



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2008-063

Service d'entretien JDH Inc.

v.

Department of Public Works and
Government Services

*Order and reasons issued
Tuesday, April 13, 2010*

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IN THE MATTER OF a complaint filed by Service d'entretien JDH Inc. 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, pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, recommending that the Department of Public Works and Government Services terminate the contract awarded to C.T. Entretien Général (2004) S.N.E.C. and award it to Service d'entretien JDH Inc., as soon as possible;

AND FURTHER TO a recommendation, pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, that Service d'entretien JDH Inc. be compensated for the profit that it lost in being deprived of the contract in question for the period from February 1, 2009, to the date when Service d'entretien JDH Inc. would be awarded the contract.

BETWEEN

SERVICE D'ENTRETIEN JDH 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 Service d'entretien JDH Inc. in the amount of \$18,683.14 for the profit that it would have earned from the contract during the period from February 1, 2009, to the date when Service d'entretien JDH Inc. was awarded the contract.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

STATEMENT OF REASONS

INTRODUCTION

1. In a decision issued on August 10, 2009, the Canadian International Trade Tribunal (the Tribunal), pursuant to subsections 30.15(2) and 30.15(3) of the *Canadian International Trade Tribunal Act*, recommended that the Department of Public Works and Government Services (PWGSC) terminate the contract awarded to C.T. Entretien Général (2004) S.N.E.C. and award it to Service d'entretien JDH Inc. (JDH) as soon as possible. Pursuant to subsections 30.15(2) and 30.15(3), the Tribunal also recommended that PWGSC compensate JDH for the profit that it lost in being deprived of the contract in question for the period from February 1, 2009, to the date when Service d'entretien JDH Inc. would be awarded the contract. In its decision, the Tribunal stipulated, in particular, that the basis for calculating the lost profit would be the price submitted by JDH in the proposal it had submitted in response to Solicitation No. EF053-091182/A.

2. JDH and PWGSC were also to negotiate the amount of compensation and report the results to the Tribunal within 60 days following the date of the August 10, 2009, decision. If the parties were unable to agree on the amount of compensation, JDH was to file with the Tribunal, within 70 days following the date of the Tribunal's decision, a submission on the matter of compensation. PWGSC then had 7 working days after receiving JDH's submission to file its comments in reply. JDH then had 5 working days after receiving PWGSC's reply submission to submit any additional comments.

3. The parties were unable to agree on the amount of compensation and, on October 19, 2009, JDH filed its submission on the matter. On November 4, 2009, PWGSC filed its comments in reply to JDH's submission and, on November 12, 2009, JDH filed its comments in reply.

COMPENSATION FOR LOST PROFIT

4. The Tribunal will deal individually with each of the five grounds of compensation claimed by JDH. The base period for calculating the amount of compensation is therefore from February 1, 2009, to the date when JDH was awarded the contract.

Lost Profit

5. JDH claimed \$18,683.14 for lost profit during the base period.

6. PWGSC submitted that it agrees with the accounting method proposed by JDH, which consists in subtracting the cost of maintenance services from the revenue that it would have earned from the contract. PWGSC submitted however that it is not possible to verify the amounts claimed because JDH's submission only itemizes the amounts associated with materiel and labour costs without providing any supporting evidence. PWGSC referred to paragraph 2.2 of the *Procurement Compensation Guidelines* (the *Guidelines*) which states that "... in all circumstances, claims for compensation must be accompanied by credible economic, financial or other evidence", even if that information is confidential.

7. In its reply to PWGSC, JDH indicated that the compensation that it is proposing is based on a "... financial structure ..." ¹ that clearly sets out the project costs and expenses and provides the supporting figures.

1. JDH's reply submission to PWGSC' comments dated November 12, 2009, at 1.

8. The Tribunal reviewed the operating statement provided by JDH and noted that it provides evidence of the expenses relating to the housekeeping supplies and labour costs, by providing a detailed and precise calculation of the operating expenses. The Tribunal also noted that PWGSC does not dispute the accuracy of the operating statement filed on November 12, 2009. The amount of revenue is based on the amount of JDH's bid, and the expenses provided by JDH seem reasonable.

9. Consequently, the Tribunal recommends that JDH be awarded \$18,683.14 for the profit that it lost in being deprived of the contract for the base period.

Loss Associated with Financing a Line of Credit

10. JDH claimed the costs of financing its line of credit. It submitted that those costs were directly related to the irregularities in the procurement process, which were acknowledged by the Tribunal.

11. PWGSC submitted that the amount claimed on this ground is too remote because the JDH's liabilities were not caused by the improper evaluation of the proposals submitted for this procurement. PWGSC submitted that it was not aware of the fact that JDH had a line of credit.

12. The Tribunal is of the view that this loss is in fact too remote and that it does not result directly from a violation of the trade agreements for which PWGSC is held accountable. Subparagraph 3.2.2 of the *Guidelines* reads as follows:

Remoteness of Damages - A complainant may not receive compensation for a loss that is considered too remote by the Tribunal. A breach may cause the complainant to lose some anticipated gain which is not the immediate result of the breach and which arises from a separate transaction. In general, a loss may be considered too remote where it does not flow naturally from the government's breach or breaches or where the government could not reasonably have been expected to know that a loss of that kind would be suffered by the complainant in the event of the government's breach of its obligations.

The Tribunal will therefore not compensate JDH for the loss associated with financing its line of credit.

Loss Associated with Layoffs

13. JDH submitted that it had been forced to pay out an amount to its employees who were laid off because it was not awarded the contract. According to JDH, that amount is directly associated with the injury suffered by JDH due to the irregularities in the procurement process, which were acknowledged by the Tribunal.

14. PWGSC submitted that this ground is too remote and that no supporting evidence was provided. Further, PWGSC submitted that JDH was given no guarantee that it would be the winning bidder as a result of the invitation to tender. According to PWGSC, JDH did not explain why it did not give its employees two weeks' advance notice as soon as it knew that the contract had been awarded to another bidder.

15. The Tribunal is of the view that JDH had an obligation to mitigate its damages and to take the necessary steps in order to lay off its employees or to assign them to other contracts as soon as it found out that it had not been awarded the contract, that is, on January 22, 2009.² Subparagraph 3.2.3 of the *Guidelines* deals with the duty to mitigate damages and reads as follows:

Mitigation of Damages – The Tribunal will also consider whether the claimant could have avoided losses suffered as a result of the government's breach or breaches. This principle is often referred to as the plaintiff's "duty to mitigate" loss. In deciding what amount of compensation to recommend,

2. *Re Complaint Filed by Service d'entretien JDH Inc.* (10 August 2009), PR-2008-063 (CIIT) at para. 7.

the Tribunal will require the complainant to describe the steps that it has taken to limit or mitigate the lost profit that it suffered or may suffer as a result of the government's breach or breaches. The Tribunal's compensation recommendation may be reduced where a complainant has not acted reasonably in this regard.

16. Further, the Tribunal notes that there are specific risks inherent in all business activities and that, in the case of a housekeeping business, those risks include the possibility of not being awarded a contract and of having to incur the costs associated with maintaining staff. Subparagraph 3.2.4 of the *Guidelines* reads as follows:

Amount for Contingency – Despite the fact that complainants anticipate earning a profit in performing a designated contract, few, if any, business undertakings are without risk and few have a guaranteed level of profit. The Tribunal's recommendation may be adjusted downwards to reflect a variety of risks that might be involved in the performance of the contract, including contractual, business and human resource risks, for example. The amount of this downward adjustment will depend on the relative risk associated with the performance of the designated contract in question.

The Tribunal is of the view that JDH is not entitled to compensation on this ground.

Moving Expenses

17. JDH claimed costs for removing its equipment and inventory from the contract premises and submitted that those costs were directly related to the injury suffered by JDH due to the irregularities in the procurement process, which were acknowledged by the Tribunal.

18. PWGSC submitted that JDH was given no guarantee that it would be awarded the contract and, according to PWGSC, the costs of removing equipment and inventory are too remote.

19. The Tribunal is of the view that JDH is not entitled to compensation on this ground because the need to move equipment and inventory are part of the inherent risks of running a housekeeping business and that it is normal for these costs to be borne by JDH.

Professional Fees

20. JDH claimed legal fees in excess of the \$2,400 already awarded by the Tribunal on the ground that the amount is not sufficient to fully compensate JDH for its legal fees. PWGS submitted that, since the Tribunal has already awarded JDH an amount for its reasonable costs incurred in preparing and proceeding with the complaint, it is of the view that the claim for professional legal fees at this stage of the proceedings amounts to double compensation.

21. The Tribunal will not award compensation for professional fees, given that it has already made an order relating to this ground and that, therefore, this ground can no longer be the subject of a request for compensation in respect of compensation for lost profit. In fact, the Tribunal dealt with this ground for compensation in its September 14, 2009, order relating to costs in this matter. That order was pursuant to the Tribunal's August 10, 2009, decision with respect to, in particular, the preliminary indication of the level of complexity and the preliminary indication of the amount of the award. That decision indicated the procedure to follow in order to object, if desired, to the preliminary indication of the level of complexity or the preliminary indication of the amount of award. The Tribunal noted that JDH made no submission in this regard when it had the opportunity to do so during the proceedings.

CONCLUSION

22. The Tribunal hereby recommends that PWGSC compensate JDH in the amount of \$18,683.14 for the profit that it would have earned from the contract during the base period.

Serge Fréchette
Serge Fréchette
Presiding Member