Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

**CANADIAN INTERNATIONAL TRADE TRIBUNAL**

# Procurement

## ORDER AND REASONS

File PR-2020-023

Marine International Dragage (M.I.D.) Inc.

v.

Department of Public Works and Government Services

*Order and reasons issued Monday, January 24, 2022*

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IN THE MATTER OF a complaint filed by Marine International Dragage (M.I.D.) Inc. pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*;

AND FURTHER TO the Canadian International Trade Tribunal's preliminary indication of the level of complexity for the complaint case and its preliminary indication of the amount of the cost award and recommendation, pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, that Marine International Dragage be compensated for lost profit.

**BETWEEN**

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| **MARINE INTERNATIONAL DRAGAGE (M.I.D.) INC.** | **Complainant** |

**AND**

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

## ORDER

In its determination of December 23, 2020, the Canadian International Trade Tribunal, pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, awarded Marine International Dragage (M.I.D.) Inc. (hereinafter M.I.D.) its reasonable costs incurred in preparing and filing its complaint. The Tribunal's preliminary indication of the level of complexity for the complaint case was Level 1, and its preliminary indication of the amount of the cost award was $1,150. The Tribunal confirms its preliminary indications by awarding M.I.D. its costs in the amount of $1,150 for preparing and filing its complaint and directs the Department of Public Works and Government Services (PWGSC) to take appropriate action to ensure prompt payment.

In addition, the Tribunal recommends that PWGSC compensate M.I.D. in the amount of $37,000 for lost profit.

Georges Bujold

Georges Bujold
Presiding Member

## STATEMENT OF REASONS

## INTRODUCTION

[1] In a determination issued on December 23, 2020,[1] the Canadian International Trade Tribunal determined, pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*,[2] that the complaint filed by Marine International Dragage (M.I.D.) Inc. (hereinafter M.I.D.) on August 8, 2020, and considered properly documented on August 10, 2020, was valid. This complaint concerned an invitation to tender (ITT) (solicitation EE517-210222/A) issued by the Department of Public Works and Government Services (PWGSC) for the removal of concrete structures (primarily blocks) located at the bottom of the Richelieu River, in Lacolle, Quebec.

[2] In its decision, the Tribunal found that various aspects of the procurement process had provided the successful bidder, MVC Océan Inc. (hereinafter MVC), with an unfair competitive advantage and with access to information that other suppliers did not have. On this basis, the Tribunal found that the procurement process failed to comply with the provisions of the Canadian Free Trade Agreement (CFTA). Specifically, the Tribunal found that PWGSC had awarded a contract in a manner that resulted in discrimination between potential suppliers, contrary to article 502.1 of the CFTA.

[3] In addition, the Tribunal found that the facts were analogous to a situation in which PWGSC would provide information to a potential supplier in order to give that supplier an advantage over other suppliers, which is contrary to article 503.5(g) of the CFTA. Furthermore, the Tribunal found that the fact that PWGSC allowed the successful bidder to submit a bid when it had access to information on the bid solicitation that was not available to other suppliers constituted a breach of paragraph 1(b) of clause GI17 of the ITT and, therefore, was contrary to the terms of the ITT and was thereby a breach of article 515(5) of the CFTA.

[4] With respect to the remedy, the Tribunal recommended, pursuant to subsections 30.15(2) and 30.15(3) of the CITT Act, that M.I.D. be compensated by PWGSC in recognition of the profit that it could have made had it been awarded the contract. The Tribunal specified that the calculation of the amount of profit would be based on the price indicated in M.I.D.'s proposal. The Tribunal added that, if the parties could not agree on the amount of compensation for lost profit, they would have to file submissions with the Tribunal on this matter.

[5] In addition, pursuant to section 30.16 of the CITT Act, the Tribunal granted M.I.D. its reasonable costs incurred in preparing and filing its complaint. In accordance with the *Procurement Costs Guideline*,[3] the Tribunal's preliminary indication of the level of complexity of the complaint was Level 1 and the amount of the cost award was $1,150. The Tribunal also indicated that if either party disagreed with the preliminary determination of the level of complexity or the amount of compensation, it could file submissions with the Tribunal, in accordance with section 4.2 of the above-mentioned guideline.

[6] With respect to compensation for lost profit, on February 3, 2021, M.I.D. informed the Tribunal that the parties had not agreed on the amount of compensation. On February 4, 2021, M.I.D.

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1 The Tribunal issued its determination on that date. Reasons were issued on January 7, 2021.

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

3 Online: <https://citt-tcce.gc.ca/en/resource-types/procurement-costs-guideline.html>.

sent the Tribunal certain documents exchanged between the parties in the context of their negotiations on the amount of compensation, indicating that it was doing so to enable the Tribunal to decide on the amount of compensation. On the same day, PWGSC informed the Tribunal that several of the documents submitted by M.I.D. were protected by the settlement privilege and asked the Tribunal to deny M.I.D.'s filing request. Later that same day, M.I.D. responded to PWGSC's objection, and PWGSC filed submissions in response to M.I.D.

[7] In response, in a letter dated February 4, 2021, the Tribunal reminded the parties that its decision issued on December 23, 2020, provided that, if the parties could not agree on the amount of compensation for lost profit, they were to report to the Tribunal on the outcome of negotiations within 45 days of the date of the Tribunal's decision. In this case, M.I.D. was to file with the Tribunal, within 60 days of the date of the Tribunal's decision, a submission on the issue of compensation. With respect to the submission to be made by M.I. D. to the Tribunal, the Tribunal referred the complainant to its *Procurement Compensation Guidelines*[4] (Guidelines) and advised it to seek the assistance of a lawyer or counsel if necessary. In addition, the Tribunal granted PWGSC's request and denied the complainant's request to file the settlement attempt documents submitted, indicating that they would not be placed on the record.

[8] On February 10, 2021, M.I.D. filed a submission with the Tribunal on the issue of compensation for lost profit with supporting documents. In its submission, M.I.D. claimed that it had lost $128,680 in profit.

[9] Following the granting of two extensions of time by the Tribunal on February 19, 2021, PWGSC filed its submissions in response to M.I.D.'s submission on the issue of the amount of compensation for lost profit. In its submissions, PWGSC requested, among other things, the striking of certain paragraphs from M.I.D.'s submission and documents filed by M.I.D. in support of its arguments, on the basis that, once again, they were documents protected by the settlement privilege. M.I.D. replied to PWGSC on February 26, 2021.[5]

[10] Neither of the parties provided submissions as to the preliminary determination of the level of complexity of the complaint or the amount of compensation for the costs incurred in preparing and filing the complaint granted to M.I.D.

## FILING INTO EVIDENCE BY M.I.D. OF DOCUMENTS COVERED BY THE SETTLEMENT PRIVILEGE

[11] PWGSC objects to the filing by M.I.D., in its submission, of information that PWGSC claims is protected by the settlement privilege, including certain correspondence that the Tribunal had already refused to allow to be filed on February 4, 2021.

[12] As noted by PWGSC, on February 5, 2021, the Tribunal indeed granted PWGSC's request to deny the admission into evidence of documents sent to the Tribunal by M.I.D. on February 4, 2021. At first glance, the documents sent by M.I.D. contained exchanges between the parties that were covered by the settlement privilege. More fundamentally, as the Tribunal then reiterated, M.I.D. was

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4 Online: <https://www.citt-tcce.gc.ca/en/resource-types/procurement-compensation-guidelines.html>.

5 The Tribunal also sent a letter to the parties on February 23, 2021, requesting confirmation that their bids did not contain confidential information. On February 23 and 26, 2021, the parties confirmed that their bids did not contain any confidential information.

required to provide the Tribunal with a submission detailing the amount of compensation that it was due, not a copy of the exchanges between the parties regarding the amount of compensation for lost profit.[6]

[13] In its submission on the amount of compensation for lost profit, PWGSC requested that the Tribunal strike a series of paragraphs from M.I.D.'s submission and a letter from M.I.D. addressed to PWGSC's counsel, which was attached to M.I.D.'s submission.

[14] M.I.D. objects to this request by PWGSC. M.I.D. submits that it did not file, in its submission on the amount of compensation, the settlement offer made by PWGSC or the emails exchanged between the parties but did file its own documents supporting its request and its comments to fulfill its own burden of proof. M.I.D. also notes that PWGSC itself refers to the arguments and documents submitted by M.I.D. during the negotiations, thereby waiving the privilege.

[15] The settlement privilege is a rule of evidence that makes certain communications between the parties inadmissible in evidence.[7] The Supreme Court explained this privilege as follows:

> Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. Sometimes called the "without prejudice" rule, it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation. This promotes honest and frank discussions between the parties, which can make it easier to reach a settlement . . .[8]

[16] There are exceptions to this privilege; for example, when negotiations have resulted in an agreement between the parties and one of them is attempting to establish the existence or terms and conditions of this agreement.[9]

[17] M.I.D. argues that the privilege does not apply in this case, as the discussions between the parties were not intended to settle a dispute but to determine the amount of compensation for lost profit.

[18] The Tribunal does not agree with M.I.D. It is obvious that the discussions referred to in the documents filed by M.I.D. were indeed intended to settle a dispute, the dispute being the amount of compensation. In principle, the privilege applies to the dispute between the parties, and it would therefore be inappropriate to allow M.I.D. to use, before the Tribunal, the information disclosed by PWGSC during the prior negotiations.

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6 In this regard, the Tribunal notes that M.I.D.'s failure to provide sufficient documentation in its submissions on the issue of lost profits, as required by the Guidelines, significantly complicated the Tribunal's analysis and, as a result, made it more difficult to determine the amount of compensation in this case. The deficiencies in M.I.D.'s submission will be discussed in detail below.

7 *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 (CanLII), [2014] 1 SCR 800 [*Union Carbide*] at para. 37. The Tribunal has considered this privilege on a number of occasions; see notably *Canadian Tire Corporation, Limited v. President of the Canada Border Services Agency* (30 June 2015), EA-2014-001(CITT) at paras. 6–21; *SoftSim Technologies Inc. v. Department of Foreign Affairs, Trade and Development* (25 November 2020), PR-2020-031 (CITT) at paras. 23–27.

8 *Union Carbide* at para. 31.

9 *Union Carbide* at paras. 34–35.

[19] The way in which M.I.D. went about submitting its submission on compensation for lost profit was far from ideal. In its submission, M.I.D. provides a history of what it provided to PWGSC in the context of the negotiations between the parties and repeats the arguments it submitted to PWGSC in support of its claim for compensation, as well as its response to some of the arguments raised by PWGSC. It does so by citing or incorporating the arguments and documents it put forward in the exchanges between the parties. Instead, M.I.D. should have submitted to the Tribunal its arguments and relevant evidence in support of the amount it considers appropriate without referring to exchanges between the parties in the context of their discussions.

[20] The Tribunal nonetheless considers the fact that M.I.D. is not represented by counsel. In addition, in ensuring that the principles of procedural fairness are followed, the Tribunal is free to exercise some flexibility in applying the rules on admissibility of evidence in its proceedings. Accordingly, at most, the Tribunal accepts that the documents (or parts of documents) that M.I.D. submitted in the course of its discussions with PWGSC remain on the record. Communications (or parts of communications) that disclose the content of information originating from PWGSC during these discussions are struck from the file as they are protected by the settlement privilege.

[21] Therefore, the Tribunal strikes the following paragraphs from M.I.D.'s submission on the amount of compensation, and will conduct its analysis without regard to those paragraphs: paragraphs 2 to 5 and 8, as they detail the negotiation process between the parties; those parts of paragraphs 6, 9 and 11 to 14 of M.I.D.'s submission and of the letter from M.I.D. to PWGSC's prosecutor dated February 1, 2021, that deal primarily with PWGSC's position in the negotiations or deal with the negotiation process. Conversely, to the extent that in these paragraphs M.I.D. reiterates its own position, the Tribunal admits these paragraphs into evidence.

## COMPENSATION FOR LOST PROFIT

### Principles applicable to the calculation of compensation

[22] Subsection 30.15(2) of the CITT Act provides that the Tribunal may, when ruling in favour of the complainant, recommend appropriate remedies, including the payment of compensation to the complainant. The CITT Act and the *Canadian International Trade Tribunal Procurement Inquiry Regulations*[10] do not specify how to quantify lost profit or provide details on compensation issues in general. However, the Guidelines set out several principles that guide the Tribunal on this matter.[11]

[23] With respect to the issue of compensation for lost profit, the Guidelines provide the following:

> 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. In doing so, the Tribunal may recommend prejudgment interest be included in the compensation amount.

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10 SOR/93-602.

11 Section 1.1.4 of the Guidelines states that they "do not limit or detract from the discretion provided to the Tribunal under the Act. To the extent that the process or the substantive principles [in the Guidelines] are not appropriate or not applicable, as the case may be, the Tribunal may depart from that process or those principles."

> 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 recommended 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.

[24] The Guidelines also provide that compensation awarded will not be based on speculation or conjecture, that claims must be accompanied by reliable economic, financial or other evidence, and that the onus of proof of a compensation claim rests with the complainant.[12]

[25] In addition, the Tribunal has made it clear on several occasions that its recommendations for compensation should not be a windfall for the complainant but should instead reflect the actual losses incurred as a result of the government's breach.[13]

**Calculation of lost profit**

Arguments of the parties

[26] To calculate its lost profit, M.I.D. starts with the revenues that it would have earned from the contract (i.e. the amount of its bid) and deducts various costs that, according to its own estimation, it would have had to bear in fulfilling this contract.

[27] M.I.D. also refers to data from the Department of Industry on the revenue and profit margins of companies operating, according to M.I.D., in the same industry, which are included in category 2379 of the Department of Industry, "Other heavy and civil engineering construction".

[28] The data from the Department of Industry on which M.I.D. relies concerns the year 2019.[14] M.I.D. refers to it in support of the profit margin that it purportedly obtains by applying the revenue-less-expenses method, arguing that the Department of Industry's data corroborates the profit margin calculated by M.I.D. using this method. M.I.D. relies in this respect on the Tribunal's order in *V Zero Corporation v. Department of Public Works and Government Services*.[15] According to M.I.D., in *V Zero*, the complainant submitted evidence enabling it to justify a higher profit margin by industry and type of company. M.I.D. believes that its situation is similar to that of the complainant in *V Zero* in that it is a small private business specializing in the maritime field and classified under the "Other heavy and civil engineering construction" category according to the Department of Industry.

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12 See sections 2.1.2 and 4.1 of the Guidelines. In the order issued by the Tribunal in *Spacesaver Corporation* (27 April 1999), PR-98-028 (CITT) [*Spacesaver Corporation*] at 2, the Tribunal stated that the general burden of proof lies upon the complainant, "to establish and prove the loss of profit for which compensation is claimed '*on a reasonable preponderance of evidence*'" [italics in original, footnote omitted].

13 See, for example, *Oshkosh Defense Canada Inc. v. Department of Public Works and Government Services* (29 December 2017), PR-2015-051 and PR-2015-067 (CITT) [*Oshkosh*] at paras. 71, 145; *Douglas Barlett Associates Inc.* (7 January 2000), PR-98-050 (CITT) at 3.

14 Online: <https://www.ic.gc.ca/app/scr/app/cis/summary-sommaire/2379> (referring to data for the year 2019 last accessed on December 6, 2021). This link to the Department of Industry site subsequently referred to data for the year 2020 (last accessed on January 12, 2022). Unless otherwise noted, the data the Tribunal relies on below is for the year 2019.

15 (17 June 2020), PR-2018-031 (CITT) [*V Zero*].

[29] PWGSC argues that M.I.D. did not submit any compelling and reliable evidence to substantiate the figures that it submits for its loss of profit, other than a crew's proposal for a captain's salary. PWGSC considers that M.I.D. did not meet its onus of proof and asks the Tribunal not to grant it a grossly exaggerated profit percentage based on speculation and conjecture.

[30] PWGSC submits that, to determine the appropriate amount of compensation in this case, the Tribunal must reconcile various competing imperatives to achieve the objectives at issue, that is, on the one hand, to discourage the breach of trade agreements, to encourage the use of complaint resolution procedures and to compensate aggrieved bidders, and, on the other hand, the Tribunal must consider the public interest in not paying twice for a service and avoiding that a complainant benefit from a windfall by making an excessive profit without effort.[16] The principles that govern the award of damages in the case of an action in contractual liability (or for breach of contract under common law) are also considerations that the Tribunal may weigh as one of several elements.

[31] PWGSC submits that M.I.D. does not describe in detail the reasons for the amount of compensation that it claims; according to PWGSC, M.I.D. did not substantiate its claims with convincing evidence. In addition, PWGSC submits that M.I.D. fails to take into account in its calculations several factors and expenditure items that are relevant under the Guidelines and the Tribunal's case law and it fails to make several deductions or explain those made for "unforeseen circumstances" [translation]. M.I.D. does not provide any details that would indicate that it has attempted to reduce or minimize its losses but claims all the profit that it would have hoped to make in a highly optimistic scenario. M.I.D. also fails to take into account the Tribunal's indication in its decision that its bid could have been lower had it had access to the cost assessment included in MVC's technical evaluation report.

[32] PWGSC encourages the Tribunal to use a general rate of compensation as previously used by the Tribunal on occasion.[17] PWGSC claims that this rate (10 percent plus or minus 5 percent) is in general sufficient to achieve the various financial compensation objectives in a public procurement case. PWGSC contends that this case is not appropriate for the application of the approach used by the Tribunal in *V Zero*, in which the Tribunal had used a higher profit margin, and that the circumstances of the two cases are different.

[33] PWGSC argues that the Department of Industry's data cannot be used in this case. PWGSC submits that this data cannot be used to verify a profit margin based on a loss of profit that is not supported by compelling and reliable evidence, that it is not sufficiently specific to the services covered by the ITT, and that M.I.D. provided too little information to enable the appropriate use of this data. In addition, better evidence is available, namely, the supporting documents provided for in the Guidelines, and M.I.D. chose not to disclose this information. If the Tribunal chooses to refer to the Department of Industry data, PWGSC argues that the net profit margin ratio relevant in the circumstances would be the one applicable to the entire industry, which is 8.6 percent.

[34] M.I.D. responds that a margin in the range suggested by PWGSC is insufficient, that PWGSC fails to consider the fact that M.I.D. is a seasonal business and that it provides specialized services rather than goods. M.I.D. notes that the Tribunal's order in *V Zero* indicates that these considerations are relevant to the determination of the profit margin.

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16 In this regard, PWGSC relies notably on the Tribunal's order in *Oshkosh*.

17 For example, in *Oshkosh*.

[35] With respect to PWGSC's argument that M.I.D. provides insufficient reliable information, M.I.D. notes that bidders needed only to submit three prices that were not broken down: one price for mobilizing labour, one price for organizing the site, and one price for the removal and disposal of concrete structures. These three prices were inclusive, with no additional detail required.

[36] M.I.D. also responds to PWGSC's arguments that it failed to consider fixed costs, noting that the Tribunal has indicated in the past that it does not deduct any fixed costs that a complainant would have incurred in any event, regardless of whether the contract was awarded to it or not. It also stated that it could not describe the contingency amount indicated in its submission in more detail, having failed to perform the contract. Furthermore, there was nothing more M.I.D. could do to minimize its losses, given that the business line operates with a specific work schedule based on various environmental certificates limiting areas of intervention. M.I.D. also refers to the order made by the Tribunal on June 24, 2014, in *Knowledge Circle Learning Services v. Department of Health* stating that "there is no requirement that a complainant bid on other opportunities, as long as the complainant acted reasonably."[18]

Analysis

[37] In accordance with the principles set out in the above-mentioned Guidelines, the Tribunal shall attempt to put M.I.D. in the position in which it would have been had it been awarded the contract at the conclusion of the ITT rather than MVC. The Tribunal must therefore determine the amount of profit that M.I.D. would have made (or the amount of lost profit by the company) had it not been incorrectly deprived of the contract.

[38] The amount of lost profit is the amount of the complainant's bid (in other words, the amount that PWGSC would have paid to it had it been awarded the contract) less the costs that it would have incurred in performing the same contract. M.I.D.'s lost profit can therefore be calculated by subtracting from the revenues it would have received from this contract (its incremental revenues) the expenses it would have incurred to perform the same contract (its incremental costs).[19] This method of calculation is commonly referred to as the revenue-less-cost method or the revenue-less-expenses method. This is the method recommended by M.I.D. in its submission on compensation. As discussed below, the Tribunal attempted to apply it in this case, but the information provided by M.I.D. proved insufficient and, above all, insufficiently supported by compelling and reliable evidence to do so.

[39] Furthermore, in its decision, the Tribunal stated that the calculation of the amount of compensation for lost profit should be based on the amount of M.I.D.'s bid. In this regard, PWGSC notes that the Tribunal also indicated, in the reasons for its decision, that M.I.D.'s bid might have been lower had PWGSC not failed to share all relevant information with all potential suppliers. That said, the Tribunal considers that it would not be appropriate to speculate on what the amount of M.I.D.'s bid might have been but for PWGSC's failure to meet its obligations under the CFTA. As the Tribunal stated in its decision, it is more appropriate to determine M.I.D.'s loss of profit based on the amount of its bid.

[40] As stated in the Guidelines, the onus was on M.I.D. to demonstrate the merits of its application based on reliable evidence. In this regard, section 4.1.1 of the Guidelines provides that

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18 (24 June 2014), PR-2013-014 (CITT) at para. 26.

19 See, for example, *V Zero* at footnote 30.

the submission of the amount of compensation to be filed by a complainant must describe "*in detail the basis upon which the complainant considers the requested compensation to be appropriate*" [emphasis added] and include certain elements, including "such financial statements, reports, records, projections and other economic information or data as are *necessary to substantiate the complainant's requested level of compensation*" [emphasis added]. In addition, section 4.1.2 provides the following:

> Where the complainant relies upon a profit formula to establish its compensation claim, it may submit, *inter alia*, its financial statements, or contracts of similar size to that in issue. Affidavit evidence from a third party (e.g. an external accountant) may also prove helpful.

[41] In the Tribunal's opinion, M.I.D. only briefly described the expenses that it would have incurred in performing the contract. The Tribunal finds that it did not meet its burden of proof. To put it bluntly, it did not help its cause. The submission of the expenses alleged by M.I.D. is incomplete, and the evidence filed by M.I.D. to support its argument as to the expenses it would have incurred is insufficient.

[42] Contrary to the Guidelines' requirements, M.I.D.'s submission is not accompanied by economic or financial data or other compelling and reliable evidence. With one exception, M.I.D. did not submit evidence to support the amounts that it included in its expenditure estimate; for example, M.I.D. indicates an amount for gasoline but does not provide any evidence to support the specified price of gas.

[43] For example, in support of its estimates, M.I.D. could have submitted to the Tribunal supporting evidence such as invoices for gas on dates relevant to the performance of the contract and specifications or purchase orders for materials, for example, for expenses incurred in carrying out projects of a similar nature and size in the recent past. At the very least, M.I.D. could have supported its estimates with one or more sworn statements. However, the only evidence filed by M.I.D. to support its expenditure estimate is an offer to provide services of crew captains for another project.

[44] Moreover, although M.I.D. broke down some of the expenses that it would have incurred to perform the contract, the expenditure items submitted by M.I.D. are mostly very generic, and they are not exhaustive, which is problematic, to say the least.[20] M.I.D. maintains that it would not have incurred any additional fixed or overhead costs as a result of the contract in question. However, the ITT imposes a number of obligations on the successful bidder. These obligations would likely have led M.I.D. to engage in certain activities and incur certain costs that it would not otherwise have incurred. The expenditure estimate provided by M.I.D. therefore does not include several expenditure items.

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[20] Moreover, the technical specifications attached to the ITT stipulated that the contractor had to provide, no later than 10 days after the notice of acceptance of the tender, a breakdown of the cost of the lump sum items included in the tender as well as a list of the equipment and the hourly rate of each piece of equipment available for the execution of the work and a list of the hourly rates of his staff (Exhibit PR-2020-023-01 at 53). It is therefore incorrect to argue, as M.I.D. did, that bidders were only required to submit three unbundled prices with no obligation on the part of the prospective contractor to provide additional detail. Although M.I.D. outlined in its submission some of its expenses and the equipment it would have used, and provided some information on the hourly rate of its staff, the Tribunal would have expected a more detailed breakdown (for example, the hourly rate by equipment used and not simply by stage of the work) in light of the requirements of the technical specifications.

[45] Among the elements that M.I.D. does not address in its submission, the Tribunal notes that the technical specifications of the work, which were part of the ITT, provided for the disposal of concrete structures (blocks and the like) removed from the bottom of the Richelieu River, and disposing of the structures in "an authorized site,"[21] "safely, in compliance with the environmental standards in effect".[22] M.I.D. did not include any expenses related to the disposal of the concrete blocks, arguing that it would not have disposed of any of the blocks that it removed and instead would have retrieved them all and brought them back to its facilities. M.I.D.'s claim in this respect is not convincing, because it is a mere assertion.

[46] It is logical to believe that, had M.I.D. won the contract, it would eventually have had to dispose of the concrete structures and that their storage would have incurred costs for the company. Unless otherwise explained (for example, by demonstrating that M.I.D.'s facilities have the necessary authorizations and that the blocks had a value for M.I.D.), the Tribunal therefore believes that it would be appropriate to assign a certain cost for the disposal of the 80 concrete blocks and structures to be removed from the Richelieu River.

[47] The technical specifications attached to the ITT also provided that the contractor:

(a) was responsible for the management of minor pollutants resulting from the removal of the structures and that it should obtain the necessary authorizations from the competent environmental authorities, as needed.[23]

(b) was required to obtain the necessary authorizations under the *Canadian Navigable Waters Act*, including regarding the turbidity curtain.[24]

(c) was required to submit to the departmental representative for approval a timetable for the work of removing the structures and disposing of them.[25]

(d) was responsible for providing access and transportation to the site to the testing and inspection agencies, to competent authorities, to the site supervisor, and to the departmental representative, and was responsible for obtaining the necessary access authorizations from the property owners along the riverbank, if applicable.[26]

(e) was required to, upon completion of the work, restore the existing environment to a state equivalent to or better than its original state.[27]

(f) was required to, if necessary, identify and pay for any additional work or storage areas required to perform the tasks.[28]

(g) was required to provide the departmental representative and the Commission des normes, de l'équité, de la santé et de la sécurité du travail with a site-specific prevention program

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21 Exhibit PR-2020-023-01 at 49, 51.
22 *Ibid.* at 50.
23 *Ibid.*
24 *Ibid.* at 52.
25 *Ibid.*
26 *Ibid.* at 50.
27 *Ibid.* at 52.
28 *Ibid.* at 51.

for approval at least 10 days prior to the start of the work, to update this prevention program as needed, and to periodically submit to the department the health and safety inspection reports on the site.[29]

(h) was required to provide the PWGSC representative with an emergency response plan,[30] and a dive plan for each dive.[31]

(i) was required to submit an environmental protection plan 15 days before start of construction.[32]

[48] These items, listed in the specifications, were the responsibility of the successful contractor. Possibly all, or at least some of these positions, were likely to increase the costs incurred by M.I.D. compared to the fixed costs that it would have incurred anyway in its operations.[33] The absence of any reference to these obligations and the lack of a detailed explanation for them make it very difficult to assess the actual costs that M.I.D. would have incurred to carry out the contract.

[49] In the end, M.I.D. did not make a convincing demonstration of the costs it would have incurred, and the evidence on the record suggests that it significantly underestimated those costs. In the absence of reliable and tangible evidence to support them, the Tribunal cannot accept M.I.D.'s claims regarding the high profit margin it submits.[34] Therefore, the Tribunal does not consider that it can apply the revenue-less-expenses method proposed by M.I.D. in this case. To apply this method, the Tribunal would have to accept the amounts proposed by M.I.D. without sufficient evidence and would also have to make additional deductions for the above-mentioned expenditure items omitted by M.I.D. To this end, the Tribunal would have to rely on speculation or determine amounts arbitrarily, which would be inappropriate.[35] The Tribunal further notes that the bid submitted by M.I.D. to PWGSC and its submission and reply regarding the amount of compensation do not contain any additional elements that would enable the Tribunal to fill in the gaps in M.I.D.'s submission with respect to its alleged loss of profit.

[50] For these reasons, the Tribunal believes that the evidence on the record does not allow it to apply the revenue-less-expenses method.

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29 *Ibid.* at 56, 60–61.

30 *Ibid.* at 57, 61.

31 *Ibid.* at 89.

32 *Ibid.* at 91.

33 However, the Tribunal does not consider that the costs incurred by M. I. D. in preparing its bid and complaint should be added to its expenses, as these costs had already been incurred by M. I. D.

34 This lack of supporting exhibits contrasts with the situation in the Tribunal's order in *V Zero* on which M.I.D. relies. It is clear from the Tribunal's reasons in that case that the complainant had submitted supporting exhibits, including invoices, quotes and purchase orders for its materials and cost of sales.

35 In light of this decision and the limited and incomplete evidence on record, the Tribunal is also unable to rule on whether M.I.D.'s claim included an adequate deduction for the turbidity curtain, an important element in the performance of this type of work according to the technical specifications, and on the number of days it would have taken to complete the work. In this regard, the Tribunal notes that M.I.D.'s estimate of expenses is based on a 10-day schedule. However, M.I.D. did not support this assertion with historical data or convincing evidence as to its ability to perform comparable marine work or execute similar contracts within this time frame. It merely referred, in a very general way, to its equipment, crew and expertise. Therefore, it was not determined that a 10-day schedule was a suitable estimate of the likely duration of the work.

Method based on industry profit margins

[51] The profit loss calculation may also be based on industry or firm-wide profit margins, using historical or qualitative evidence of firm- and industry-specific profit margins for similar goods or services, or a reasonable profit margin.[36]

[52] Ideally, the Tribunal would have based its profit margin analysis on figures provided by M.I.D. with respect to its annual profit margin or the profit margin for projects similar to that referred to in the ITT. Once again, M.I.D. did not submit any documentary evidence to assist the Tribunal in this regard. M.I.D. explained that it had not entered a balance sheet into evidence because its balance sheets cover its total revenues for the year, so they would not have made it possible to determine the percentage of profit for each contract and thus the profit losses for the contract covered by the Tribunal's decision. In other words, M.I.D. considers that its general profit margin is not relevant to analyzing the amount of lost profit for the contract in question.

[53] However, the Tribunal believes that evidence in this regard would not only have been useful but was also required, considering the Guidelines which expressly refer to a company's financial statements, reports, forecasts, and other economic information or data as examples of the documents necessary to justify the amount of compensation claimed. For example, according to the Tribunal, there is no doubt that information on the profit margin made by M.I.D. for the performance of work that is similar or of the same scope with the equipment required in this case constituted economic data relevant and necessary to justify the amount of compensation claimed by M.I.D. Such information could have corroborated M.I.D.'s claim or validated some of its claims about its incremental expenditures to perform this type of contract.[37] In any case, M.I.D.'s choice not to submit this type of information is another factor that results in the Tribunal being unable to base the calculation of lost profit in this case on specific data related to M.I.D.'s usual activities and profit.

[54] In the absence of historical or qualitative data on the company's profit margins as such or figures on its profit for the performance of similar contracts, and although they would be imperfect because they would encompass a wider range of activities than that covered by the contract in question, the Tribunal considers that the Department of Industry statistics entered into evidence by M.I.D. are, by default, the only evidence on the record that makes it possible to estimate, in a reasonable way, the loss of profit suffered by M.I.D. The data from the Department of Industry provides reliable evidence of the profit rates earned by companies operating in the same industry as M.I.D., and it enables the Tribunal to determine the amount of the lost profit incurred by M.I.D. based on an estimate of the percentage of reasonable profit margin to be applied to the amount of M.I.D.'s bid.

[55] The data compiled by the Department of Industry indicates the historical profit margin of small or medium-sized businesses (SMEs) (defined as businesses with annual revenues between $30,000 and $5,000,000) operating in the same industry as M.I.D., namely "Other heavy and civil

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36 *V Zero* at para. 14 and at footnote 9; *Almon Equipment Limited* (14 October 2011), PR-2008-048R (CITT) at paras. 8–9, 23; *Oshkosh* at paras. 143, 148. The Tribunal has also used this profit margin method to confirm the margin obtained under the revenue-less-expenses method. See the Tribunal's order in *The Masha Krupp Translation Group Ltd. v. Canada Revenue Agency* (17 October 2018), PR-2016-041 (CITT) at paras. 56–57; *V Zero* at paras. 15, 64.

37 Rather, M.I.D.'s failure to file such evidence gives the impression that it would have been impossible for it to justify the amount claimed with reliable economic data and evidentiary documents related to the operation of its business. In other words, the Tribunal draws a negative inference from this omission.

engineering construction". With respect to the definition of this industry, the Department of Industry states the following:

> This industry comprises establishments, not classified to any other industry, primarily engaged in: constructing heavy and civil engineering works. The work performed may include new work, reconstruction, rehabilitation, and repairs.
>
> Specialized trade activities related to these engineering and civil construction projects (such as marine pile driving) are included construction projects involving water resources (e.g., dredging and land drainage), development of marine facilities, and open space recreational construction projects (e.g., parks and trails) are included in this industry.[38]

[56] The data cited by M.I.D. refer to the year 2019. The Department of Industry divides SMEs in this industry into four quarters (or quartiles) according to their total annual revenues and their net annual profit.

[57] Data from the Department of Industry indicates an average net profit margin of 8.6 percent for all SMEs in this industry. The data indicates different annual net profit margins per quartile.

[58] M.I.D. has not provided the Tribunal with data enabling it to determine its annual sales, making it impossible for the Tribunal to determine its exact classification by quartile in relation to its total annual revenue. However, in itself, the revenue it would have earned from the contract in question would have placed it in the second quartile, that of SMEs with annual revenues between $100,000 and $233,000, and close to the third quartile, that of SMEs with annual revenues between $233,000 and $809,000. This excludes M.I.D., from the outset, from the companies listed in the first quartile (SMEs with annual revenues between $30,000 and $100,000). This first quartile is the only one in which the listed companies suffered losses on average (negative average net profit margin). For this reason, the Tribunal considers that the average profit margin for all SMEs in the industry (8.6 percent), i.e. the margin that, according to PWGSC, should be used to calculate M.I.D.'s profit margin on the contract at issue, misrepresents the complainant's situation.

[59] However, without further information on M.I.D.'s annual revenues,[39] the Tribunal cannot posit that M.I.D.'s annual sales would have placed it in the second quartile rather than in the third or fourth quartiles, which had lower average net profit margins than companies in the second quartile. The average net profit margins of companies in the second, third, and fourth quartiles are

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38 M.I.D. refers to Department of Industry's website, online: <https://www.ic.gc.ca/app/scr/app/cis/performance/rev/2379> and <https://www.ic.gc.ca/app/scr/app/cis/performance/2379> (last accessed on December 6, 2021).

39 The Tribunal notes that the Guidelines recognize that the Tribunal may request additional information from the complainant. In this case, in its letter of February 4, 2021, the Tribunal asked M.I.D. to file a submission in accordance with the Guidelines and invited M.I.D. to seek legal counsel or advice if necessary. In addition, the deficiencies in the evidence submitted by M.I.D. were noted by PWGSC in its response to M.I.D.'s submission. In its reply, M.I.D. did not submit or attempt to submit any additional data or evidence, merely responding to PWGSC's arguments and stating that data, such as its annual sales figures, were of no assistance in calculating the compensation for lost profits. In these circumstances, the Tribunal considers that M.I.D. had sufficient opportunity to present data relating to its financial situation but refused to do so.

26.5 percent, 6.5 percent, and 10.2 percent, respectively,[40] which suggests that the relevant profit margin in this case is above 10 percent.

[60] In addition, the median profit margin for SMEs surveyed in the Department of Industry data is 13.9 percent.[41]

[61] The Tribunal reiterates that the relevant profit margin is that of the contract covered by the ITT, that is, the incremental profit margin attributable to the contract in question and not the company's overall profit margin. Ultimately, even assuming that the contract in question would have generated an increase in the company's fixed costs, the incremental profit margin that the Tribunal must estimate should normally be higher than the overall profit margin of the companies in the industry reported by the Department of Industry.[42]

[62] Moreover, in this case, M.I.D. explained that its activities are seasonal and that its revenues from the season during which dredging work can be carried out are used to cover its fixed costs for the full year.[43] This results in a relatively higher incremental profit margin. In addition, the Tribunal has in the past recognized that a contract obtained in the context of an award process usually involves a lower risk and therefore a higher level of profit than other commercial contracts.[44]

[63] In light of these factors, and in particular the fact that the Tribunal must base the calculation of lost profit not on the company's overall profit margin but on the incremental profit that it would have earned from the contract in question, the Tribunal considers that the average margin for each quartile and the overall average profit margin of 8.6 percent derived from the Department of Industry data are overly conservative indications of the incremental profit that the contract in question earned for M.I.D.[45] The median profit margin of 13.9 percent is also conservative given that it is based on

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40 These average net profit margins are obtained by dividing the average net profit (or loss) for each quartile by the average total revenue for the same quartile. They are therefore weighted averages for each quartile. During the course of the Tribunal's deliberations, the Department of Industry updated the data published on its website to refer to data for the year 2020. The Tribunal considered it appropriate to refer to this 2020 data for completeness, since M.I.D. was relying on this source of information and PWGSC accepted it, at least for the purposes of its alternative argument for an 8.6 percent award. The contract would have been executed in 2020. For these reasons, the Tribunal determined that it should consider the 2020 figures but did not make them the basis for its decision. The average net profit margins for the second, third, and fourth quartile firms for 2020 are 19.3 percent, 9.9 percent, and 10.5 percent, respectively. That said, lockdown measures and the economic downturn due to COVID-19 have made 2020 an unusual year, most likely less representative of typical revenues and profits in this industry. For this reason, the 2019 data is more compelling evidence in this case and the Tribunal prefers it to the 2020 data.

41 Looking at the Department of Industry data for 2020, the median profit margin is 13 percent.

42 Although the Tribunal indicated above that the lack of evidence made it impossible to precisely estimate the extent to which the contract would have caused M.I.D. to incur additional fixed costs or overhead, the fact remains that the fixed costs it would have incurred in any event, regardless of whether it was awarded the contract, should not be deducted. Therefore, the overall net margin for the industry in the Department of Industry's table, while relevant, is not a perfect measure for determining M.I.D.'s lost profits in this case. For the purposes of this exercise, therefore, it should be adjusted upward.

43 M.I.D. maintains that dredging work in Quebec is done over a very short period, between August and mid-December. As a result, revenues are based on more or less four months, and profits are high since these months are crucial to be able to meet the expenses of the other months of the year.

44 *Oshkosh* at para. 147; *Spacesaver Corporation* at 3.

45 This is also true for the average profit margins by quartile and the overall average profit margin of 5.4 percent that emerge from the 2020 data.

the least profitable quartile for the SMEs in the industry; as noted above, the same comment applies to the average profit margin of 8.6 percent. The Tribunal therefore considers it appropriate to increase these profit margins reported by the Department of Industry in light of the type of contract covered by the ITT (an award process that usually involves a lower risk and a higher profit) and the seasonal nature of M.I.D.'s operations. For these reasons, in light of the evidence on the record, the Tribunal considers that a profit margin of 20 percent is a reasonable approximation of the profit margin that M.I.D. would have earned from the contract in question.

[64] Finally, the Tribunal notes that in its response to the reply submission, M.I.D. refers to the gross profit margin of 51.8 percent for all SMEs in the industry.[46] However, the Tribunal does not consider that the Department of Industry data on gross profit margins provide an appropriate indication of the incremental profit margin that M.I.D. would have earned from the contract in question. In addition, these gross profit margins do not appear to consider the number of incremental expenditures that would have affected M.I.D.'s profit margin for the contract in question and which are discussed above. Therefore, the Tribunal believes that it would be unreasonable to accept that the gross profit margin data for all SMEs in the industry is reflective of M.I.D.'s incremental profit margin that would have been attributable to the contract in question.

[65] Therefore, the Tribunal cannot accept that the gross profit margin for all companies in the industry is representative of the net profit margin or profit lost by M.I.D. in this case. At best, this figure of 51.8 percent could be used as a starting point for the analysis. It would then be necessary to adjust it downward. All things considered, and given the evidence on the record, including the relevant data on the gross profit margin of the industry provided by the Department of Industry, the Tribunal remains convinced that a profit margin of 20 percent is a reasonable approximation of the profit that M.I.D. could have earned had it been awarded the contract.

[66] PWGSC submits that the Tribunal has in the past indicated that a reasonable profit margin is around 10 percent, plus or minus 5 percent. However, the Tribunal has indicated that a net profit margin of less than 5 percent or more than 15 percent may be appropriate if the circumstances warrant it and that, ultimately, each case is decided on its merits.[47] In this case, a profit margin of 20 percent is therefore justifiable in light of the evidence and the Tribunal's earlier decisions.

Finding on the amount of compensation for lost profit

[67] M.I.D. has submitted very little evidence of an economic, financial or other nature to justify the profit margin granted by the Tribunal. The high profit margin claimed by M.I.D. is not justified based on the evidence submitted.

[68] Although the Tribunal cannot accurately evaluate the expenses that would have been incurred by M.I.D., the information at its disposal indicates that these expenses were likely higher than those indicated by M.I.D. in its submission. Therefore, the Tribunal cannot base its decision on the revenue-less-expenses method.

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46 The Tribunal notes that the gross profit margin for all SMEs in the industry was slightly lower in 2020 according to the Department of Industry data, at 49.8 percent.

47 *V Zero* at paras. 67–68.

[69] M.I.D. also failed to submit evidence as to the profit margins it has made in the past on contracts of similar scope.

[70] In light of these shortcomings, the Tribunal considers it appropriate to estimate the profit that M.I.D. would have earned from the contract in question based on evidence submitted by M.I.D. in regard to the usual margins of SMEs in its industry. Based on the Department of Industry data on the record, which it interpreted and adjusted to account for the circumstances of this case and other relevant evidence, the Tribunal finds that a margin of 20 percent is a reasonable approximation of the profit margin that M.I.D. would have earned. Therefore, the Tribunal finds that compensation for lost profit of $37,000 is appropriate in this case.[48]

## COMPLAINT COSTS

[71] In its decision dated December 23, 2020, the Tribunal awarded M.I.D. reimbursement of reasonable costs it incurred in preparing and filing its complaint. The preliminary indication of the level of complexity of this complaint given by the Tribunal in that decision was Level 1, and its preliminary indication of the amount of the cost award was $1,150.

[72] As the parties have not filed any submissions against these preliminary indications, the Tribunal confirms them by awarding M.I.D. its costs in the amount of $1,150 for preparing and filing its complaint.

## CONCLUSION

[73] In its determination of December 23, 2020, the Tribunal, pursuant to section 30.16 of the CITT Act, awarded M.I.D. its reasonable costs incurred in preparing and filing the complaint. The Tribunal's preliminary indication of the level of complexity for the complaint case was Level 1, and its preliminary indication of the amount of the cost award was $1,150. The Tribunal confirms its preliminary indications by awarding M.I.D. its costs in the amount of $1,150 for preparing and filing its complaint and directs PWGSC to take appropriate action to ensure prompt payment.

[74] In addition, the Tribunal recommends that PWGSC compensate M.I.D. in the amount of $37,000 for lost profit.

Georges Bujold

Georges Bujold
Presiding Member

[48] This amount represents the 20 percent profit margin applied to M.I.D.'s bid amount.