



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2013-014

Knowledge Circle Learning
Services Inc.

v.

Department of Health

*Order and reasons issued
Tuesday, June 24, 2014*

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IN THE MATTER OF a complaint filed by Knowledge Circle Learning Services Inc. pursuant to subsection 30.11(1) of the Canadian International Trade Tribunal Act, R.S.C., 1985, c. 47 (4th Supp.);

AND FURTHER TO a recommendation made pursuant to subsections 30.15(2) and (3) of the Canadian International Trade Tribunal Act that Knowledge Circle Learning Services Inc. be compensated for its lost opportunity in accordance with the Canadian International Trade Tribunal's Procurement Compensation Guidelines;

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.

BETWEEN

KNOWLEDGE CIRCLE LEARNING SERVICES INC.

Complainant

AND

THE DEPARTMENT OF HEALTH

**Government
Institution**

ORDER

The Canadian International Trade Tribunal hereby recommends that the Department of Health compensate Knowledge Circle Learning Services Inc. in the amount of \$97,683.66, which includes the profit that it would reasonably have earned had it been awarded a Standing Offer Agreement resulting from a Request for Standing Offer issued by the Department of Health and pre-judgment interest.

The Canadian International Trade Tribunal hereby confirms its preliminary indications by awarding Knowledge Circle Learning Services Inc. its costs in the amount of \$1,000 for preparing and proceeding with the complaint and directs the Department of Health to take appropriate action to ensure prompt payment.

Ann Penner
Ann Penner
Presiding Member

Gillian Burnett
Gillian Burnett
Secretary

STATEMENT OF REASONS

INTRODUCTION

1. In its determination of January 13, 2014, 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 Knowledge Circle Learning Services Inc. (Knowledge Circle) was valid.
2. The complaint concerned a Request for Standing Offer (RFSO) (Reference No. 123728) by the Department of Health (Health Canada). The RFSO sought part-time/full-time (private) French language training services for Health Canada employees off-site (i.e. at vendor office locations) within the National Capital Region on an “as and when requested” basis.
3. The Tribunal found that Health Canada improperly extended 6 of the 10 Standing Offer Agreements (SOAs) with other SOA holders beyond the maximum duration specified in the RFSO and the original 10 SOAs.
4. In terms of remedy, the Tribunal recommended, pursuant to subsections 30.15(2) and (3) of the *CITT Act*, that Health Canada compensate Knowledge Circle for its lost opportunity. The parties were given 30 days from the date of the Tribunal’s determination to agree on the amount of compensation.
5. On February 13, 2014, the Tribunal granted a one-week extension at the request of the parties. Nonetheless, the parties were not able to agree on the amount of compensation.
6. The parties therefore looked to the Tribunal to determine the appropriate amount of compensation. To that end, Knowledge Circle filed submissions on March 3, 2014, making a preliminary estimate of compensation in the amount of \$251,081. Health Canada filed its submissions on March 12, 2014, estimating the appropriate amount of compensation to be \$30,830. Knowledge Circle responded to Health Canada’s submissions on March 19, 2014.

COMPENSATION FOR LOST PROFIT

7. The *CITT Act* and the *Canadian International Trade Tribunal Procurement Inquiry Regulations*² provide little to no guidance on how to quantify compensation. The Tribunal’s *Procurement Compensation Guidelines* (the *Guidelines*), revised in June 2001, do however set out a number of principles that will guide the Tribunal’s determination in the matter at hand, most importantly, the following:

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.

3.1.4. Compensation will be awarded for lost opportunity in situations where it is uncertain whether the complainant or other bidders would have won the contract, but for the government’s breach or breaches. Where the Tribunal is unable to conclude that the complainant would have been awarded the designated contract, but concludes that the complainant lost the opportunity to participate actively or meaningfully in the procurement process as a result of the government’s breach or breaches, the Tribunal may recommend that compensation be awarded for the lost

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. S.O.R./93-602.

opportunity. Subject to 3.1.5 below, compensation for lost opportunity may also be awarded with relation to the terms of any option periods contained in the contract.

3.1.5 In assessing the value of a lost opportunity, the Tribunal may take into account any factor it considers relevant, including:

- the number of bidders in respect of the designated contract;
- the number of bidders whose bids were determined to be compliant by the government, if that information is available; and
- the likelihood that, but for the government's breach or breaches, the complainant would have been awarded the designated contract.

3.2.3 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, 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.

3.2.4 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.

Estimated Value of Work Lost by Knowledge Circle

8. Both parties agree that the total value of work that was awarded by Health Canada during the time period when the SOAs were improperly extended (the loss period) was \$1,541,544. However, the parties disagree as to how to determine the share of this figure that would have been awarded to Knowledge Circle, had it been awarded SOAs during the loss period.

9. Knowledge Circle contended that the share of the value of the work that it would have been awarded during the loss period should be calculated on the basis of the percentage of work that it was actually awarded in the last fiscal year in which it had an SOA with Health Canada. In 2010-2011, Knowledge Circle was awarded 36.04 percent of the work under its SOA.³ When multiplied by the total work awarded during the loss period, this would result in an estimated value of \$555,516. Knowledge Circle maintained that this approach is consistent with the *Guidelines* and with the principle that the most specific and accurate information available should be used when determining compensation.⁴

10. Knowledge Circle provided the Tribunal with an accountant's report by Raymond Chabot Grant Thornton (the RCGT report) to support its arguments. The RCGT report contended that, because Knowledge Circle's proportion of the work allocated under the SOA had steadily increased from 2007-2008 to 2010-2011, it was reasonable to assume that Knowledge Circle would have received at least the same proportion of work during the loss period as it had been allocated in the final fiscal year.⁵ Further, the RCGT

3. Knowledge Circle's submissions dated March 3, 2014, at para. 19, Vol. 3.

4. *Ibid.* at para. 14.

5. *Ibid.*, tab 3.

report stated that 36.04 percent was a “conservative” estimate since it only reflected the 11 months of 2010-2011 during which Knowledge Circle had an active SOA with Health Canada.⁶

11. In contrast, Health Canada argued that the total value of work awarded during the loss period should be divided by the nine language providers (including Knowledge Circle) that provided services. In other words, Health Canada submitted that Knowledge Circle’s estimated proportion of work should be calculated by dividing the total value of work awarded by nine, for a total estimated value of \$171,282.67.

12. In Health Canada’s view, this approach is consistent not only with the *Guidelines* but also with the Tribunal’s decision in *FreeBalance Inc. v. Canada Revenue Agency*,⁷ a case in which the Tribunal held that it would calculate the compensation for lost opportunity as follows:

11. . . . by taking the profits that a complainant would have earned on a contract and dividing it by the number of potential bidders. The resulting recommendation should reflect the actual loss suffered as a result of the government’s breach, as opposed to a windfall.

[Footnotes omitted]

Health Canada highlighted the Tribunal’s use of the word “windfall” in *FreeBalance* to caution against Knowledge Circle’s proposed approach. It argued that Knowledge Circle’s approach would represent just such a windfall, as it is purely speculative, given that “[t]he distribution of call ups . . . would have been at the absolute discretion of Health Canada.”⁸

13. The Tribunal notes that the percentage of the work awarded to Knowledge Circle fluctuated greatly from 17.47 percent to 36.04 percent during the period from 2007 to 2011.⁹ Even though the proportion of work awarded to Knowledge Circle increased year over year, the Tribunal agrees with Health Canada that there is no guarantee that Knowledge Circle would have continued to be awarded an increasing percentage of work over the loss period. The division of work amongst the SOA holders was entirely at Health Canada’s discretion.¹⁰

14. Accordingly, the Tribunal finds that the estimated value of the work lost by Knowledge Circle over the loss period is properly determined by dividing the total amount of work by nine—the number of language providers that provided services. This approach not only is consistent with paragraph 3.1.5 of the *Guidelines* and the Tribunal’s decision in *FreeBalance* but also reflects the discretionary nature of work awarded under the SOAs.

15. Therefore, the Tribunal finds that the estimated value of the work lost by Knowledge Circle over the loss period is \$171,282.67.

Profit Margin

16. Having determined the value of the work lost by Knowledge Circle during the loss period, the Tribunal must now ascertain the appropriate profit margin.

6. The Tribunal notes that from February 28 to March 3, 2011, Knowledge Circle and Health Canada were in a contractual dispute; see *ibid.*

7. (4 July 2012), PR-2011-041 (CITT) [*FreeBalance*].

8. Health Canada’s submissions dated March 11, 2014, at para. 17, Vol. 3.

9. *Ibid.* at para. 14.

10. *Ibid.* at paras. 16-17.

17. Knowledge Circle argued that the appropriate profit margin is 45.2 percent (i.e. the average gross profit margin that it actually realized from 2007 to 2011).¹¹ It submitted that this time frame is appropriate because it reflects the period during which it provided the majority of its services to Health Canada.

18. Knowledge Circle suggested that a margin of 45.2 percent reflects any additional incremental costs that it would have incurred (e.g. additional instructors and materials) had it been awarded work during the loss period. Furthermore, it contended that no fixed costs should be deducted because the amount that it actually spent (e.g. rent, overhead) would have been sufficient to meet the demands of the additional work.¹² In its view, this approach is consistent with the Tribunal's decision in *FreeBalance*, in which the Tribunal stated as follows:

34. In general, the Tribunal will not deduct fixed costs which would have been incurred regardless of whether a complainant had been awarded a contract. . . .

[Footnote omitted]

19. Health Canada objected to Knowledge Circle's views. It stated that the profit margin should be capped at 20 percent, as section 10.65 of the Supply Manual stipulates that 20 percent is the maximum allowable profit on negotiated contracts.

20. Health Canada also argued that Knowledge Circle was incorrect in stating that all the potential increases in its incremental costs were reflected in the profit margin and that additional work would not have changed Knowledge Circle's fixed costs. Health Canada suggested that accounting for these costs when determining the profit margin would be consistent with the Tribunal's previous compensation decisions.

21. The Tribunal notes that Health Canada provided little to no extrinsic evidence in support of its arguments. In contrast, Knowledge Circle provided the RCGT report to substantiate its claim that the appropriate profit margin is 45.2 percent.

22. Given that the Tribunal has broad discretion in awarding compensation and is not required to cap the profit margin at 20 percent, and in light of the fact that Knowledge Circle provided "credible economic, financial or other evidence" in support of its position, the Tribunal accepts Knowledge Circle's view. Similarly, the Tribunal accepts the evidence that, as presented in the RCGT report, Knowledge Circle's operating expenditures are ". . . fixed expenses that do not vary directly with revenue."¹³

23. Therefore, the Tribunal finds that the appropriate profit margin to be applied is 45.2 percent. When the 45.2 percent profit margin is applied to the \$171,282.67 value of the work lost by Knowledge Circle, as established above, the Tribunal's recommended compensation payable by Health Canada to Knowledge Circle is \$77,419.77.

Mitigation and Contingency

24. Health Canada argued that the amount of compensation owed to Knowledge Circle should be reduced by 10 percent to account for the risks inherent in the performance of contracts and for failure to mitigate. Health Canada submitted that Knowledge Circle did not provide any supporting evidence

11. Knowledge Circle's submissions dated March 3, 2014, at para. 23, Vol. 3.

12. *Ibid.* at para. 25.

13. Knowledge Circle's submissions dated March 3, 2014, tab 3, Vol. 3.

regarding any competitions that it entered, or any other steps that it took, to offset the loss of revenues. In fact, it maintained that Knowledge Circle's advertising expenditures decreased during the loss period.¹⁴

25. Knowledge Circle responded that there should be no reduction in the compensation owed for failure to mitigate or for contingencies. Knowledge Circle explained that it actively pursued all available opportunities, but was unable to mitigate the loss of this opportunity because the Government of Canada is the major user of French language training in Ottawa, Ontario, and there are many French language trainers available. In support of this contention, Knowledge Circle submitted an affidavit from its owner and president, Mr. Geoffrey Eden, confirming his understanding of the competitive nature of the French language training market in Ottawa.¹⁵

26. With respect to mitigation of damages, the *Guidelines* state that "[t]he Tribunal's compensation recommendation may be reduced where a complainant has not acted reasonably in this regard." As such, there is no requirement that a deduction must be made to account for a failure to mitigate damages. Furthermore, there is no requirement that a complainant bid on other opportunities, as long as the complainant acted reasonably.

27. Again, the Tribunal notes that Health Canada did not provide any evidence to explain why a reduction of 10 percent would be appropriate in the present circumstances. Fundamentally, Health Canada prevented Knowledge Circle from being able to bid on the SOAs. This matter simply does not involve a situation in which the complainant could have mitigated any losses whatsoever in respect of that decision and the consequences must therefore be borne entirely by Health Canada. As such, the Tribunal does not recommend any deduction from the compensation award.

Interest Payable

28. Knowledge Circle requested pre-judgment interest in the amount of 3 percent compounded monthly over 16 months, in order to account for the time value of the money lost. Health Canada did not make any submissions on this issue.

29. In *Systèmes Equinox inc. v. Canada (Public Works and Government Services)*,¹⁶ the Federal Court of Appeal recognized that the Tribunal has the power to recommend the award of pre-judgment interest as follows:

[13] . . . While the Act does not specifically empower the Tribunal to recommend the award of pre-judgment interest, the Tribunal is entitled to take into account the time value of money. In our view, the Tribunal's remedial discretion as set out in paragraph 30.15(2)(e) is sufficiently broad to allow the award that it made.

In so saying, the Federal Court of Appeal upheld the Tribunal's recommendation that the complainant be awarded pre-judgment interest.

30. In order to calculate the interest that Knowledge Circle could reasonably have earned, had it been awarded an SOA, the Tribunal must first determine the rate to be applied. In *Systèmes Equinox*, the Tribunal

14. Health Canada's submissions dated March 11, 2014, at para. 52, Vol. 3.

15. Knowledge Circle's submissions dated March 19 2014, at para. 29, Vol. 3.

16. 2012 FCA 51 (CanLII), upholding in part *Les Systèmes Equinox Inc. v. Department of Public Works and Government Services* (1 June 2011), PR-2006-045R (CITT) [*Systèmes Equinox*].

used a rate of 3 percent at least in part because it was very near the average pre-judgment rate prescribed in the Ontario *Courts of Justice Act*¹⁷ during the years in which the complainant lost revenue.

31. The Tribunal notes that the RFSO at issue dictates that any resulting SOA shall be interpreted and governed by the laws of the province of Ontario.¹⁸ During the loss period, the pre-judgment rate prescribed in the Ontario *Courts of Justice Act* consistently remained at 1.3 percent. Thus, the Tribunal finds that 1.3 percent is a reasonable rate at which to calculate pre-judgment interest on the recommended compensation award.

32. Using the rate of 1.3 percent compounded monthly over a period of 18 months, which represents the time between Health Canada's breach and June 2014,¹⁹ the Tribunal will increase the recommended amount of compensation for Knowledge Circle by \$20,263.89. Combined with the \$77,419.77 in lost opportunity, as determined above, the total amount of compensation recommended by the Tribunal is \$97,683.66.

Costs

33. With respect to costs, in its determination of January 13, 2014, the Tribunal, pursuant to section 30.16 of the *CITT Act*, awarded Knowledge Circle its reasonable costs incurred in preparing and proceeding with 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 \$1,000.

34. The Tribunal notes that neither party made submissions regarding the Tribunal's preliminary indication of costs as set out in its determination of January 13, 2014. It therefore confirms its preliminary indications.

CONCLUSION

35. The Tribunal hereby recommends that Health Canada compensate Knowledge Circle in the amount of \$97,683.66, which includes compensation for Knowledge Circle's lost opportunity and pre-judgment interest.

36. The Tribunal hereby confirms its preliminary indications by awarding Knowledge Circle its costs in the amount of \$1,000 for preparing and proceeding with the complaint and directs Health Canada to take appropriate action to ensure prompt payment.

Ann Penner

Ann Penner

Presiding Member

17. R.S.O. 1990, c. C.43.

18. Exhibit PR-2013-014-01, tab 2, Vol. 1.

19. This approach is consistent with the Tribunal's decision in *Systèmes Equinox*, in which the Tribunal calculated monthly compound interest from the time of the breach until the time of the Tribunal's compensation recommendation.