AND FURTHER TO a recommendation made pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act* that Foundry Networks Inc. be compensated one ninth of the profit that it would have made, if any, if it had submitted a proposal for a price of one dollar less than that of Bell Nexxia and to an award made pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, of Foundry Networks Inc.'s reasonable costs incurred in relation to preparing and proceeding with the complaint.

## ORDER AND RECOMMENDATION

### INTRODUCTION

In a determination made on March 12, 2002, the Canadian International Trade Tribunal (the Tribunal) awarded Foundry Networks Inc. (Foundry) its reasonable costs incurred in relation to preparing and proceeding with the complaint. The Tribunal also recommended, as a remedy, that Foundry be compensated one ninth of the profit that it would have made, if any, if it had submitted a proposal for a price of one dollar less than that of the successful bidder, Bell Nexxia.

On March 26, 2002, Foundry submitted a claim for compensation of \$15,624.49, based on the average net profit of 23 percent applied by the Tribunal in File No. PR-2000-060.<sup>1</sup> On April 8, 2002, Foundry submitted a claim for costs in the amount of \$9,863.60 in relation to preparing and proceeding with the complaint.

The Department of Public Works and Government Services (PWGSC) sent comments on Foundry's claim on May 6, 2002. On May 29, 2002, Foundry submitted additional comments and an affidavit of the rate of profit claimed. On July 2, 2002, PWGSC submitted additional comments on the affidavit and requested a more detailed breakdown of the calculation of costs relating to the claim for compensation. On July 24, 2002, Foundry provided a detailed breakdown.

### COMPLAINT COSTS

Foundry has claimed legal costs (fees and disbursements) in the amount of \$9,863.60. PWGSC did not comment on this portion of Foundry's claim. The Tribunal notes that Foundry has claimed a total of \$1,846.61 (including taxes) for in-house photocopies at \$0.25 a copy. In accordance with Appendix B to the Tribunal's *Procurement Cost Guidelines* (the Guidelines), the maximum amount allowed for in-house photocopies is \$0.10 a copy. The Tribunal awards Foundry \$642.30 for in-house photocopy disbursements

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1. *Order* (16 November 2001) (CITT).

(6,423 copies at \$0.10 a copy, plus GST and PST). With respect to the other costs, the Tribunal finds these costs to be reasonable and consistent with the Guidelines. However, since the PST is not applicable to legal services in Ontario, the Tribunal reduces the total claimed by the amount of PST added. The Tribunal hereby awards Foundry costs in the amount of \$8,146.54 in relation to preparing and proceeding with the complaint.

### COMPENSATION FOR LOSS OF OPPORTUNITY

Foundry has claimed \$15,624.49 for lost profit based on one ninth of an average net profit of 23 percent applied to a contract value of \$611,392.04.<sup>2</sup> PWGSC submitted that the applied rate related to the average net profit for the year 2000 and that it would be more appropriately based on the cost of Foundry's products as if it had submitted a proposal at the price established by the Tribunal. Foundry, in its subsequent submission, provided evidence in the form of a cost breakdown that supported a profit margin of the magnitude in its original claim.

The Tribunal is of the opinion that, in the particular circumstances of this case, the compensation claimed by Foundry is reasonable, supported by evidence and consistent with the Tribunal's recommendation. As such, the Tribunal recommends that PWGSC pay Foundry compensation in the amount of \$15,624.49 representing one ninth of the profit that it would have made if it had submitted a proposal for a price of one dollar less than that of Bell Nexxia.

### CONCLUSION

The Tribunal hereby awards Foundry costs in relation to preparing and proceeding with the complaint in the amount of \$8,146.54 and directs PWGSC to take appropriate action to ensure prompt payment.

The Tribunal hereby recommends that PWGSC pay compensation to Foundry in the amount of \$15,624.49.

Zdenek Kvarda  
Zdenek Kvarda  
Presiding Member

Susanne Grimes  
Susanne Grimes  
Acting Secretary

2. The value of Bell Nexxia's proposal less one dollar.