



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## ORDER AND REASONS

File No. PR-2013-014

Knowledge Circle Learning  
Services Inc.

v.

Department of Health

*Order and reasons issued  
Thursday, September 11, 2014*

**TABLE OF CONTENTS**

ORDER ..... i

STATEMENT OF REASONS ..... 1

    INTRODUCTION ..... 1

    PRELIMINARY EVIDENTIARY ISSUE..... 2

    TRIBUNAL’S ANALYSIS ..... 2

    CONCLUSION ..... 4

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 the Canadian International Trade Tribunal's indication of the level of complexity for the complaint case and its indication of the amount of the cost award.

**BETWEEN**

**KNOWLEDGE CIRCLE LEARNING SERVICES INC.**

**Complainant**

**AND**

**THE DEPARTMENT OF HEALTH**

**Government  
Institution**

**ORDER**

In its determination of January 13, 2014, the Canadian International Trade Tribunal, pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, awarded Knowledge Circle Learning Services Inc. its reasonable costs incurred in preparing and proceeding with the complaint. The Canadian International Trade 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. For further certainty, the present order supersedes the order on costs, dated on June 24, 2014, mistakenly issued by reason of an administrative oversight by the Canadian International Trade Tribunal. After considering the submissions of Knowledge Circle Learning Services Inc. and the Department of Health, the Canadian International Trade Tribunal hereby revises its preliminary indication of the amount of the cost award by awarding Knowledge Circle Learning Services Inc. its costs in the amount of \$22,416.61 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

## STATEMENT OF REASONS

### INTRODUCTION

1. In a determination issued on January 13, 2014, the Canadian International Trade Tribunal (the Tribunal), under section 30.16 of the *Canadian International Trade Tribunal Act*,<sup>1</sup> determined that the complaint filed by Knowledge Circle Learning Services Inc. (Knowledge Circle) was valid and awarded Knowledge Circle its reasonable costs incurred in preparing and proceeding with the complaint. The Tribunal's preliminary indication of the cost award was \$1,000.
2. On January 27, 2014, Knowledge Circle requested that the Tribunal defer its determination on costs until the issue of compensation had been resolved. Knowledge Circle submitted that, if additional submissions on the appropriate amount of compensation were necessary, the costs incurred by Knowledge Circle would increase.
3. On January 28, 2014, the Tribunal granted Knowledge Circle's request and stated that the Tribunal would make its final determination on costs after the amount of compensation had been resolved and after parties had had an opportunity to make any necessary additional submissions regarding the costs to be awarded.
4. As the parties were not able to come to an agreement on the appropriate amount of compensation, both parties made additional submissions to the Tribunal in respect of that issue.
5. On June 24, 2014, the Tribunal issued an order regarding the recommended amount of compensation and the amount for costs payable to Knowledge Circle. That order was mistakenly issued because of an administrative oversight; the Tribunal had not yet sought final submissions on the issue of costs, whereas it had indicated to the parties that it would do so, as explained in the paragraphs that follow.
6. On June 24, 2014, Knowledge Circle wrote precisely to the Tribunal to draw its attention to the decision of January 28, 2014, in which the Tribunal had indeed granted the parties permission to make additional submissions on costs *after* the appropriate amount of compensation had been determined. Knowledge Circle therefore requested that it be permitted to file additional submissions on costs.
7. On June 27, 2014, the Department of Health (Health Canada) wrote to the Tribunal and stated that it was in agreement with the Tribunal's determination on costs. However, Health Canada also requested that it be permitted to make additional submissions on costs, should the Tribunal grant Knowledge Circle's request.
8. On June 27, 2014, Knowledge Circle provided submissions in support of its request of June 24, 2014. Knowledge Circle argued that it would be procedurally unfair to deny it the chance to make further submissions on costs, as Knowledge Circle had explicitly requested, and been granted permission, and had relied on that permission when conducting itself.
9. On July 2, 2014, after having considered the comments of the parties, the Tribunal wrote to inform the parties that it would accept additional submissions on the issue of costs. In particular, the Tribunal recognized the inevitable procedural unfairness that would arise if Knowledge Circle were denied the opportunity to make further submissions on costs after the Tribunal had previously expressly stated that Knowledge Circle would have the opportunity to do so.
10. On July 7, 2014, Knowledge Circle filed its additional submissions on the issue of costs.

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

11. On July 14, 2014, Health Canada filed its response to Knowledge Circle's submissions on the issue of costs.

12. On July 18, 2014, Knowledge Circle filed its reply to Health Canada's response (the original reply brief).

### PRELIMINARY EVIDENTIARY ISSUE

13. On July 22, 2014, Health Canada made a request, pursuant to rule 23.1 of the *Canadian International Trade Tribunal Rules*,<sup>2</sup> requesting that a letter attached as "Attachment 3" to Knowledge Circle's original reply brief, as well as the reference thereto in Knowledge Circle's original reply brief, be stricken from the record on the grounds of settlement privilege.

14. On July 25, 2014, Knowledge Circle informed the Tribunal that the parties were in discussions regarding the possibility of a compromise to resolve Health Canada's concerns.

15. On July 29, 2014, Knowledge Circle filed a revised version of the original reply brief (the revised brief).

16. On July 29, 2014, Health Canada wrote to the Tribunal and confirmed that the revised brief filed by Knowledge Circle successfully resolved the issue raised in Health Canada's request under rule 23.1 of the *Rules*.

17. On July 30, 2014, the Tribunal informed the parties that the original reply brief would be destroyed and replaced with the revised brief.

### TRIBUNAL'S ANALYSIS

18. Pursuant to subsection 30.16 of the *CITT Act*, the Tribunal can award costs of proceedings. As set out in the *CITT Act*, this is a discretionary power.

19. In the exercise of its discretionary power under the *CITT Act*, the Tribunal issued the *Procurement Costs Guideline* (the *Guideline*) in order to provide guidance to parties seeking to recover the costs of participating in procurement complaint proceedings. However, the *Guideline* is not binding on the Tribunal, as "... each case will be considered individually, and the guideline is not intended to replace, limit or detract from the discretion of the Tribunal . . . ."<sup>3</sup>

20. Having considered the circumstances of this case and the submissions of the parties, the Tribunal believes that a departure from the levels of complexity and the rates set out in the *Guideline* is warranted.

21. First, the Tribunal notes the lengths to which Knowledge Circle was required to go in order to discover the evidence necessary to establish its complaint. As noted in the Tribunal's determination of January 13, 2014, Health Canada, both through its proactive disclosure on its Web site and in conversations with Knowledge Circle, improperly described the contract amendments that were the subject of Knowledge Circle's complaint as being competitively sourced contracts, when the opposite was in fact true.<sup>4</sup> It was not

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2. S.O.R./91-499 [*Rules*].

3. *Guideline* at para. 1.1.2.

4. *Knowledge Circle Learning Services Inc. v. Department of Health* (13 January 2014), PR-2013-014 (CITT) at para. 53.

until Knowledge Circle received the results of its Access to Information request and compared this information with what was posted on Health Canada's Web site that the true nature of the contract amendments was revealed.<sup>5</sup>

22. Being required to make an Access to Information request in order to get the information which was the basis of the complaint was an extraordinary step that Knowledge Circle was forced to take. As the information obtained through the Access to Information request was instrumental in the Tribunal's decision that the complaint was valid, the Tribunal finds that this was an exceptional cost which warrants a departure from the *Guideline*.

23. Second, as the parties were unable to agree on the proper amount of compensation payable as a result of the complaint being found valid, Knowledge Circle was obligated to make substantial submissions on the losses that it incurred as a result of Health Canada's breach of its obligations under the trade agreements. The Tribunal notes that these submissions were in stark contrast to those provided by Health Canada, which included little evidentiary support for its positions.

24. In particular, Knowledge Circle included, in its submissions, affidavit evidence regarding the nature of its business practices, as well as an expert report prepared by Raymond Chabot Grant Thornton LLP (the expert report) which detailed Knowledge Circle's financial situation. Both the affidavit and the expert report were necessary to establish the proper compensation payable to Knowledge Circle and were extensively relied upon by the Tribunal in making its recommendation regarding compensation.

25. The Tribunal notes however that some of the increased costs claimed by Knowledge Circle are in fact costs which are routinely incurred in filing a complaint with the Tribunal and which, therefore, can be accounted for by the amounts set in the *Guideline*. In particular, Knowledge Circle's written objection to Health Canada, the drafting of the complaint, the review of and reply to the GIR, and the handling of procedural matters and correspondence are all part of the habitual costs associated with filing a complaint. The Tribunal finds that there is no need to depart from the *Guideline* in respect of these costs and that the initial indication of \$1,000 is reasonable for these aspects of the complaint.

26. As described above, however, Knowledge Circle was required to incur considerable additional costs beyond those routinely expected in filing a complaint not only to gain access to the information which formed the basis of the complaint but also to establish the amount of compensation payable and to provide the necessary evidence to counter Health Canada's position on compensation. The Tribunal finds that these significant additional costs warrant a departure from the costs framework provided in the *Guideline*. The Tribunal accepts Knowledge Circle's submissions that the actual costs of such necessary actions amounted to \$42,833.22.<sup>6</sup> However, the Tribunal recognizes that costs are to be awarded on a partial indemnity basis and finds that a partial indemnity rate of 50 percent is reasonable in the present case.

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5. Exhibit PR-2013-014-01, tabs 13, 14, Vol. 1.

6. Health Canada's public submissions on costs dated July 14, 2014, at 4. This amount was calculated by combining the costs for the formulation and review of a response to the Access to Information request, the review and analysis of relevant information on Health Canada's Web site, the submissions on compensation, the review of Health Canada's response to the submissions on compensation and the drafting of a reply and supporting affidavit, and the expert report.

27. Thus, on the basis of the foregoing, the Tribunal revises its preliminary indication of the amount of the cost award and awards Knowledge Circle its costs in the amount of \$22,416.61.<sup>7</sup>

## CONCLUSION

28. 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 amount of the cost award was \$1,000. While the Tribunal purported to confirm this cost award in its order regarding compensation dated June 24, 2014, that confirmation was an administrative oversight, which contradicted the Tribunal's earlier decision to allow additional submissions on costs after the issuance of its order regarding compensation. In order to correct this oversight, and to respect the principles of procedural fairness, the Tribunal accepted additional submissions on costs from the parties.

29. After having considered the additional submissions on costs of both Knowledge Circle and Health Canada, the Tribunal hereby revises its preliminary indication of the amount of the cost award by awarding Knowledge Circle its costs in the amount of \$22,416.61 for preparing and proceeding with the complaint and directs Health Canada to take appropriate action to ensure prompt payment.

Ann Penner

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Presiding Member

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7. This cost award includes 50 percent partial indemnity of Knowledge Circle's actual costs for the additional expenses incurred, as well as \$1,000 in costs awarded under the *Guideline* for its routine costs, as discussed above.