



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER

File No. PR-2003-070

CSI Consulting Inc.

v.

Department of Public Works and
Government Services

*Order issued
Wednesday, March 22, 2006*

IN THE MATTER OF a complaint filed by CSI Consulting 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 decision of the Canadian International Trade Tribunal, pursuant to sections 30.15 and 30.16 of the *Canadian International Trade Tribunal Act*, recommending that CSI Consulting Inc. be compensated for its lost opportunity by an amount equal to one third of the profit that it would reasonably have earned, had it been the successful bidder in Solicitation No. V7587-03-0001/A, and awarding CSI Consulting Inc. its reasonable costs incurred in relation to filing and proceeding with the complaint;

AND FURTHER TO a determination of the Federal Court of Appeal in Docket A-299-04 upholding the Canadian International Trade Tribunal recommendation and award.

BETWEEN

CSI CONSULTING INC.

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

ORDER AND RECOMMENDATION

INTRODUCTION

In a determination made on May 3, 2004, the Canadian International Trade Tribunal (the Tribunal), pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*,¹ awarded CSI Consulting Inc. (CSI) its reasonable costs incurred in relation to filing and proceeding with the complaint. Pursuant to subsections 30.15(2) and (3), the Tribunal recommended, as a remedy, that CSI be compensated by one third of the profit that it would reasonably have made, had it been issued the contract. The Tribunal's *Procurement Cost Guidelines (1999 Cost Guidelines)* and *Procurement Compensation Guidelines—Revised (2001 Compensation Guidelines)* apply to CSI's claim for costs and compensation.

On September 28, 2005, CSI submitted to the Tribunal its claim for costs in the amount of \$41,218.49 (GST included). The Tribunal requested additional substantiating information and, on October 15, 2005, CSI submitted a new claim for costs in the amount of \$33,394.41 (GST included). On October 26, 2005, the Department of Public Works and Government Services (PWGSC) filed comments on CSI's claims. On November 8, 2005, CSI provided its final comments.

On November 4, 2005, CSI submitted to the Tribunal its claim for compensation in the amount of \$125,533.33. On November 16, 2005, PWGSC provided its initial comments and requested that CSI provide more information. On November 17, 2006, the Tribunal requested that CSI submit additional information regarding its claim, which CSI did on November 24, 2005. On December 7, 2005, PWGSC filed its final comments on CSI's submissions. On January 20, 2006, CSI provided its final comments.

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

COMPLAINT COSTS

CSI claimed a total of \$23,454.56² (GST included) in legal fees from three firms. That amount represents 78.0 hours at \$250.00/hour (Firm 1), 8.9 hours at \$269.14/hour (Firm 2), 7.4 hours at \$103.81/hour (Firm 2) and 2 minutes at \$220.00/hour (Firm 3). It also claimed \$3,660.80 (GST included) in disbursements, \$5,350.00 (GST included) for independent procurement advice involved in drafting portions of the complaint and \$851.13 (GST included) in expenses for two staff members who were required to travel as a result of the complaint proceeding.

PWGSC submitted that the 78 hours claimed by the first legal firm were all performed by the same counsel and that there was no attestation on the file regarding the number of years that that counsel had practiced. PWGSC submitted that the only permissible hourly rate is the one prescribed by Appendix B to the *1999 Cost Guidelines* for counsel who have the number of years of experience claimed by that counsel. PWGSC also submitted that the 78 hours claimed were excessive and unjustified with respect to the limited complexity of the complaint. It noted that, throughout the proceedings, CSI's counsel took the opportunity to make lengthy repetitive and excessive submissions. Regarding costs claimed by the second legal firm, PWGSC argued that costs were claimed for work that was carried out prior to and distinct from the "filing and proceeding with the complaint" costs awarded to CSI by the Tribunal. It also noted that the work claimed by the second firm was the same that was claimed by the first firm. PWGSC had no comment on the 2 minutes charged by the third firm.

PWGSC submitted that the expenses claimed by CSI employees were incurred while acting in their usual capacity and, in accordance with section 5.2.3 of the *1999 Cost Guidelines*, and that they should not be allowed. It also submitted that the two trips appear to have occurred on March 9 and May 2, 2004, which is after the Tribunal issued its determination on March 3, 2004, and after CSI's counsel had filed its last submission. PWGSC did not comment on the independent procurement advice claim of \$5,350.00.

In response to PWGSC's submission, CSI submitted that the counsel from Firm 1 had practiced for 14 years and, owing to his experience in international trade law and policy as well as his years of practice, it should be entitled to the maximum hourly rate permitted by the Tribunal for legal counsel (\$200.00/hour), which, it noted, is less than the current market rate of between \$260.00/hour and \$350.00/hour. CSI submitted that, through its breaches of the trade agreements, PWGSC left it no other choice but to incur costs to file a complaint with the Tribunal and then to defend itself when PWGSC appealed the Tribunal's determination. CSI submitted that the case turned on three distinct issues, i.e. bias, the security clearance and the unstated mandatory requirements, and that the hours claimed were not excessive.

CSI also submitted that the costs incurred by Firm 2 did not occur prior to and were not distinct from the "filing and proceeding with the complaint" and should therefore be allowed. It argued that the work done by the firm was extremely relevant and important and that the firm provided it with guidance as to what information was needed from PWGSC. It submitted that this information formed part of its supporting materials in its complaint to the Tribunal. CSI noted that, on November 28, 2005, Firm 2 found out that it was representing IT/NET Consultants Inc. (IT/NET), the contract winner in the subject complaint; CSI then forwarded the work done by Firm 2 to Firm 1, which continued with the case.

2. One of the legal firms, Firm 1, submitted invoices for 78 hours, evenly split between two invoices. Due to a mathematical error, one of the invoices only charged \$9,000.00 instead of the correct \$ 9,750.00 amount for 39 hours of work at \$250.00/hour.

Regarding the employee expenses, CSI submitted that it did not claim the time spent by its officer and employee in connection with the proceeding. It submitted that, due to the complexity and volume of facts that needed to be gathered and discussed in preparation of the claim, CSI had to incur traveling expenses to meet, review and discuss the proceeding material in Toronto and Ottawa.

ANALYSIS

Taking into account the above submissions, the Tribunal will allow the following: 78 hours of legal fees, part of the disbursements, none of the employee expenses and all of the specialized procurement advice.

Regarding the legal expenses, the Tribunal will allow the full 78 hours claimed with respect to the firm that represented CSI throughout the proceeding before the Tribunal. The amount allowable, however, will be in accordance with Appendix B to the *1999 Cost Guidelines* rates and not at the rate claimed by CSI. Appendix B stipulates that the applicable rate for counsel with between 13 and 20 years experience is between \$125.00/hour and \$150.00/hour. Given that, at the time that he represented CSI, counsel had 14 years of experience, the Tribunal will allow the lower rate of \$125.00/hour for a pre-GST total of \$9,750.00. The Tribunal notes that part of the 78 hours claimed by this counsel included time for “Review of Procurement file” and “Preparing draft complaint”,³ and it will therefore not allow any part of the claim for legal fees in regard to Firm 2. CSI claimed that this firm, that recused itself from representing CSI for reasons of conflict of interest, did important work in establishing the complaint. Given the claim from Firm 1, however, the Tribunal does not believe that PWGSC should be required to compensate CSI twice for what appears to be the same work. Regarding the 2 minute claim from Firm 3, the Tribunal is not able to reconcile the content of that claim with the proceeding and, accordingly, will not allow it.

Regarding disbursements, the Tribunal notes that the claim was made up of three items: photocopies, courier services and binding and separating the complaint.⁴ It will allow the 9,684 pages photocopied, but at the rate prescribed by Appendix B to the *1999 Cost Guidelines* (\$0.10 per copy) and not at the rate at which CSI was claiming (\$0.25 per copy) for a pre-GST total of \$968.40. The Tribunal notes that the documented courier charges total \$202.66 (pre-GST) and it will allow this amount. It will allow the \$660.50, pre-GST, claimed for binding and separating the complaint.

Regarding employee expenses, the Tribunal notes that, in its determination of May 3, 2004, it awarded CSI costs for “filing and proceeding with the complaint.” The expenses claimed by CSI for its employees’ travel occurred after the determination date and, therefore, after the proceeding had finished. The Tribunal will not allow these costs.

Noting that PWGSC did not comment on the validity of the specialized procurement advice claimed by CSI in preparing its complaint, the Tribunal will allow this portion of the claim in its entirety.

In total, the Tribunal allows \$9,750.00 for legal fees, \$1,831.56 for disbursements and \$5,000.00 for the specialized procurement advice (all items pre-GST), for a total of \$16,581.56. When GST is added, the total amount allowable is \$17,742.27.

COMPENSATION FOR LOST OPPORTUNITY

CSI claimed that the amount of profit that it lost by not being awarded the contract, divided by three as recommended by the Tribunal in its determination, was \$125,533.33.

3. Firm 1—Invoice 10325—*Revised*.

4. Firm 1—Invoice 10324.

PWGSC submitted that the amount claimed was based on the erroneous assumptions that the contract option time periods were one year each, whereas two of the three were actually six months, and that all option periods were exercised, which was not the case. It submitted that, due to inadequate funding, the contract was terminated without any option periods being exercised. PWGSC submitted that CSI's claim should therefore only be based on the profit that it would have earned for the initial contract year and should not include any amount for profit earned in any option periods.

Upon review of the financial statements submitted by CSI, PWGSC argued that the claimed profit for this contract was based on labour costs that were unsubstantiated and inconsistently lower than the rates charged for the same personnel under the previous contract,⁵ thus artificially increasing the profit component of the hourly rate that CSI had included in its proposal. It also noted that CSI's total "Cost of Sales—Subcontractors" for the year in question was, in terms of percentage, significantly higher than the rate that CSI was claiming in respect of this contract. PWGSC submitted that, given this discrepancy, the amount claimed by CSI was unreasonable and unsupported by its financial statements, and ought not to be accepted by the Tribunal.

Regarding the profit margin claimed by CSI, PWGSC submitted that, based on CSI's financial statements, ". . . there are serious inconsistencies between the proposed level of profitability claimed by CSI Consulting on the subject contract and the profit levels achieved by the Company in recent years . . ." ⁶ The actual amount of profit that CSI would have earned should be based on its financial statements, which supported a significantly lower profit margin.

In response to PWGSC, CSI submitted that PWGSC's actions relating to one firm, in this case IT/NET, were not relevant to CSI's claim. CSI submitted that, given that it proposed personnel with extensive knowledge of the project, at a much lower price than IT/NET, it should have been awarded the contract in the first place. In these circumstances, it claimed that there would have been adequate funding in place for the option periods and that its claim for lost profits should therefore be based on the profit that it would have earned for the entire period of the contract and not just the initial period.

CSI also submitted that PWGSC ignored the cost structure of the contract at issue, focussing instead on extrapolating CSI's costs from the past years' financial statements. It stated that its projects have unique cost models and profitability margins and that the data submitted to the Tribunal relating to this particular project is what is most important.

With respect to PWGSC's claim of "serious inconsistencies", CSI claimed that these concerns are nothing more than a bald statement of opinion that should be rejected. It noted that there was no description or analysis of the steps taken to review CSI's claim, no listing of any of the assumptions underlying that analysis, and no note of what the specific inconsistencies were or what specific conclusions were in fact reached. CSI submitted that PWGSC had to demonstrate to the Tribunal that its submissions were accurate and that it failed to do so in this case.

Finally, CSI submitted that PWGSC's estimate of what its profit margin should be was so low that it implied that CSI is not in the business of making money. CSI claimed that the estimate was so unreasonably low that the fact that PWGSC advanced these amounts demonstrated that its analysis was seriously flawed.

5. In CSI's response to the subject solicitation, the incumbent supplier was proposed as a subcontractor to CSI.

6. Exhibit 3 to PWGSC December 7, 2005, submission.

ANALYSIS

The Tribunal has reviewed the claims and recommends that PWGSC compensate CSI by an amount of \$41,677.

In determining the amount of lost profit, the Tribunal referred to section 3.1.2 of the *2001 Compensation Guidelines*, which reads 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.

PERIOD OF CONTRACT

Regarding the actual amount of time for which CSI's lost profit claim will be allowed, the Tribunal is not convinced by CSI's argument that it should receive its lost profits for the option periods of the contract. The right to exercise the option rests with the Crown; it is pure speculation for CSI to argue that, if it had been awarded the contract, the Crown would have proceeded with the option periods. Section 2.2 of the *2001 Compensation Guidelines*, as one of its guiding principles, states the following: "Compensation awards will not be based on speculation or conjecture" The Tribunal does not believe that any of the parties to this proceeding can know what would have happened if the contract had been awarded to CSI or to the third compliant bidder. Therefore, the Tribunal bases its determination on the contract period, which was from November 2003 to October 2004, and allows CSI to claim one third of the profit that it would reasonably have earned during that period.

ACCOUNTING ISSUES

The Tribunal used the tables found at Appendices A and B (Confidential) to this order to determine its recommendation regarding the final allowable compensation amount. Given the confidential nature of the financial information in the submissions regarding the claims, the Tribunal cannot publish the actual numbers in Appendix A to this order. Confidential Appendix B is provided to the parties and contains the numbers used by the Tribunal.

CSI submitted that it used the actual billable amount of the solicitation as the gross revenue amount in its calculation for the allowable contract period. From this amount, it deducted its labour and general administration costs to arrive at lost profit.

To assess the reasonableness of the costs CSI submitted it would have incurred, the Tribunal had to address several fundamental accounting issues relating to CSI's submission, specifically:

- Is the dollar amount reported for the gross revenue (total billable) for the allowable contract period reasonable?
- Is the cost allocation method used reasonable (i.e. are the costs that are applied against the gross revenue amount to arrive at the loss profit amount appropriate and reasonable)?
- Are the dollar estimates reported for the various applicable costs reasonable?

Regarding the first issue (gross revenue), the Tribunal finds the amount reasonable and, therefore, will accept CSI's submission that its gross revenue amount is equivalent to the dollar amount reported for the allowable contract period, which the Tribunal has determined above to be one year. This number appears as the total in Column D of Appendix B.

Regarding the second issue (cost allocation), in order to arrive at a reasonable lost profit amount for a specific contract, applicable costs must be deducted from the gross revenue (i.e. total billable) amount of the contract. Unfortunately, there is no set method used to derive the applicable costs. There are, however, two categories of costs to be allocated: direct costs and associated indirect costs.⁷ The direct costs category includes such items as direct material costs and direct labour costs. The associated indirect costs category includes costs that are associated with completing the contract, such as certain depreciation, certain rent and supervisory salaries. CSI submitted that its direct costs consisted solely of “Labour” costs. The company refers to its associated indirect costs as “General Admin”. These two groups of costs represent all of CSI’s costs. Hence, there are no other cost items to be considered to arrive at a reasonable estimate for lost profit.

This leads to the third issue (dollar estimates). Once the relevant cost items to be applied have been identified, a dollar amount must be established for each one of these items. Again, there is no set method to arrive at these amounts. However, in the Tribunal view, a company’s financial statements and other documents, such as published standards, can provide the basis for determining reasonable amounts. The Tribunal notes that the amount that CSI claimed in its cost submission for general administration costs appears to be reasonable in light of the amounts reported in its annual financial statements. However, the Tribunal notes that the amount that CSI claimed in its cost submission for labour costs is considerably lower than the amount that would be derived by using its financial statements for guidance. Furthermore, the labour amount is lower than the amount that would be derived by using the Social Development Canada (SDC) wage rates⁸ in the same geographical area in which CSI is located, which are published for the period of the contract. Accordingly, the Tribunal chose to use these wage rates to establish viable benchmark dollar estimates for the various labour categories identified by CSI.

CSI submitted that it calculated the labour costs by using the per diem wage rate applicable to each position multiplied by the number of days each employee would have been employed at that position during the initial contract period. The total wages for each position were then added together in order to arrive at the total labour cost. General administration costs were calculated by applying a rate of 16 percent to the total billable amount. In this particular case, labour is the only direct cost identified by CSI. CSI refers to the associated indirect costs that would have been incurred to complete the work as “General Administrative Costs”.

The Tribunal reviewed CSI’s statement of income for the year ended December 31, 2004, and found that there were no other categories of direct costs beyond labour. It notes that the labour-to-revenue ratio in the cost submission is considerably lower than that found in the statement of income. As a result, the Tribunal considers that CSI’s estimate of labour costs in the cost submission may be low. The cost submission does not identify the components of the general administration costs. However, the Tribunal notes that the rate of 16 percent that CSI used to calculate these costs slightly *exceeds* the rate that would result by applying the same methodology to the amounts in CSI’s statement of income for the year ended December 31, 2004.⁹ Nevertheless, the Tribunal accepts CSI’s rate for general administration costs as reasonable.

7. According to one of the sources most often referred to by accountants for cost allocation guidance, T. Charles Horngren and George Foster, *COST ACCOUNTING: A Managerial Emphasis*, 6th ed. (Englewood Cliffs, NJ: Prentice Hall, Inc., 1987).

8. Ottawa 2004 Employment Insurance Wage Rates, 30 May 2005, online: Social Development Canada <<http://www.sdc.gc.ca/en/on/offices/2004wages/ottawa.shtml>>.

9. Based on CSI’s financial information, the Tribunal determined that a formula of *all* expenses (other than direct costs) divided by revenue produced a result of 14.5 percent.

When comparing the labour rate charged, per category, with the industry standards found on SDC's Web site, the Tribunal notes that, for four out of the five job positions in its contract proposal, CSI claimed a labour rate that is lower than the low SDC wage¹⁰. As a result, the wage portion of CSI's claim is lower and the profit element is proportionally higher than it would be if CSI were charging the SDC "low wage" or "average wage".

Given the parties' divergent submissions, the Tribunal decided that it was reasonable to calculate CSI's lost profit by using the SDC average wage as a benchmark. It therefore applied the SDC average wage to the hours bid, per category, for the contract period (Column A). These amounts were combined as a "Total SDC Average Wage" for the contract. CSI's general administration costs were added to the "Total SDC Average Wage" to establish CSI's total cost (Column C). This total cost was subtracted from CSI's submitted gross revenues (Column D) to arrive at what the Tribunal considers to be a fair and representative profit of \$125,030 (Column E). This number was divided by three (Column F), as the Tribunal could not determine whether CSI would necessarily have been the winner of the contract, given that there were two other technically compliant bidders. Accordingly, the Tribunal establishes CSI's lost profit at \$41,677.

CONCLUSION

The Tribunal hereby awards CSI costs in the amount of \$17,742.27 in relation to filing 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 CSI in the amount of \$41,677.

Meriel V. M. Bradford
Meriel V. M. Bradford
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Zdenek Kvarda
Zdenek Kvarda
Member

Susanne Grimes
Susanne Grimes
Acting Secretary

10. SDC provides three average wage rates: a low wage, an average wage and a high wage.

APPENDIX A

	A	B	C	D	E	F
POSITION	Total Average Wage*—as per SDC Web Site	General Administration Costs by Position—as per CSI	Total Costs (Column A + Column B)	Gross Revenue (Total Billable)—as per CSI	Lost Profit per Category (Column D - Column C)	One Third of Lost Profit (Column E Divided by 3)
IT Project Manager						
Software Developer						
Systems Analyst						
Systems Analyst						
Quality Assurance Consultant						
		TOTAL			125,030	41,677

* Based on the hourly average wage multiplied by 7.5 hours multiplied by the number of work days reported by CSI.

APPENDIX B

Confidential version of Appendix A.