Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2008-048R

Almon Equipment Limited

v.

Department of Public Works and Government Services

Order and reasons issued
Friday, October 14, 2011

Canada

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IN THE MATTER OF a complaint filed by Almon Equipment Limited pursuant to 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*, in which it recommended that Almon Equipment Limited 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 on Requirement 2 of the Statement of Work for Solicitation No. W0125-088713/B.

BETWEEN

ALMON EQUIPMENT LIMITED	**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 Almon Equipment Limited in the amount of $100,221, which represents one third of the profit that it lost in not being awarded the contract in question.

Jason W. Downey
Jason W. Downey
Presiding Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

Stephen A. Leach
Stephen A. Leach
Member

Dominique Laporte
Dominique Laporte
Secretary

STATEMENT OF REASONS

INTRODUCTION

1. In its decision of March 1, 2011, the Canadian International Trade Tribunal (the Tribunal) determined, pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*,[1] that the complaint filed by Almon Equipment Limited (Almon) was valid in part. Pursuant to subsections 30.15(2) and (3), the Tribunal recommended, as a remedy, that the Department of Public Works and Government Services (PWGSC) compensate Almon 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 on Requirement 2 of the Statement of Work (SOW) for Solicitation No. W0125-088713/B. The contract was for the reclamation and disposal of glycol and glycol-contaminated materials resulting from the snow and ice removal from aircraft at Canadian Forces Base (CFB) Trenton.[2] The Tribunal recommended that the parties negotiate the amount of compensation, but reserved jurisdiction to establish the final amount of compensation.

2. As the parties were unable to reach an agreement on the amount of compensation, Almon filed a submission with the Tribunal on April 8, 2011, estimating the compensation amount at --------. PWGSC filed a response with the Tribunal on April 19, 2011, estimating the compensation amount at --------. On April 28, 2011, Almon replied to PWGSC's submission, challenging both PWGSC's calculations and certain information which, it claimed, had only come to light in PWGSC's response submission. Almon maintained its claimed compensation amount at virtually the same amount as in its initial submission—------.

3. On May 19, 2011, after considering the parties' submissions and, specifically, noting the amount of information deemed confidential, the Tribunal, citing its need to be able to explain its decisions, requested that the parties re-examine their respective submissions and, in particular, the necessity of maintaining their respective confidential designations. In addition, the Tribunal requested that Almon provide more detailed financial information and that PWGSC provide additional details about actual expenditures for the entire contract period.[3] The Tribunal requested that both parties respond to its letter by June 10, 2011, and advised them that they would then have until June 17, 2011, to file any comments on each other's submissions.

4. The parties each filed submissions on June 10, 2011, and commented on the other party's filing on June 17, 2011. On June 20, 2011, Almon wrote to the Tribunal, questioning the veracity of some of the information provided by PWGSC regarding the amount of glycol that was actually used and recovered during the contract period. On June 22, 2011, the Tribunal requested that PWGSC comment on Almon's last submission. On June 23, 2011, PWGSC responded to Almon's claims.

5. In its penultimate submission, Almon claimed that it should receive ---------- as compensation for the profit that it lost in not being awarded the contract in question. PWGSC, for its part, increased slightly its compensation offer to ----------.

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1. R.S.C. 1985 (4th supp.), c. 47 [*CITT Act*].
2. Requirement 1 was for the actual de-icing and anti-icing of the aircraft. In essence, the awardee of the contract for Requirement 1 was to spray the glycol to remove ice and snow from the aircraft and the awardee of the contract for Requirement 2 was to clean up/reclaim the glycol-laden snow and ice that fell from the aircraft.
3. The contract at issue was for three winter seasons: 2008-2009, 2009-2010 and 2010-2011. The final invoices for the third season had not yet been submitted when PWGSC made its April 19, 2011, submission. When the Tribunal made this request, the final invoices had been processed, and the information was provided by PWGSC in a subsequent submission.

COMPENSATION FOR LOST PROFIT

6. The *CITT Act* and the *Canadian International Trade Tribunal Procurement Inquiry Regulations*[4] do not provide any guidance regarding compensation matters.[5] However, the Tribunal's *Procurement Compensation Guidelines* (the *Guidelines*), revised in June 2001, provide 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.
>
> . . .
>
> **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.
>
> **3.1.3** Lost profit refers to the amount of profit that the complainant would have received pursuant to the designated contract, had it been awarded that contract. Compensation can be awarded for lost profit in situations where it is clear that the complainant would have won the contract, but for the government's breach or breaches.
>
> . . .
>
> **3.2.1** Compensation awards for lost profit and lost opportunity may be reduced in accordance with the principles outlined herein.
>
> . . .
>
> **4.1** The complainant bears the onus of proof in establishing a compensation claim.[6]

7. As the Tribunal has stated in previous compensation orders, recommendations should not represent a windfall, but rather, should reflect the actual loss suffered as a result of the government's breach.[7]

Profit Formula

8. The Tribunal was faced with two proposed methodologies for determining the quantum of lost profit: (1) a revenue-less-cost approach; and (2) a profit-margin approach. The former requires sufficiently detailed financial information that would allow parties to reasonably determine the actual revenues and any and all costs that would have been associated with the generation of those revenues. Profit is then determined by subtracting all the costs from the total revenue. The latter approach would simply apply a profit percentage to an identified total revenue figure.

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4. S.O.R./93-602.
5. Subsection 30.15(2) of the *CITT Act* simply provides that, where the Tribunal determines that a procurement complaint is valid, it may recommend any remedy that it considers appropriate, including payment of compensation to the complainant in an amount specified by the Tribunal.
6. In its order in *Re Complaint Filed by Spacesaver Corporation* (27 April 1999), PR-98-028 (CITT), the Tribunal stated that the burden on the complainant was to "... establish and prove the loss of profit for which compensation is claimed 'on a reasonable preponderance of evidence'."
7. See, for example, the Tribunal's order in *Re Complaint Filed by Douglas Barlett Associates Inc.* (7 January 2000), PR-98-050 (CITT).

9. In this regard, Almon proposed a revenue-less-cost approach, whereas PWGSC proposed a profit-margin approach to determine the quantum of compensation. After consideration of the available data, including the financial information provided by Almon on June 10, 2011, the Tribunal has determined that Almon did not satisfactorily demonstrate the costs that it would have incurred in performing the work, had it been awarded the contract. Almon advised the Tribunal that, although it had been an incumbent supplier at CFB Trenton prior to the award of the contract in question, ---------- during which time it not only reclaimed glycol but was also responsible for the de-icing and anti-icing of aircraft. Because these informational deficiencies rendered this methodology unreliable, the Tribunal decided to employ a profit-margin approach.

Revenue

10. The contract specified that payment would be made on the basis of three components: call-outs during pre-determined "stand-by" periods that encompassed the two weeks immediately preceding and following each of the October 15 to April 15 de-icing seasons; a monthly management fee for the six months of each de-icing season; and a per-litre charge for the reclamation and disposal of glycol and glycol-contaminated materials. In addition, due to unusually high precipitation during the second season, an amendment (amendment No. 3) was issued for additional on-site storage, removal and off-site storage, processing and disposal of the glycol-contaminated materials.

11. For revenue calculation purposes, the parties agreed on a number of facts: the number of call-outs that occurred during the contract period; the number of months for which a management fee would have been paid; the amount of type I glycol that was recovered; and that the value of amendment No. 3 would have been earned by Almon.[8] These agreed-upon facts resulted in revenue totalling $1,372,891.[9]

12. Almon also claimed that there were additional amounts of glycol that had been sprayed and reclaimed, which PWGSC had neglected to consider. According to Almon, the de-icing and anti-icing functions require the use of two types of glycol, type I and type IV. It further submitted that type IV glycol is merely a concentrated version of type I glycol, therefore making it impossible to distinguish between the two types when reclaimed. Almon also noted that PWGSC had provided the amounts of type IV glycol sprayed during the contract period while the parties conducted their unsuccessful negotiations that preceded their submissions to the Tribunal.

13. According to PWGSC, the recovery of type IV glycol was not covered by the contract at issue and, in any event, type IV glycol is not recovered. PWGSC submitted that type I glycol is a *de*-icing agent used to melt any snow remaining on an aircraft after other de-snowing procedures (i.e. brushing) have been carried out. PWGSC stated that the type I glycol concentration is sufficiently high, such that it cannot be allowed to enter the storm drain system and must be collected and disposed of by treatment or recycling processes. PWGSC submitted that type IV glycol, on the other hand, is an *anti*-icing agent applied to aircraft being readied for flight after their surfaces are free of snow and ice. PWGSC submitted that type IV glycol

8. In its June 17, 2011, submission, Almon submitted that, if it had performed the services at issue in amendment No. 3, its costs would have been ----------. The Tribunal chose to use the actual amendment value of $299,608.
9. There were minor mathematical differences in Almon's submissions (a) regarding the amount of glycol reclaimed during season 2 and, as noted above, (b) regarding amendment No. 3. The figure presented above reflects the correct amount.

adheres to the flight surfaces and that any run-off should be minimal prior to an aircraft taking off. It further submitted that, during take-off, type IV glycol begins to shear off the flight surfaces, mist, and widely dispersed onto the runway and surrounding area. PWGSC claimed that the type IV glycol is so widely dispersed that its collection and recovery is not practical and that it would be so diluted that it could safely enter CFB Trenton's storm drain system.

14. The Tribunal notes that the contract explained the manner in which the contract awardee was to be paid. It provided that the scope of work included the following:

> 3.1 . . . the provision of all labour, materials and equipment to collect, recycle and dispose of glycol, glycol-contaminated snow and water and all other glycol-contaminated materials related to aircraft de-icing and anti-icing.[10]

15. Annex B of the contract stated the following:

> The Contractor will be paid its costs reasonably and properly incurred in the performance of the Work . . . .
>
> The firm price for sprayed litre for reclamation . . . *will be paid on the basis of per litre of Type I fluid applied*.[11]
>
> [Emphasis added]

16. In the Tribunal's view, Annex B of the contract clearly specifies that payments under the resulting contract would be determined on the basis of the amount of type I glycol fluid applied.

17. Regarding Almon's assertion that it is impossible to distinguish between the two types of glycol when recovering the contaminated snow and water, the Tribunal could find nothing in PWGSC's submissions that challenged this claim. PWGSC submitted that the type IV glycol is so widely dispersed during take-off that it is unrecoverable and that any run-off of the anti-icing type IV glycol should be "minimal", which indicated that there might be some run-off that would be reclaimed with the type I de-icing.

18. The Tribunal notes that, as a practical matter, while it may indeed be impossible to distinguish between the two types of glycol during the reclamation stage, it is relatively easy to quantify the actual volumes of each agent sprayed during the de-icing and anti-icing processes. In addition, the Tribunal notes that, as support for its claims regarding revenue, PWGSC included copies of the invoices submitted by the contract awardee. These indicated that PWGSC only paid for the recovery of the sprayed type I glycol.[12] This is consistent with the provision made in Annex B to the contract that payments would be determined on the basis of the amount of type I glycol fluid applied.

19. On the basis of the above, the Tribunal does not consider the solicitation to have been extended to include the reclamation of type IV glycol.

20. Regarding Almon's June 20, 2011, challenge of the veracity of PWGSC's claims regarding the quantity of type I glycol recovered, the Tribunal is satisfied that the invoices submitted by PWGSC in relation to the actual contract properly demonstrate the quantity of reclaimed type I glycol.

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10. Contract No. W0125-088713/002/TOR at 9.
11. *Ibid.* at 13.
12. PWGSC's June 10, 2011, submission, tabs A, B and C.

21. The Tribunal notes that, prior to the final invoices being presented on June 10, 2011, some of the amounts of sprayed glycol were estimated and that the information that PWGSC had provided to Almon during their negotiations did appear to indicate that some type IV glycol had been reclaimed.[13] However, in its April 19, 2011, submission, PWGSC indicated that the figures that appeared to relate to type IV glycol (listed as "Type 4 LTRS" in Annex A of Almon's April 8, 2011, submission), in one instance, were an error on the part of the contract awardee in charging for the reclamation of some sprayed type IV glycol and, in the remaining instances, referred to the concentration level of the glycol that was reclaimed, i.e. it was greater than the 4 percent dilution limit that could be safely released into the regular water treatment system. After its review of the information, the Tribunal is satisfied with the explanation provided by PWGSC.

Total Revenue

22. Taking into consideration the above, the Tribunal finds that, had Almon been awarded the contract, it would have earned $1,372,891 in total revenue.

Profit Margin

23. As noted above, the Tribunal determined that, on the basis of the information provided by Almon, it was not able to reasonably determine the costs that Almon would have incurred, had it been awarded the contract. The Tribunal was able to take information submitted by the parties throughout the compensation process to effectively determine a reasonable profit margin that reflects the circumstances.

24. In its April 8 and 28, 2011, submissions, Almon, using the revenue-less-cost approach, submitted that it would have earned profits equal to ------- percent, on the basis of financial information relating to its previous and similar contract with CFB Trenton in 2007.

25. Almon submitted that, because it owns outright all of its de-icing equipment, its operating costs are significantly lower than those of its competitors, which, according to Almon, are required to lease their equipment.

26. In response to PWGSC's April 19, 2011, submission, Almon claimed that Canadian superior courts have consistently recognized that, in cases involving a breach of contract, lost profits for service-related contracts are claimable at a rate of 15 to 20 percent. It argued that profit margins are higher for specialized contracts because bids for these contracts are inherently less competitive.[14] It further submitted that de-icing and anti-icing are highly specialized services and that actual realized profit margins would have been well in excess of ----------.

27. In PWGSC's April 19, 2011, submission, it argued that Almon had not provided adequate information to justify its claimed profit margin and argued that a reasonable profit margin was ---- percent. After reviewing the financial information provided by Almon on June 10, 2011, PWGSC noted that Almon's profit margins from 2006 to the first quarter of 2011 were as follows: ----------[15] ----------. It submitted that the average profit margin was therefore between ---- and --- percent and that, since the profit for 2007 was ----------. It maintained that ---- percent was fair, reasonable and consistent with the information before the Tribunal.

13. This information was included in a letter sent by PWGSC to Almon on March 30, 2011. This letter was Annex A of Almon's April 8, 2011, submission.
14. Almon's April 28, 2011, submission at 5.
15. PWGSC noted that the figure varied on the basis of claims that Almon had made involving another issue, unrelated to these proceedings, between PWGSC and Almon.

28. The Tribunal considers that the average profit margin determined by PWGSC in its June 17, 2011, submission, i.e. ----------, is an appropriate base-profit margin. This figure, however, is a general submission on the basis of the totality of Almon's business and does not necessarily reflect the specialized nature of reclaiming glycol-contaminated materials.

29. The Tribunal accepts Almon's argument that there is a profit premium for specialized services because such services are not readily available and competition is limited. In this regard, the Tribunal notes Almon's argument that courts have identified that such a situation can command a premium in the range of 15 to 20 percent.

30. In this case, the Tribunal considers 20 percent of the base ------ margin to be the appropriate premium to reflect the requirements of handling chemicals and appropriately storing them for disposal. The Tribunal therefore finds that, on the basis of Almon's average profit margin and taking into account the specialized nature of services relating to the reclamation of glycol-contaminated materials, Almon would reasonably have earned a profit margin of ----------.

31. In addition, Almon claimed that, unlike its competitors, it owns outright all of its equipment and that "[t]his represents a ------- initial savings".[16] Almon did not however provide details on how it arrived at this figure or as to which of the cost items the alleged savings related (i.e. whether these savings related to leasing another vehicle, the manufacture of a new vehicle or the purchase of another vehicle).

32. Almon provided the Tribunal with documentation regarding the vehicles that it used in its 2007 contract, which, it claimed, would have been used for the contract for Requirement 2, had it been the successful bidder. However, Almon did not directly link the vehicles and equipment listed in its proposal in respect of Requirement 2[17] with the vehicles that it used during its 2007 contract, when it provided services for both Requirement 1 and Requirement 2 to CFB Trenton.

33. Therefore, in the Tribunal's view, Almon's accounting methodology did not demonstrate that all of the equipment that it listed in its proposal in respect of Requirement 2 would have been fully paid for at the beginning of the 2008-2009 season. That being the case, the Tribunal cannot accept that Almon would not have incurred any vehicle or equipment expenses during the contract period at issue. However, the Tribunal was able to determine that the main vehicles[18] would have been fully paid for and accepts that this would have resulted in Almon's profit margin being higher than the above-noted ---------.

34. The Tribunal considered Almon's claim relating to vehicle and equipment ownership and the fact that this would have allowed it to realize a ---- percent saving. The Tribunal however considers that a ---- percent premium is more appropriate to this end. This therefore translates into an additional ----- percent profit premium on the ------ percent profit noted above.

35. Sum-totalled, the Tribunal considers that Almon would reasonably have realized a profit margin of 21.9 percent on revenues of $1,372,891, or more specifically $300,663, had it been awarded the contract for Requirement 2. As the Tribunal's determination was that Almon should receive one third of the profit that it would have earned, had it been awarded the contract, the quantum of compensation must then be one third of $300,663, or $100,221.

16. Almon's April 28, 2011, submission at 4.
17. Almon's proposal at 58.
18. According to Annex 8 of Almon's June 10, 2011, submission, ---------- would have been fully paid for by the beginning of the 2008-2009 season.

36. In addition to submissions relating to lost profit, in its June 10, 2011, submission, Almon stated that the necessity of litigating this matter and thus incurring legal fees had caused it undue hardship. PWGSC responded by stating that Almon had not substantiated any claim that legal fees ought to be considered in determining the appropriate amount of compensation.

37. The Tribunal's March 1, 2011, determination did not include any consideration for additional costs, legal fees or otherwise; as such, Almon's legal fees will not be considered.

CONCLUSION

38. The Tribunal hereby recommends that PWGSC compensate Almon in the amount of $100,221, which represents one third of the profit that it lost in not being awarded the contract in question.

Jason W. Downey
Jason W. Downey
Presiding Member

Pasquale Michaele Saroli
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Member

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Member