Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2006-024

Antian Professional Services Inc.

v.

Department of Public Works and Government Services

Order and reasons issued
Wednesday, August 15, 2007

Canada

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IN THE MATTER OF a complaint filed by Antian Professional Services 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 subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, recommending that Antian Professional Services Inc. be compensated by an amount equal to one half of the profit that it would reasonably have earned during the first year of the standing offer had it been the top-ranked bidder in Solicitation No. EN578-054602/A.

BETWEEN

ANTIAN PROFESSIONAL SERVICES INC. **Complainant**

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES **Government Institution**

ORDER

The Canadian International Trade Tribunal hereby recommends that the Department of Public Works and Government Services compensate Antian Professional Services Inc. in the amount of $67,003.90 for one half of the profit that it would reasonably have earned during the first year of the standing offer had it been the top-ranked bidder in Solicitation No. EN578-054602/A.

Ellen Fry
Ellen Fry
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

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

Susanne Grimes
Susanne Grimes
Acting Secretary

STATEMENT OF REASONS

BACKGROUND

1. In its determination made on December 20, 2006, the Canadian International Trade Tribunal (the Tribunal), pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*,[1] recommended that the Department of Public Works and Government Services (PWGSC) compensate Antian Professional Services Inc. (Antian) by an amount equal to one half of the profit that it would reasonably have earned during the first year of the standing offer had it been the top-ranked bidder in Solicitation No. EN578-054602/A. In that determination, the Tribunal directed the parties to develop a joint proposal for compensation. If reaching an agreement on the amount of compensation was unsuccessful, Antian was then to submit its claim for compensation directly to the Tribunal.

2. The parties were unable to agree on the amount of compensation in the initial period following the Tribunal's determination. As a result, on February 13, 2007, Antian submitted its initial arguments and claim for compensation. PWGSC responded on February 26, 2007, and Antian filed its comments on PWGSC's response on March 5, 2007.

3. On February 7, 2007, PWGSC filed a motion with the Tribunal requesting that it order Antian to produce financial documents relating to Antian's financial performance for the years 2003, 2004 and 2005. On February 15, 2007, the Tribunal denied the motion because it considered the motion to be premature. Antian had 10 days to file its claim for compensation with the Tribunal, and the Tribunal was not due to receive Antian's submission until the week following the February 7, 2007, motion from PWGSC.

4. On April 5, 2007, the Tribunal directed that Antian provide additional information regarding its claim for compensation. On April 19, 2007, Antian provided the Tribunal with ". . . all available accounting documentation in relation to this matter . . . ."[2] PWGSC filed its comments on this final information on April 27, 2007.

COMPENSATION

5. In determining the amount for lost profit, the Tribunal considered the *Procurement Compensation Guidelines Revised (June 2001)*, which read as follows:

> . . .
>
> **2.2** Compensation awards will not be based on speculation or conjecture. The Tribunal recognizes that inherent in certain compensation recommendations will be the requirement to project into the future. However, in all circumstances, claims for compensation must be accompanied by credible economic, financial or other evidence.
>
> . . .
>
> **4.1** The complainant bears the onus of proof in establishing a compensation claim.
>
> . . .

6. The parties' submissions focussed on two issues: the value of the call-ups that would reasonably have been made during the standing offer period and the reasonable profit margin to be applied to that value.

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. Antian's covering letter dated April 18, 2007.

Call-up Value

7. Antian submitted that the relevant period to be considered was from the date of the award of the standing offer, July 14, 2006, to the termination date recommended by the Tribunal, March 31, 2007, i.e. 8.5 months. It also submitted that, because of the Tribunal's postponement of award order, the actual value of the call-ups was not representative of the total value that would have been called up if Antian had been the winning bidder,. That order was in force from August 18 to December 20, 2007, the date of the Tribunal's determination, prohibiting call-ups during that period. According to Antian, the postponement of award order reduced the total value of call-ups on the standing offer in the 8.5-month period during which it was in effect. Antian submitted that the only reliable measure of determining what the value of call-ups would have been, had it been the top-ranked bidder in the solicitation in question, was to use the actual value of call-ups made during a time period of the same length for a previous, virtually identical standing offer.

8. PWGSC submitted that the compensation must reflect the value of the actual contracts that were performed in relation to the solicitation that was the subject of the complaint and should not be determined on the basis of completely different standing offers. It submitted that the two primary users of the standing offer, the Department of Agriculture and Agri-Food and the Department of Natural Resources, had both been able to meet their requirements under the standing offer in issue either before or after the Tribunal's postponement of award order was in effect. PWGSC submitted that it would be unacceptable to award Antian compensation for services denied to the Crown and profits denied to the winning bidder. It also argued that, as Antian had requested the postponement of award order, it should have to live with the consequences of that request.

9. The Tribunal considers that, in the four-month period during which the Tribunal's postponement of award order was in effect, departments would likely have had the work in question done under other contracts. Since the postponement of award order was issued only about a week after Antian filed the complaint, there was little opportunity to accelerate call-ups under the standing offer in anticipation of a postponement of award order. With respect to PWGSC's argument that pent-up demand for services was met under this standing offer after the Tribunal's order was rescinded, the information on past contracting activity provided by Antian indicates a significant number of call-ups in previous years during the same four-month period as the one where the order was in place. Therefore, it is likely that, in 2006, there was also a demand for these services during the same period of the year. The Tribunal considers it unlikely that departments would find it practical to postpone their contracting for the four-month period during which the Tribunal's postponement of award order was in effect. This is particularly so in light of the fact that the Government could not know in advance that the standing offer could be reactivated after only four months, because it could not know in advance the effect of the Tribunal's recommendation, which could have included cancelling the standing offer and re-tendering the requirement, thereby causing an even longer delay.

10. Accordingly, to determine the value of the call-ups to be used in arriving at the amount of compensation, the Tribunal based its calculation on PWGSC's estimated value of the actual call-ups under the present standing offer ($----------). It then divided this amount by the number of months in which call-ups were able to be made (4.5 months) and determined that the average monthly value was $--------. This amount was multiplied by the number of months during which the standing offer was in effect, including the period during which the Tribunal's postponement of award order was in effect, i.e. 8.5 months, to arrive at a reasonable overall estimated value of $---------- over the 8.5-month period of the standing offer.

Profit Margin

11. Antian submitted that the appropriate profit margin to use was that of its most recent contract with the Government. It claimed that this contract was for identical work done for Communications Canada between April 2003 and September 2005. Regarding PWGSC's argument that the profit earned by the top-ranked bidder in the solicitation in question should be used to determine Antian's profit margin, Antian submitted that different companies have different financial structures and that the profit that one company may have earned will differ from the profit another company would have earned doing the same work.

12. PWGSC submitted that, with respect to using the 2003-2005 standing offer as a proxy for determining a reasonable profit on the standing offer in question, labour costs have risen during the intervening years, and the labour rates charged under the subject standing offer were significantly lower. It submitted that the amount of profit margin should be similar to that of the top-ranked bidder in the solicitation in question.

13. Antian calculated its profit margin of ----- percent from its Communications Canada contract by subtracting actual direct expenses, including purchases and payroll costs, from actual revenues for the period from January 1, 2003, to September 30, 2005, and then deducting a set overhead percentage of -----.

14. PWGSC submitted that a reasonable profit margin would be similar to the one of the top-ranked bidder in the solicitation in question, i.e. ---- percent.[3] While maintaining its contention that the cost and revenues associated with the 2003-2005 Communications Canada contract do not correspond to the conditions associated with the standing offer in question, on April 27, 2007, PWGSC estimated that Antian had actually earned an average annual profit of ----- percent for the years 2003 to 2005 under the Communications Canada contract, not the higher percentage claimed by Antian.

15. The Tribunal agrees with Antian's submission that it is reasonable to determine an appropriate profit margin using Antian's experience with a similar contract, rather than the results obtained by the top-ranked bidder in the solicitation in question. Given that the Tribunal's recommendation was to compensate Antian for one half of the profit that it would reasonably have earned, in the Tribunal's view, it is appropriate to base its determination of lost profits on the specific financial circumstances of Antian, to the greatest extent possible. Accordingly, the Tribunal finds that the financial information provided by Antian in relation to its 2003-2005 contract with Communications Canada should form the base for determining the appropriate profit margin. With respect to that contract, Antian had the following categories of costs:

- **Costs associated with Antian employees hired exclusively to work on the Communications Canada contract—**Antian submitted that this category entails costs associated with its "salaries and benefits" as found in its submissions. PWGSC submitted that costs for "temporary help", also provided in Antian's submissions, should also be included in this category.
- **Indirect labour costs—**Antian submitted that a certain percentage of its office payroll costs should be allocated to the Communications Canada contract, based on how much time the office staff worked on that contract. PWGSC, on the other hand, claimed that the allocation should be based on the pro rata share of total company revenues accounted for under the subject contract in each relevant time period.

3. No evidence was presented to support this figure.

- **Overhead costs**—Using fiscal year 2006 data, Antian determined an amount based on present-day circumstances (costs for the amount of space that it currently occupies in its building and expenses incurred from July to December 2006 relative to its estimate of the value of the call-ups made on the subject standing offer). PWGSC, meanwhile, argued that a revenue-based pro rata share of Antian's "General and Administrative" costs from the detailed fiscal year financial statements for each relevant time period (from 2003 to 2005) should be considered.

16. The Tribunal's actual calculation to determine an appropriate profit margin is found in the appendix. The Tribunal is of the view that Antian's argument with respect to applying the cost of indirect labour has some merit. However, its argument was not substantiated sufficiently. Therefore, the profit margin calculated by the Tribunal, using an allocation based on revenue for indirect labour, will be increased only slightly to --- percent. In order to use data from the same time period as that used in the profit margin calculation, the Tribunal used Antian's 2003-2005 overhead figures to determine the correct overhead application rate, instead of the 2006 overhead figures proposed by Antian. The Tribunal agrees with PWGSC that, in this case, costs relating to overhead should be allocated on a pro rata basis relating to revenue and not in accordance with Antian's proposed methodology. The Tribunal concurs with PWGSC's submission that Antian is responsible for all the building-related expenses, even though it leases part of the building to other companies. Further, the Tribunal notes that Antian excluded depreciation from its calculation; normally, it is included in the calculation of total overhead costs.

17. The Tribunal considers the following to be a reasonable formula that it would typically use to calculate profit margins for service providers such as Antian: contract revenues less contract direct costs (e.g. supplies, personnel) less a pro rata share of other costs, including indirect labour and total overhead costs, based on revenue.

18. The Tribunal notes however that this formula is only a starting point and that the final determination of an appropriate methodology depends on the specific circumstances of each case. The type of data that the Tribunal needs to calculate an appropriate profit margin includes, but is not necessarily limited to, historic financial statements for the claimant company, broken out by its various business lines and including details about revenues, direct and indirect costs, salaries and wages, and all types of overhead costs, including general overhead costs such as finance costs, profits and taxes, if applicable. Claimants should carefully explain how they calculated all the components of their claims and support the figures with actual company documents and/or printouts.

19. In this case, as noted above, Antian provided insufficient information to justify its proposed methodology to allocate indirect labour costs other than on a pro rata basis. In order to accept Antian's proposal, the Tribunal would have required a more detailed explanation and additional evidence as to the actual hours worked by its indirect employees, for example, in the form of payroll sheets. Similarly, Antian failed to provide sufficient information to convince the Tribunal that its overhead costs should be calculated in a manner that deviated from the above-mentioned formula. In this regard, the Tribunal would have required evidence to indicate that Antian's proposed approach was in keeping with good accounting practices and was appropriate in the circumstances of this case.

20. Accordingly, in the Tribunal's view, one half of the profit that Antian would reasonably have earned is --- percent. Applying this profit margin to the reasonable call-up value, which, as discussed above, is $----------, yields an amount for compensation of $67,003.90.

CONCLUSION

21. The Tribunal hereby recommends that PWGSC compensate Antian in the amount of $67,003.90 for one half of the profit that it would reasonably have earned during the first year of the standing offer had it been the top-ranked bidder in Solicitation No. EN578-054602/A.

Ellen Fry
Ellen Fry
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

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

APPENDIX

	FY2003	FY2004	FY2005	Total	%
Total Revenue	------------	------------	------------	------------	
Communications Canada Revenue	------------	------------	----------	------------	----
Communications Canada Direct Expenses	----------	----------	----------	------------	---
Gross Margin	----------	----------	----------	------------	---
Other Costs					
Antian Employees on Communications Canada Contract (temporary help)	----------	----------	----------	----------	---
Indirect Labour (office employees)	----------	----------	----------	----------	---
Overhead	----------	----------	----------	----------	---
Net Profits	----------	----------	----------	----------	---