

Ottawa, Wednesday, June 18, 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 recommendation made pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act* 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, and to an award made pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, of Huron Consulting's reasonable costs incurred in preparing and proceeding with the complaint.

## ORDER AND RECOMMENDATION

### INTRODUCTION

In a determination made on February 10, 2003, the Canadian International Trade Tribunal (the Tribunal), pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*,<sup>1</sup> awarded Huron Consulting (Huron) its reasonable costs incurred in preparing and proceeding with the complaint. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommended, as a remedy, 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.

On March 12, 2003, Huron submitted to the Tribunal its claim for costs in the amount of \$3,371.47 and its claim for compensation in the amount of \$14,688.96. The Department of Public Works and Government Services (PWGSC) filed comments on Huron's claims on April 4, 2003. On April 21, 2003, Huron provided its final comments to the Tribunal.

### COMPLAINT COSTS

Huron claimed a total of \$3,371.47 in fees and disbursements. That amount includes representative's fees incurred for the work of one of its employees for 43.25 hours at \$75.00/hour and \$127.72 in disbursements, for which no receipts were submitted. PWGSC submitted that it has no comments on the claim for complaint costs.

The Tribunal is of the opinion that, while not supported by invoices, the fees and disbursements are reasonable and consistent with the Tribunal's *Procurement Cost Guidelines* (the Guidelines) and, therefore, allows the full amount of \$3,371.47.

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

## COMPENSATION FOR LOST OPPORTUNITY

Huron claimed \$14,688.96 for lost opportunity based on one fourth of the profit that it would reasonably have made based on 130 training days. This is based on a “Total Revenue” of \$57,200.00, less “Expected Expenses” of \$2,288.00, for a “Total Net Profit Revenue” of \$54,912.00. The “Total Claim For Lost Opportunity” is therefore based on 25 percent of the “Total Net Profit Revenue” (\$13,728.00) plus GST (\$960.96), for an amount of \$14,688.96.

PWGSC submitted that Huron’s means of calculating total profits is wrong. It submitted that Huron calculates “Total Net Profit Revenue” as its potential “Total Revenue” less its “Expected Expenses”. Thus, according to PWGSC, Huron has submitted that it can count all its potential revenues under the contract as “profit”, deducting only the costs of training manuals. In other words, according to PWGSC, Huron’s position is that, since it is a sole proprietorship, it incurs no labour or other resource costs and that, as a result, its only costs would be printing costs. Therefore, according to PWGSC, Huron submitted that the entire value of the contract over and above the small amount for printing costs should be treated as “profit”, for the purpose of calculating “lost opportunity”.

PWGSC argued that the profits of a business are the proceeds that remain after all costs (cash, non-cash, direct or indirect) have been deducted. It further submitted that “[c]ontributions of labour and skill by the owner of a sole proprietorship to a contract are properly classified as direct costs” and should be deducted from total revenues in order to establish profit. It submitted that whether the sole proprietor decides to remunerate himself for these direct costs is within his discretion and that the decision that he makes in this respect does not change the nature of the costs incurred.

PWGSC cited the approach by the World Trade Organization Appellate Body when considering the contributions of family labour and management for the purposes of determining the cost of production of milk on family farms.<sup>2</sup>

PWGSC submitted that Huron’s methodology for calculating “lost profit” should be rejected. It further submitted that, in accordance with the course adopted by the Tribunal in previous cases,<sup>3</sup> a reasonable margin of profit should be set at 10 percent of the value of the contract. It further submitted that, on this basis, a reasonable profit margin in this case would be \$5,720.00 (10 percent of \$57,200.00). Accordingly, PWGSC submitted that compensation for lost opportunity should be one quarter of \$5,720.00, or \$1,430.00.

Finally, PWGSC submitted that Huron is not entitled to compensation for GST which may have been payable on the contract.

Huron submitted that it is not a family business but a sole proprietorship, and that, by definition of a sole proprietorship, the owner assumes all responsibility for any debt incurred, including personal assets, and, further, that all monies earned under the contract have to be claimed as personal income for the purpose

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2. *Re Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products* (20 December 2002), WT/DS103/AB/RW2 and WT/DS113/AB/RW2 at paras. 103-105.

3. *Re Complaint Filed by Spacesaver Corporation* (11 January 1999), PR-98-028 (CITT) [*Spacesaver*]; *Re Complaint Filed by IBM Canada Ltd.* (5 November 1999), PR-99-020 (CITT); *Re Complaint Filed by ACE/Clear Defense Inc.* (30 June 2000), PR-99-051 (CITT).

of paying income tax, in other words, profit. It further submitted that none of the three cases cited by PWGSC dealt with a sole proprietorship, but with large incorporated companies.

In its reply filed on April 21, 2003, Huron submitted that it agrees not to claim GST on the lost opportunity and that, therefore, its claim for compensation for lost profit is revised to \$13,728.00.

In determining the amount of lost profit, it is important to remember the purpose of compensation for damages, which is summarized in the Tribunal's *Procurement Compensation Guidelines* (Compensation Guidelines) as follows:

**3.1.2** In determining the amount of compensation to recommend, the Tribunal will attempt, insofar as is appropriate in the circumstances and bearing in mind any other relief that it recommended, to place the complainant in the position in which it would have been, but for the government's breach or breaches.

It is important to point out that the Tribunal maintains discretion to determine the amount of profit that is reasonable. The Tribunal's jurisprudence does not support the proposition that it "automatically" determines profit as being 10 percent of the value of the contract. There is no mention in the Tribunal's Compensation Guidelines of a 10 percent "rule of thumb" approach to determining profit. It is also important to note that those cases in which the 10 percent figure was applied involved the procurement of goods, not services. Salaries typically make up a large proportion of the value of a service contract, such as the one at issue. Further, treating a salary as a direct cost may be more appropriate in those cases in which it is a "sunk cost", that is, a cost that will have to be paid irrespective of the performance of the contract. It may not be appropriate where, as is the case here, compensation for labour is the "consideration" under the proposed contract.

The case law identified by PWGSC in which the 10 percent factor was applied indicates that the Tribunal determined the best manner in which to calculate profit based on the evidence. In *Spacesaver*, for example, the Tribunal applied the 10 percent profit margin estimate after concluding that the complainant had not provided any evidence to support that the requested 32.5 percent profit margin was reasonable. The Tribunal is of the view that the application of a "profit margin" in the context of the revenue of an unincorporated entity, which, in fact, is essentially an employment contract for one individual, is inappropriate. The specific profit margin suggested by PWGSC, 10 percent, has no factual basis in this case, and the Tribunal does not consider it to be a reasonable profit margin in this case.

The Tribunal is of the view that an appropriate approach in this case is to treat the estimated value of the standing offer, based on 130 training days, less costs, as profit for the purpose of the compensation award. However, the Tribunal must consider whether this figure should be reduced in accordance with the principles recognized in the Compensation Guidelines. The Tribunal is of the view that the profit should be adjusted to take into account Huron's duty to mitigate. While Huron has stated that the standing offer in question was its only source of income, the Tribunal expects that Huron would have or should have had another source of income to replace some of the loss of income had it not been issued the standing offer. Consequently, the Tribunal reduces Huron's claim for lost profit by 50 percent. With respect to the original claim for GST on the lost opportunity, the Tribunal notes that Huron agrees that GST will not be payable on the lost opportunity. Therefore, the Tribunal recommends that the amount of compensation paid to Huron be \$6,864.00.

**CONCLUSION**

The Tribunal hereby awards Huron costs in the amount of \$3,371.47 in relation to preparing and proceeding with the complaint and directs PWGSC to take appropriate action to ensure prompt payment.

The Tribunal hereby recommends that PWGSC pay compensation for lost profit to Huron in the amount of \$6,864.00.

Zdenek Kvarda  
Zdenek Kvarda  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary