



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2016-041

The Masha Krupp Translation  
Group Ltd.

v.

Canada Revenue Agency

*Determination issued  
Wednesday, March 15, 2017*

*Reasons issued  
Monday, March 20, 2017*

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IN THE MATTER OF a complaint filed by The Masha Krupp Translation Group Ltd. 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 decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

**BETWEEN**

**THE MASHA KRUPP TRANSLATION GROUP LTD.**

**Complainant**

**AND**

**THE CANADA REVENUE AGENCY**

**Government  
Institution**

**DETERMINATION**

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal finds that the Masha Krupp Translation Group Ltd.'s complaint is valid in part.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that the Canada Revenue Agency retender the procurement that is the subject of this complaint, in accordance with the applicable trade agreements, as soon as is operationally possible. The Tribunal also recommends that the current contract remain with CLS Lexi-Tech until such time as the retendering is complete and a new contract is awarded.

In addition, the Canadian International Trade Tribunal recommends that The Masha Krupp Translation Group Ltd. be compensated for lost opportunity in the amount of the profit that it would reasonably have made during the time that CLS Lexi-Tech holds the current contract and until such time as the retendering is complete, divided by the number of bidders that were compliant with the mandatory criteria.

The amount of compensation is to be negotiated between the parties. The parties will provide the Canadian International Trade Tribunal, within 40 days of the date of this determination, an approximate schedule of the time frame for retendering the procurement and completing the negotiations. If the parties reach agreement on the amount of compensation, they will notify the Canadian International Trade Tribunal of their agreement. If the parties are unable to agree on the amount of compensation, they may make submissions to the Canadian International Trade Tribunal regarding the appropriate amount of compensation. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of compensation.

Each party will bear its own costs.

Rose Ritcey  
Rose Ritcey  
Presiding member

The statement of reasons will be issued at a later date.

Tribunal Panel: Rose Ritcey, Presiding Member

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Complainant: The Masha Krupp Translation Group Ltd.

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## STATEMENT OF REASONS

1. On October 31, 2016, The Masha Krupp Translation Group Ltd. (MKTG) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.<sup>1</sup> The complaint concerned a Request for Proposal (RFP) (Solicitation No. 1000329852) issued by the Canada Revenue Agency (CRA) for translation and editing services, in contemplation of a resulting contract valued at \$35 million over 7 years.

2. MKTG complained that the CRA had awarded the contract to a non-compliant bidder, had failed to contact its references as required by the RFP and had used a process to evaluate the bids that was inconsistent with what was required by the RFP and that had introduced an unfair element of subjectivity. As a remedy, MKTG requested that it be awarded the resulting contract or, in the alternative, that it be compensated for its lost profits; or, in the further alternative, that the bids be re-evaluated or that a new solicitation for the resulting contract be issued.

### RELEVANT PROVISIONS OF THE RFP

3. On May 19, 2016, the CRA issued the RFP, with a closing date of June 28, 2016. The Government of Canada's procurement Web site, [buyandsell.gc.ca](http://buyandsell.gc.ca), made clear that the RFP would be governed by the terms of the *Agreement on Internal Trade*.<sup>2</sup>

4. The RFP required the submission of technical as well as financial proposals. The evaluation of technical proposals required, as a first step, that bids meet a set of mandatory criteria and, as a second step, that they be scored in accordance with five point-rated criteria, resulting in a total technical merit score. Only those bids meeting all the requirements of the first and second steps would have their financial proposals evaluated.<sup>3</sup>

5. Part 3 of the RFP (Proposal Preparation Instructions) reads in part as follows:

**Section I: Technical Bid** (one hard copy and one soft copy)

In their technical bid, bidders should demonstrate their understanding of the requirements contained in the bid solicitation and explain how they will meet these requirements.

6. In addition, Part 4 of the RFP (Evaluation and Selection) reads in part as follows:

**Step 4 – Basis of Selection**

...

1. To be declared responsive, a bid must:
  - a. comply with all the requirements of the bid solicitation; and
  - b. meet all mandatory criteria; and
  - c. obtain the required minimum of 70 points overall for the technical evaluation criteria which are subject to point rating. The rating is performed on a scale of 100 points.

...

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1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].  
2. Online: [buyandsell.gc.ca](http://buyandsell.gc.ca) <<https://buyandsell.gc.ca/procurement-data/tender-notice/PW-16-00733507>>. *Agreement on Internal Trade*: 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>> (*AIT*).  
3. Exhibit PR-2016-041-01, Exhibit 3 at p. 11, Vol 1.

3. The selection will be based on the highest responsive combined rating of technical merit and price. The ratio will be 50% for the technical merit and 50% for the price.

...

### **Step 7 – Condition Precedent to Contract Award**

The Bidder recommended for award of a Contract must meet the requirements provided in Part 5 “Certifications and Additional Information” and Part 6 “Security, Financial and Other Requirements” of this RFP.

7. Further, Part 6 of the RFP (Security, Financial and Other Requirements) reads in part as follows:

#### **6.1 Security Requirements**

1. Before award of a contract the following conditions must be met:
  - (a) the Bidder must hold a valid organization security clearance as indicated in Part 7 – Model Contract;
  - (b) the Bidder’s proposed individuals requiring access to classified or protected information, assets or sensitive work site(s) must meet the security requirements as indicated in Part 7 – Model Contract;

...

### **Appendix 1: Mandatory Criteria**

...

#### **1. Corporate maturity**

...

The bidder must have conducted three large translation projects within the last five years from the date of bid closing. All three large translation projects must meet the specialized category (Level 2) as described in Table A3 of Annex A.

The bidder must provide a synopsis of each of these projects including:

- department/organization
- word count of source document
- brief description of text
- start and end date of project
- roles and responsibilities of the contractor in the translation project
- *project reference: contact names, current phone number, and e-mail address*

#### **2. Corporate capabilities**

...

The bidder must demonstrate that it has a minimum of 25 qualified, in-house translators capable of handling CRA work volume of approximately 70,000 words per day and the nature of CRA texts (as described in Table A3 of Annex A).<sup>4</sup>

[Emphasis added]

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4. Table A3 of Annex A divides CRA texts into two broad levels for the purposes of translation and editing, with Level 1 texts classed as “general administration and business” and inclusive of items such as training materials, and Level 2 texts classed as “specialized” and inclusive of items such as legal texts related to taxation.

8. Appendix 2 of Part 6 of the RFP sets out how the five point-rated criteria will be assessed. To assess the first point-rated criterion, Corporate Maturity, the three projects identified in relation to mandatory criterion 1 “will be measured based on client satisfaction”,<sup>5</sup> as described in the evaluation grid to Appendix 2:

<u>Evaluation criteria</u>	<u>Evaluation of bidder’s response</u>
<p><b>1. Corporate maturity</b> (Maximum of 18 points)</p> <p>Project evaluation – Three large translation projects submitted by the bidder in Appendix 1, section 1 – Corporate Maturity, that were performed by the bidder, will be measured based on client satisfaction.</p> <p>The following scale will be used to measure client satisfaction:</p> <p>0 – very poor service provided; missed deadlines and poor quality.</p> <p>1 – poor service provided; some missed deadlines and/or poor quality.</p> <p>2 – somewhat poor service provided; deadlines were met, but quality was poor.</p> <p>3 – somewhat satisfactory service provided; deadlines were met and overall quality was acceptable. However, the process on the corrective measures was less than satisfactory.</p> <p>4 – satisfactory service provided; deadlines and quality were met.</p> <p>5 – very satisfactory service provided, exceeding client’s expectations in terms of deadlines and quality.</p>	<p><b>Client satisfaction – Work quality and timely delivery</b> (max 6 points per project)</p> <p><i>0 points</i> – Bidder’s project reference reports that pre-established delivery time frames of the project were not met and/or reports poor quality of translation services (scored 0–1 on a scale of 0–5).</p> <p><i>3 points</i> – Bidder’s project reference reports that pre-established delivery time frames of the project were met; however, quality of translation services was not satisfactory (scored at 2 on a scale of 0–5).</p> <p><i>4 points</i> – Bidder’s project reference reports that pre-established delivery time frames of the project were met and overall quality of translation services was not fully satisfactory, but was acceptable. However, corrective measures were less than satisfactory (scored at 3 on a scale of 0–5).</p> <p><i>5 points</i> – Bidder’s project reference confirms on-time delivery of the project with satisfactory quality of translation services (scored at 4 on a scale of 0–5).</p> <p><i>6 points</i> – Bidder’s project reference confirms on-time delivery of the project with excellent quality of translation services. It had exceeded the expectation from the client (scored at 5 on a scale of 0–5).</p>

9. Finally, the solicitation process allowed for bidders to ask questions, to which the CRA provided detailed answers. Those answers constituted amendments, supplementing the terms of the RFP. One such answer, in response to Question 7, clarified that the requirements of the RFP could not be met through the use of outsourced or self-employed personnel.<sup>6</sup>

## BACKGROUND TO THE COMPLAINT

10. MKTG submitted its bid on June 28, 2016.

11. On September 21, 2016, the CRA awarded the resulting contract to CLS Lexi-tech Ltd. (CLS). The CRA informed MKTG of this fact by way of e-mail on September 27, 2016. Additionally, the e-mail

5. Exhibit PR-2016-041-01 at 67, Vol. 1.

6. *Ibid.*, Exhibit 2 at p. 3.



indicated that MKTG had been awarded a total of 97.50 points, while CLS had been awarded a total of 98.43 points.

12. On September 30, 2016, by way of e-mail, MKTG informed the contracting authority that CLS had contacted one of MKTG's translators in an attempt to recruit her. According to MKTG, this was evidence that CLS did not have the required number of qualified translators at the time of contract award. MKTG indicated that it would submit a formal objection to the award of the contract to CLS.

13. On October 4, 2016, by way of a letter, MKTG formally objected to the award of the contract to CLS, asserting that it was "well known in the translation industry that CLS' business model involves outsourcing work to translators" and that, therefore, CLS could not have been compliant with those requirements of the RFP that pertain to the use of employees.

14. Subsequent to MKTG's objection, the CRA met with and debriefed it on October 11, 2016.

15. MKTG indicated that, during the briefing, it was advised that it had been awarded a perfect score of 100 on its financial proposal, which translated to a score of 50 points—the maximum possible—for this element of the RFP. In addition, MKTG was advised that it had been awarded a score of 95 out of 100 points on its technical proposal, which translated into 47.50 points. MKTG was informed that 3 of the 5 points it lost on its technical proposal pertained to the first point-rated criterion, Corporate Maturity, for which it had received a score of 15 out of 18 available points.<sup>7</sup>

16. According to MKTG, during the debriefing session, one CRA official indicated that four evaluators had spoken directly with each of its three references, only to be corrected by a second CRA official who indicated that, in fact, three evaluators had spoken with each of the three references.<sup>8</sup>

17. At the debriefing session, MKTG requested a copy of its evaluation grid, which the CRA refused to provide.<sup>9</sup>

18. MKTG indicated that, immediately subsequent to the debriefing, it contacted the three references for the projects it had identified in its bid, and two of the three indicated that they had not been contacted by the CRA, while the third indicated that he had no recollection of having been contacted.<sup>10</sup>

19. MKTG delivered a letter of further objection to the CRA on October 12, 2016, seeking an explanation regarding the fact that its references either indicated that they had not been contacted, or had no recollection of being contacted, by the CRA.

20. On October 17, 2016, by way of a letter, the CRA responded to MKTG. The CRA stated that all bids received were evaluated in accordance with the criteria listed in the RFP, based on the information submitted by bidders and that it could not evaluate bids using factors not included in the bid solicitation. As well, the CRA provided information detailing the dates and times that MKTG's references had been contacted, as well as the number and identity of the evaluators who had contacted them.<sup>11</sup> The CRA also wrote that each of MKTG's references was asked the questions set out in Appendix 2 of Part 6 of the RFP,

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7. *Ibid.* at paras. 21-24.

8. *Ibid.* at para. 56.

9. *Ibid.* at para. 65.

10. *Ibid.* at para. 26.

11. In a further amendment of the information it had provided during the debriefing, the CRA wrote that two evaluators had contacted two of MKTG's references, while three evaluators had contacted the third reference.

and that MKTG's bid was subsequently scored by the CRA evaluation team, with MKTG's final technical score being based on the answers provided by the references.<sup>12</sup>

21. On October 31, 2016, MKTG filed its complaint with the Tribunal.
22. On November 4, 2016, the Tribunal accepted MKTG's complaint for inquiry, and directed the CRA to provide contact details for CLS.
23. On November 7, 2016, the CRA provided the Tribunal with the contact details for CLS.
24. On November 24, 2016, the Tribunal wrote to CLS, informing it of the complaint and giving it an opportunity, pursuant to section 30.17 of the *CITT Act*, to request intervener status. CLS requested intervener status on November 25, 2016, and was granted that status by the Tribunal on November 28, 2016.
25. On November 29, 2016, the CRA filed its Government Institution Report (GIR) with the Tribunal. The GIR contained an affidavit sworn by one of the CRA's evaluators, setting out the evaluation process followed with regard to the RFP and in relation to MKTG's bid.<sup>13</sup> It also provided the evaluation grids for MKTG's and CLS' bids.<sup>14</sup>
26. On November 30, 2016, noting a delay in forwarding the complaint to the intervener and acting in the interest of procedural fairness, the Tribunal extended the deadline of MKTG and CLS with regard to the filing of comments on the GIR and, pursuant to paragraph 12(c) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>15</sup> extended the deadline for the issuance of its determination to 135 days from the filing of the complaint.
27. On December 14, 2016, CLS filed its comments on the GIR with the Tribunal.
28. On December 19, 2016, MKTG's public and confidential comments on the GIR were filed with the Tribunal and served on the parties.<sup>16</sup> MKTG's comments on the GIR contained transcripts of the cross-examination of the affiant whose affidavit was included in the GIR.<sup>17</sup>
29. On December 20, 2016, the CRA wrote to the Tribunal, asserting that MKTG had raised new grounds of complaint in its comments on the GIR, in particular grounds related to the evaluation process and

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12. Exhibit PR-2016-041-01B at 3, Vol. 1.

13. Exhibit PR-2016-041-11, Annex A, Vol. 1A.

14. *Ibid.*, tabs 1, 2 and 22.

15. S.O.R./93-602 (*Regulations*).

16. On December 14, 2016, MKTG submitted confidential comments on the GIR that did not comply with the Tribunal's requirements for confidential documents. MKTG acknowledged this but indicated that it wished to discuss the confidentiality of certain information with opposing counsel before submitting compliant confidential and public versions. On December 15, 2016, the Tribunal informed MKTG that it could not consider the non-compliant confidential documents as properly filed and gave MKTG until noon on December 19, 2016, to file properly formatted public and confidential documents, subsequent to which the Tribunal would consider any requests to make confidential information public, as necessary. On December 16, 2016, the CRA advised the Tribunal that it had not been served with a copy of the (deficient) comments on the GIR. On December 19, 2016, MKTG filed its public and confidential comments on the GIR and served public versions on the CRA and on CLS. The Tribunal forwarded the confidential comments on the GIR to the other parties.

17. Exhibit PR-2016-041-14, Exhibit 1, Vol. 1.

the security status of CLS' employees.<sup>18</sup> Accordingly, the CRA requested the Tribunal not to consider these grounds.

30. On December 21, 2016, CLS wrote to the Tribunal, essentially making the same submissions as the CRA, namely that MKTG had raised new grounds of complaint in its comments on the GIR, which the Tribunal should refuse to consider.<sup>19</sup>

31. On December 23, 2016, MKTG responded that the CRA and CLS had mischaracterized its original grounds of complaint and that its comments on the GIR did not include new grounds. MKTG noted that the CRA had not objected to questions related to these grounds during the cross-examination of a CRA official. Further, MKTG submitted that the CRA could not object to it making additional arguments based on information contained in the GIR, particularly when the CRA had previously refused to provide it with the evaluation grid.<sup>20</sup>

32. On December 28, 2016, the CRA again wrote to the Tribunal, in this instance asserting that MKTG's comments regarding the paucity of its disclosure constituted a new issue; noting that the *AIT* provides no obligation for a debriefing when a bidder is not awarded a contract; and arguing that MKTG had been provided with extensive and precise information as to why its bid was unsuccessful.<sup>21</sup>

33. On December 29, 2016, the Tribunal wrote to the parties to indicate that, further to subsection 30.14(1) of the *CITT Act*, it would limit its consideration to the subject matter of the complaint filed by MKTG and, as such, that it would not entertain any additional submissions on the question of the characterization of the grounds of complaint.<sup>22</sup>

## POSITIONS OF PARTIES

### MKTG

34. MKTG submitted that "... it was obvious and common knowledge in the translation industry that CLS Lexi-tech could not have met the mandatory requirements of having 25 qualified in-house translators to complete the CRA's translation work as per the RFP".<sup>23</sup> According to MKTG, the inability of CLS to meet the mandatory requirements of the RFP was "almost certainly evident on the face of the bid".<sup>24</sup> Further, MKTG stated that, within three hours of being advised by the CRA that it had been awarded the contract, CLS sent an e-mail to one of MKTG's senior translators, attempting to induce her to leave her employment with MKTG.<sup>25</sup>

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18. Exhibit PR-2016-041-19, Vol. 1C. The CRA requested in the alternative that it be allowed to make further submissions on the grounds of complaint it asserted were new.

19. Exhibit PR-2016-041-20, Vol. 1C. CLS also requested in the alternative that it be allowed to "respond properly" to the grounds of complaint it asserted were new. Further, CLS indicated that, as it was not notified of the cross-examination of one of the CRA's evaluators by MKTG, it reserved the right to also examine that evaluator.

20. Exhibit PR-2016-041-21, Vol. 1C.

21. Exhibit PR-2016-041-22, Vol. 1C.

22. Exhibit PR-2016-041-23, Vol. 1C. In addition, the Tribunal utilized Rule 6 of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499, in concluding that the examination of the CRA's evaluator is not a right possessed by CLS and is not necessary with regard to the resolution of this complaint.

23. Exhibit PR-2016-041-01 at para. 13, Vol. 1.

24. *Ibid.* at para. 78.

25. *Ibid.* at para. 15.

35. Relying on the Supreme Court of Canada's jurisprudence in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*,<sup>26</sup> MKTG took the position that, for the CRA, "...having knowledge or intentionally turning a blind eye leads to the same violations and consequences. The fact that the bidder claimed to comply is not relevant, as such would have the effect of privileging form over substance...".<sup>27</sup> Therefore, since the CRA either knew or ought to have known that it was awarding the contract to a non-compliant bidder, MKTG argued, such an act or omission would be in contravention of Article 506(6) of the *AIT*, which states as follows:

In evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, transition costs, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504.<sup>28</sup> The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.

36. MKTG also submitted that it was "highly unusual" that all three of its references were unable to confirm that they had been contacted by the CRA. As MKTG put it, "[c]ommon sense dictates that a structured interview for an important contract would be something that a person would typically recollect".<sup>29</sup> As the CRA would not grant MKTG access to the evaluators' notes related to its bid, MKTG argued that an inquiry was necessary to test the evidence of the three references. MKTG also raised the concern that the CRA may have subsequently attempted to unduly influence the views of the references.

37. As well, MKTG submitted that "irrespective of the issue of the CRA not contacting the references at the relevant time", the CRA had applied the evaluation criteria in a subjective manner that was inconsistent with the criteria set out in the RFP, giving rise to concerns that bidders had not been treated equally.<sup>30</sup> According to MKTG, the "... process alleged to have been followed in this case allows for an unreasonable or discriminatory exercise of discretion on the part of the evaluators."<sup>31</sup>

38. MKTG referred to the CRA's October 17, 2016, letter in which it is stated that the evaluators, and not MKTG's references, scored MKTG's work on the three translation projects.<sup>32</sup> In addition, MKTG referred to the fact that, on two occasions, the CRA had corrected its explanation regarding the number and identity of the evaluators who had contacted MKTG's references.<sup>33</sup> MKTG once again noted that the CRA had denied it access to the evaluators' notes related to its bid, which would have allowed for an assessment of the evaluation process utilized by the CRA.<sup>34</sup>

39. In its comments on the GIR, MKTG raised a fourth ground of complaint, namely that CLS was not compliant with the RFP in that its bid had failed to include information on how it would meet the security

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26. [2010] 1 S.C.R. 69 (CanLII).

27. Exhibit PR-2016-041-01 at para. 82, Vol. 1.

28. It should be noted that Article 504 sets out the reciprocal non-discrimination provisions of the *AIT*.

29. Exhibit PR-2016-041-01 at para. 54, Vol. 1.

30. *Ibid.* at para. 62.

31. *Ibid.* at para. 69.

32. *Ibid.* at paras. 62, 63, 67 and 68. Notably, MKTG also stated that the CRA indicated in its October 17, 2016, letter that evaluators asked "a series of questions" of the references, something MKTG asserted cannot be done as the evaluation criteria contained in Appendix 2 of Part 6 of the RFP are very narrow. However, the Tribunal is unable to find any indication in that letter that a "series of questions" were asked. Rather, the letter indicates that each "... reference was asked the questions as they appear on page 29 of the RFP...".

33. Exhibit PR-2016-041-01 at paras 56 and 57, Vol. 1.

34. *Ibid.* at para. 65.

requirement set out in Part 6 of the RFP prior to the award of the resulting contract. The Tribunal notes that the latest date on which MKTG could have become aware of this ground of complaint was November 30, 2016, being the date of the transmittal of the confidential version of the CRA's GIR. Pursuant to section 6 of the *Regulations*, it was incumbent on MKTG to raise the ground of complaint within ten working days from that date; thus, no later than December 14, 2016. As the ground of complaint was raised on December 19, 2016, the Tribunal finds this ground to be untimely.<sup>35</sup>

### Canada Revenue Agency

40. According to the CRA, MKTG did not provide any evidence to support its claim that it was obvious and common knowledge in the translation industry that CLS could not have met the mandatory requirement of the RFP of having a minimum of 25 in-house qualified translators.<sup>36</sup> In addition, the CRA argued that well-established jurisprudence supports the proposition that a government institution is entitled to rely on the information included in submitted proposals.<sup>37</sup> Further, the CRA made reference to Part 4.1 of the RFP, which provides in part that

[t]he Bidder should not assume that the evaluation team is necessarily cognizant of or knowledgeable about the experience and capabilities of the Bidder or any of the proposed resource(s); as such, any relevant experience must be demonstrated in the Bidders' written proposal.

41. As for MKTG's claim that CLS had attempted to induce one of MKTG's senior translators to leave her employment with MKTG, the CRA noted that the e-mail sent by CLS—through the professional networking site LinkedIn—did not specify a project, describe the needs of CLS, or request a resume. For these reasons, the CRA asserted that the e-mail represents mere speculation rather than proof of an inducement.<sup>38</sup>

42. Further, relying on Tribunal jurisprudence, the CRA took the position that any material information brought to its attention after the award of the resulting contract—such as information regarding the alleged non-compliance of CLS—is information that falls beyond the ambit of the “procurement process” as defined by section 30.11 of the *CITT Act* as well as Article 514(2) of the *AIT* and, as such, is information related to contract administration, which falls beyond the Tribunal's statutory remit.<sup>39</sup>

43. With regard to the claim that the CRA's evaluators had failed to conduct reference checks, the CRA supplied e-mail correspondence showing that its evaluators had set up the reference checks. The CRA also submitted correspondence from MKTG's three references, in which each, essentially upon further

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35. Further, the Tribunal observes that a clear distinction exists between requirements that form part of the solicitation process and those that form part of the resulting contract. Unless solicitation documents explicitly indicate otherwise, the latter are not subject to the trade agreements and are thus not reviewable by the Tribunal. See *Tyco Electronics Canada ULC* (21 March 2014), PR-2013-048 (CITT).

36. Exhibit PR-2016-041-11 at para. 2, Vol. 1A.

37. *Ibid.* at para. 54. The CRA made reference to paragraph 31 of the Tribunal's decision in *Paul Pollack Personnel Ltd. o/a The Pollack Group Canada* (23 September 2013), PR-2013-016 (CITT) [*Paul Pollack*]: “Even if the RFS required resources to be available, the Tribunal notes that, in the absence of any further indication in the RFS regarding how that criteria would be assessed or evaluated, DFATD would be entitled, at the point of bid evaluation and contract award, to rely on representations made by Maplesoft with regard to the availability of its proposed resources.”

38. Exhibit PR-2016-041-11 at paras. 61-63, Vol. 1A.

39. *3202488 Canada Inc. o/a Kinetic Solutions* (3 March 2011), PR-2010-089 (CITT) at para. 19; *Airsolid Inc.* (12 March 2010), PR-2009-089 (CITT) at para. 16.

reflection, remembers being contacted with regard to the reference checks.<sup>40</sup> The CRA noted that MKTG was aware of correspondence from at least two of its references prior to the filing of its complaint but that it had not included this correspondence in its complaint.<sup>41</sup>

## CLS

44. In its comments on the GIR, CLS mirrored the position taken by the CRA, namely that MKTG's complaint concerned only the two grounds of complaint, namely, of the CRA not having contacted MKTG's references and of CLS not being compliant with the requirements of the RFP.

45. With regard to the first ground, CLS effectively repeated the submissions made by the CRA—that various correspondence exists that supports the conclusion that MKTG's references were not only contacted, but that they also remember being contacted, and that MKTG was aware of the existence of this correspondence prior to filing its complaint.

46. As for the second ground, CLS supplied detailed information regarding the number of translators in its employ. In addition, CLS noted that the number of employed translators it proposed in its bid, which formed part of the confidential version of the CRA's GIR, was substantially higher than the 25 required by the RFP. In support of its assertions, CLS provided an affidavit by a one of its senior managers and, further, indicated to the Tribunal that it would be pleased to provide copies of the written employment contracts of the translators it proposed in its bid.

47. In response to MKTG's claim that CLS had attempted to induce one of MKTG's senior translators to leave her employment with MKTG, CLS indicated that its hiring practices are not typically targeted towards specific individuals. Rather, according to CLS, a notice is posted on various sites, including LinkedIn, and interested candidates are then invited to submit detailed expressions of interest.

## TRIBUNAL ANALYSIS

### Characterization of Grounds of Complaint

48. In view of the parties' submissions on what constitute the grounds of complaint in this inquiry, prior to undertaking its analysis of the complaint itself, the Tribunal must first determine what are the grounds of complaint.

49. All parties agree that MKTG's complaint consists of at least two grounds, namely that the CRA had awarded the contract to a non-compliant bidder and had failed to contact MKTG's references. The Tribunal concurs that these are valid grounds and will address them later in this decision.

50. However, as described above, both the CRA and CLS submitted that MKTG had introduced new grounds of complaint in its comments on the GIR and that the Tribunal should not consider those grounds.

51. The CRA relied upon the Tribunal's decisions in *Lanthier Bakery Ltd. v. Department of Public Works and Government Services*<sup>42</sup> and in *Storeimage v. Canadian Museum of Nature*.<sup>43</sup> According to the

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40. Exhibit PR-2016-041-11, tabs 8, 9 and 10, Vol. 1A.

41. It appears that two of the three references had written to MKTG, while there was a verbal discussion with the third reference. Exhibit PR-2016-041-11, tabs 8, 9 and 10, Vol. 1A.

42. (6 May 2015), PR-2014-047 (CITT) [*Lanthier*].

43. (18 January 2013), PR-2012-015 (CITT) [*Storeimage*].

CRA, in those decisions, the Tribunal made clear that complainants cannot change the subject matter of a complaint or make additions thereto subsequent to the Tribunal's decision to conduct an inquiry. In this regard, the CRA took the position that MKTG's complaint, as filed, contained just two grounds: that CLS could not have been compliant with the requirements of the RFP, and that the CRA did not contact MKTG's references.<sup>44</sup> CLS echoed these arguments in its submissions.<sup>45</sup>

52. MKTG responded by highlighting where in its complaint it had raised the issue of the subjectivity of the evaluation.<sup>46</sup> MKTG also argued that *Lanthier* and *Storeimage* are distinguishable from the case at hand, as they relate, respectively, to instances where the complainant raised a breach of a different trade agreement or made allegations with respect to a different part of the proposal at issue. MKTG further argued that it was entitled to raise new arguments supportive of its existing grounds of complaint based on evidence disclosed to it for the first time in the GIR, especially since some of that evidence was its own evaluation sheets, which it alleged were improperly withheld from it at the debriefing.<sup>47</sup>

53. On the basis of its reading of MKTG's complaint, the Tribunal is of the view that the issue of whether the CRA followed a subjective process in evaluating the bids is a valid ground as MKTG clearly made reference to this ground in its complaint. Specifically, this ground of complaint was raised in paragraphs 62-72 of the complaint,<sup>48</sup> where MKTG stated, in reference to the evaluation of the point-rated criteria for the Corporate Maturity references, that "the limited information provided [by the CRA] to date is sufficient to establish a concern that the criteria set out in the RFP were [not] followed", and that "the subjective nature of the CRA's approach to R1 also gives rise to concerns that the bidders were not treated equally."<sup>49</sup>

54. The Tribunal observes that, in its comments on the GIR, MKTG was able to provide additional corroboration for this ground of complaint by relying on information disclosed in the CRA's GIR. While section 7 of the *Regulations* requires that complainants submit enough evidence to make out a *prima facie* case,<sup>50</sup> they are not precluded from relying on information gleaned during the inquiry as evidence for the additional support of that case. This non-preclusion is of substantial importance as the procurement review process is a fact-finding process in and of itself.

55. Further, the Tribunal observes that some of the information used as additional corroboration by MKTG—contained in the evaluation notes related to its bid—is information that fairness and transparency dictates should have been provided to it during its debriefing. While the CRA is correct in its assertion that the *AIT* provides no obligation for a debriefing, the Tribunal notes that clause 1.4 of the RFP indicates that bidders may request a debriefing. Further, buyandsell.ca, the Government of Canada's portal for potential bidders, indicates that "in accordance with *Treasury Board Contracting Policy* and the various trade agreements, every supplier has the right to request a debriefing".<sup>51</sup> Sub-clause 10.8.21 of the *Treasury Board Contracting Policy* states the following:

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44. Exhibit PR-2016-041-19, Vol. 1C.

45. Exhibit PR-2016-041-20, Vol. 1C.

46. The Tribunal dealt above with the issue of CLS' failure to comply with the security requirement.

47. Exhibit PR-2016-041-21, Vol. 1C.

48. MKTG also raised the issue of the subjectivity of the evaluation process when it completed the Tribunal's complaint form in response to the question on the "Basic nature of the complaint".

49. Exhibit PR-2016-041-01 at para. 72, Vol. 1.

50. *Paul Pollack* at paragraph 27.

51. <https://buyandsell.gc.ca/debriefings>. Clause 3 of the *Treasury Board Contracting Policy* indicates that it applies to departments and departmental corporations so designated for the purposes of the *Financial Administration Act*.

Debriefings should be provided to unsuccessful bidders on request and should normally include an outline of the factors and criteria used in the evaluation, while respecting each bidder's right to the confidentiality of specific information.

56. The question of confidentiality is not relevant in an instance in which a bidder is requesting documentation—such as evaluators' notes—pertaining to the evaluation of its *own* bid. Further, it is not acceptable to suppose that the reference to “factors and criteria” is fulfilled by a restatement, at the debriefing, of the criteria set out in an RFP. Rather, a debriefing must fulfill the objective of assuring unsuccessful bidders of the integrity of the procurement process.

### **CLS Was Non-Compliant**

57. Turning to the first ground of complaint, the Tribunal agrees with the CRA that MKTG's assertion—that it is obvious and common knowledge in the translation industry that CLS could not have met the mandatory requirements of the RFP—is unsubstantiated. In comparison, CLS supplied detailed and compelling information regarding its ability to meet the mandatory requirements of the RFP.

58. Additionally, the Tribunal has consistently held that government institutions are entitled to rely on the information included in submitted bids.<sup>52</sup> Contrary to MKTG's assertion, this approach is not in contravention of Article 506(6) of the *AIT*. While that article states that a government institution “may” take into account the capacity of a supplier to meet the requirements of the procurement, it distinguishes between the permissive and the obligatory by going on to indicate that solicitation documents “shall” clearly identify the criteria to be used in the evaluation of bids, and the methods of weighting and evaluating those criteria.

59. The Tribunal does not agree that *Tercon* is applicable in this instance. In that matter, the procuring entity “. . . took active steps to obscure the reality of the situation”.<sup>53</sup> No such behaviour occurred in this instance.

60. Finally, the Tribunal was presented with no evidence that could allow it to find any nexus between CLS having approached one of MKTG's employees and a violation of the trade agreements.

61. The Tribunal finds that this ground of complaint is not valid.

### **The CRA Did not Contact MKTG's References**

62. With regard to the second ground of complaint, the Tribunal notes that the claim that the CRA did not contact MKTG's references has been successfully rebutted by the CRA and, in fact, was retracted by MKTG. In its comments on the GIR, MKTG explained that it had included the claim in its complaint because it was unable to take as a mere coincidence the fact that each reference initially indicated an inability to verify being contacted, but later changed that indication. MKTG explained that it feared that the CRA may have unduly influenced the evidence of its references and noted that it indicated as such in

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See <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14494>. Schedule II of the *Financial Administration Act* designates the CRA as a departmental corporation. See <http://laws-lois.justice.gc.ca/eng/acts/f-11/>. Thus, the CRA is covered by the *Treasury Board Contracting Policy*.

52. *Paul Pollack* at para. 31.

53. *Tercon* at para. 40.



paragraph 53 of its complaint. MKTG has spoken to its references subsequent to the commencement of this inquiry and has satisfied itself that their initial inability to verify being contacted was indeed coincidental.<sup>54</sup>

63. The Tribunal finds that this ground of complaint is not valid.

### The Evaluation Process Was Subjective

64. Concerning the third ground of complaint, the Tribunal has consistently held that government institutions are responsible for evaluating the compliance of bids with the requirements of a solicitation strictly and thoroughly.<sup>55</sup> In considering whether or not this standard has been met, the Tribunal applies the standard of reasonableness, according a large measure of deference to evaluators absent a demonstration that their evaluation was unreasonable. An unreasonable evaluation is one in which the evaluators have not applied themselves, have ignored vital information contained in a bid, have wrongly interpreted the scope of a requirement, have utilized undisclosed criteria, or have otherwise not acted in a procedurally fair manner.<sup>56</sup>

65. MKTG alleged that the CRA introduced subjectivity in the evaluation process and thus relied on undisclosed evaluation criteria in conducting the reference checks.<sup>57</sup> The Tribunal finds that the CRA did in fact undertake the reference checks in a manner that did not comply with the stated evaluation criteria.

66. The evidence contained in the affidavit filed as Annex 1 to the CRA's GIR states the following:

4. Each evaluator completed an "Individual Scoring Grid". . . . Then, the evaluators met and, using their Individual Scoring Grids, completed a "Consensus Scoring Grid".

. . .

8. . . . We spoke with [a reference] and his colleague [a non-reference] of the CRA on July 6<sup>th</sup>, 2016 around 9:30am.<sup>58</sup> . . .

9. . . . When the reference seemed unsure as to their choice between two numbers, we offered the option to give a half-point (ie. 3.5 or 4.5). In all three cases, Masha Krupp's references gave them a score of 4 out of 5. . . .

[Emphasis added]

67. The Tribunal finds that this evidence demonstrates that the CRA evaluators acted improperly by involving a non-reference in the exercise.<sup>59</sup> They further altered the integrity of the exercise by prompting half-point answers when conducting reference checks when the option to award half points was clearly not

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54. Exhibit PR-2016-041-14 at paras. 87-94, Vol. 1B.

55. Reference can be made to *Survival Systems Training Limited v. Department of Public Works and Government Services* (3 September 2015), PR-2015-010 (CITT) [*Survival Systems*]; *IBM Canada Ltd.* (5 November 1999), PR-99-020 (CITT); and *Secure Computing LLC v. Department of Public Works and Government Services* (23 October 2012), PR-2012-006 (CITT).

56. Reference can be made to *Joint Venture of BMT Fleet Technology Limited and NOTRA Inc.* (5 November 2008), PR-2008-023 (CITT); and *Access Corporate Technologies Inc. v. Department of Transport* (14 November 2013), PR-2013-012 (CITT).

57. Exhibit PR-2016-041-01 at paras. 3, 40, 62 and 66, Vol. 1.

58. While the names of the individuals in this paragraph are in the public version of the GIR, the Tribunal has decided to exercise discretion and exclude the names from these reasons. The names are inconsequential with regard to the outcome of this procurement inquiry.

59. This fact is also contained in the evaluators' notes pertaining to MKTG's bid.

provided for by the RFP. In fact, the evaluation grids show that CLS was awarded a half-point, whereas MKTG was not.<sup>60</sup> Further, there is conflicting evidence as to whether all references were given the opportunity to provide half-points.<sup>61</sup>

68. The Tribunal finds that the awarding of half-points resulted in an impermissible translation of the references' numerical satisfaction rating (on a scale of 0 to 5) into a final score (on a scale of 0 to 6). Instead, the evaluator's subjective discretion was used to arrive at the final score.

69. All these actions compromised the evaluation beyond repair.

70. As such, the Tribunal finds that MKTG's third ground of complaint is valid.

## REMEDY

71. Having found the complaint to be valid, in part, the Tribunal must now recommend the appropriate remedy.

72. In determining the appropriate remedy, the Tribunal must consider all the circumstances relevant to the procurement, as set out in subsection 30.15(3) of the *CITT Act*. This includes taking into account the seriousness of any deficiency in the procurement process, the degree to which the complainant was prejudiced, the degree to which the integrity and efficiency of the competitive procurement system was prejudiced, whether the parties acted in good faith, and the degree to which the contract has been performed.

73. As noted above, MKTG requested as a remedy that the contract with CLS be terminated and that the contract be awarded to MKTG. In the alternative, MKTG requested that it be compensated for its anticipated lost profits over the term of the contract. In the further alternative, MKTG requested that a new solicitation be issued, or that the bids be re-evaluated.

74. The CRA and CLS did not make any submissions on the issue of remedy.

75. The Tribunal cannot accept MKTG's assertion that it would have been awarded the contract if the reference checks had been conducted properly. The uncertainty introduced into the scoring by the CRA's subjective approach to the reference checks has made it impossible for the Tribunal to conclude that MKTG would in fact have been awarded more points than CLS.<sup>62</sup> Accordingly, the Tribunal cannot award MKTG the contract.

76. However, the Tribunal considers the CRA's failures during the reference-check portion of the evaluation to be serious. The Tribunal is satisfied that there is no evidence that forethought or bias animated this behaviour. Rather, this appears to be a case in which evaluators took impermissible liberty with the task they were given to accomplish. To be sure, the evaluators may have benefitted from greater guidance for this step of the evaluation process. The Tribunal stresses that reference checks must be done with the same attention to fairness and adherence to formality as all steps of an evaluation process. Because this was not done in this instance, the Tribunal cannot but underscore the resultant compromise to the integrity of the evaluation as a whole.

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60. Exhibit PR-2016-041-11, tab 2 at 10, Vol. 1A; *Ibid.*, tab 22 at 10.

61. Exhibit PR-2016-041-14B, tab 2 at para. 13, Vol. 1B; *Ibid.*, tab 1 at paras. 699-701.

62. It is obvious math that MKTG would have received a higher total technical score than CLS *if* it had received full marks for the first point-rated criterion. The issue the Tribunal faces is that it is entirely speculative what score MKTG would have received if the CRA had conducted the reference checks properly.

77. Accordingly, the Tribunal recommends that the CRA retender the procurement that is the subject of this complaint, in accordance with the applicable trade agreements, as soon as is operationally possible. As the total term of the contract, including irrevocable option periods, extends to seven years, the Tribunal considers that the contract has not been substantially performed and that CLS will not suffer undue prejudice from its cancellation.

78. In order to ensure that the CRA does not experience undue disruption to its operations, as translation services are necessary for the day to day operation of any government department, the Tribunal also recommends that the current contract remain with CLS until the retendering is complete and a new contract is awarded.

79. In light of the fact that the contract will remain with CLS for a certain period, despite the fact that it was awarded in breach of the trade agreements, the Tribunal also recommends that MKTG receive compensation. This is in line with the fundamental principle, expressed in the Tribunal's *Procurement Compensation Guidelines*, that 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.<sup>63</sup>

80. Compensation may be awarded in the form of lost profits or lost opportunity.<sup>64</sup> Although MKTG has requested compensation in the form of lost profits, the Tribunal will generally only award lost profits where it is clear that the complainant would have been awarded the contract but for the government institution's breach of the trade agreements.<sup>65</sup> In this instance, due to the uncertainty introduced into the scoring process by the CRA's approach to the reference checks, the Tribunal cannot determine whether MKTG would have been awarded the contract.

81. 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 the complainant be compensated for its lost opportunity.<sup>66</sup> In this case, it is possible that MKTG would have won the contract but for the government's breach of the trade agreements. The CRA's approach to the scoring of the references effectively deprived MKTG of its opportunity to profit from the contract. Accordingly, MKTG should be compensated for its lost opportunity to profit from the contract during the period that CLS is performing the contract, i.e. from the date of contract award until the retendering process is complete.

82. MKTG requested, in the further alternative, that the Tribunal recommend that the bids be re-evaluated. The Tribunal does not consider this an appropriate remedy in this instance. First, there is insufficient information in the evaluators' notes of their discussions with references that would allow the CRA to re-evaluate the bids properly according to the criteria set out in the RFP. Further, in one instance,

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63. *Procurement Compensation Guidelines* at para. 3.1.2; *PTI Services* (28 November 2001), PR-2001-027 (CITT) at 3 [*PTI Services*].

64. *Procurement Compensation Guidelines* at paras. 3.1.4 and 3.1.5.

65. *Cifelli Systems v. Department of Public Works and Government Services* (5 May 2008), PR-2007-084 (CITT); *Bureau d'études stratégiques et techniques en économique v. Canadian International Development Agency* (4 June 2009), PR-2007-010R and PR-2007-012R (CITT); *Neosoft Technologies Inc. v. Department of Public Works and Government Services* (5 August 2009), PR-2008-061 (CITT).

66. *ZENON Environmental Inc.* (10 June 2003), PR-2002-015R (CITT); *ADRM Technology Consulting Group Corp. v. Department of National Defence* (16 December 2016), PR-2016-024 (CITT) at para. 57; *PTI Services* at 4; *Huron Consulting* (10 February 2003), PR-2002-037 (CITT) at 8.

the evaluator's notes are based on discussions with both a reference and a non-reference; it is impossible to determine what score MKTG would have received if only the reference had participated in the discussion. .

83. In calculating compensation for lost opportunity, the Tribunal will take the profits that a complainant would have earned on a contract and divide it by the number of potential bidders. In doing so, the aim is to quantify the value of the opportunity lost as a result of the government's breach, as opposed to providing a windfall to the complainant.

84. In this case, only two bidders (MKTG and CLS) submitted responsive bids. A third bidder apparently submitted a bid that was non-responsive.<sup>67</sup> The Tribunal cannot determine, from the evidence currently on file, whether this third bidder was eliminated from consideration based on a failure to fulfill the mandatory criteria or to achieve the required 70% pass rate for the point-rated criteria; if the latter, then it is possible that this bidder was also affected by the deficiencies in the reference check process.

85. Accordingly, MKTG should be compensated for its lost opportunity in the amount of the profit that it would reasonably have made during the time that CLS holds the current contract and until the retendering is complete, divided by the number of bidders that were compliant with the mandatory criteria.

86. The amount of compensation is to be negotiated between the parties. The Tribunal recognizes that it may not be possible for the parties to agree on the amount of compensation until the retendering process is complete, as the length of time during which CLS performs the contract could affect the amount. Nevertheless, the Tribunal wishes to remain apprised of the parties' progress in the negotiations. Accordingly, the Tribunal requests that the parties provide, within 40 days of the date of this determination, an approximate schedule of the timeframe for retendering the procurement and completing the negotiations. If the parties reach agreement on the amount of compensation, they will notify the Tribunal of their agreement. If the parties are unable to agree on the amount of compensation, they may make submissions to the Tribunal regarding the appropriate amount of compensation.

## COSTS

87. MKTG requested its bid preparation and complaint costs. The CRA claimed that MKTG's complaint was frivolous and misleading; accordingly, it requested its complaint costs beyond the level usually imposed by the Tribunal.

88. With respect to MKTG's claim for bid preparation costs, the Tribunal has previously held that bid preparation costs are generally not awarded if compensation for lost profits or lost opportunity is recommended, as this would compensate the complainant twice for the same costs.<sup>68</sup> The Tribunal sees no special circumstances in this case that would warrant awarding MKTG its bid preparation costs. Further, MKTG will likely be able to reuse large portions of its bid when the solicitation is retendered.

89. With respect to the parties' claims for complaint costs, the Tribunal notes that the complaint is valid in part only; therefore, both parties would normally be entitled to recover partial costs. However, both parties have engaged in conduct that significantly and unnecessarily complicated these proceedings.

90. As discussed above in the section regarding the characterization of the grounds of complaint, the CRA's decision to withhold MKTG's own evaluation grids during the debriefing, and to disclose them only

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67. Exhibit PR-2016-041-01B at 1, Vol. 1; Exhibit PR-2016-041-11 at para. 15, Vol. 1B; Exhibit PR-2016-041-01, Exhibit 6, Vol. 1.

68. *Canyon Contracting v. Parks Canada Agency* (19 September 2006), PR-2006-016 (CITT) at para. 31; *IBM Canada Ltd.* (7 September 2000), PR-99-020 at 3.

when it filed the GIR, deprived MKTG of the ability to fully formulate its arguments in the complaint, and complicated the Tribunal's proceedings as the Tribunal had to consider the matter of whether MKTG had raised new grounds of complaint.

91. On the other hand, it is apparent from the record that MKTG clearly knew, before it filed its complaint, that at least two of the three references it alleged had not been contacted by the CRA had, in fact, confirmed that they had been contacted.<sup>69</sup> While the Tribunal accepts that MKTG's complaint on this ground was not frivolous or vexatious, as it was concerned that the references' recollections may have been unduly influenced by the CRA, the correspondence from the references indicating that they did recall being contacted should have been disclosed to the Tribunal in the complaint.

92. Accordingly, due to the conduct of the parties, the Tribunal will not award costs to either party to these proceedings.

### **DETERMINATION OF THE TRIBUNAL**

93. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal finds that MKTG's complaint is valid in part.

94. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that the CRA retender the procurement that is the subject of this complaint, in accordance with the applicable trade agreements, as soon as is operationally possible. The Tribunal also recommends that the current contract remain with CLS until such time as the retendering is complete and a new contract is awarded.

95. In addition, the Tribunal recommends that MKTG be compensated for lost opportunity in the amount of the profit that it would reasonably have made during the time that CLS holds the current contract and until such time as the retendering is complete, divided by the number of bidders that were compliant with the mandatory criteria.

96. The amount of compensation is to be negotiated between the parties. The parties will provide the Tribunal, within 40 days of the date of this determination, an approximate schedule of the time frame for retendering the procurement and completing the negotiations. If the parties reach agreement on the amount of compensation, they will notify the Tribunal of their agreement. If the parties are unable to agree on the amount of compensation, they may make submissions to the Tribunal regarding the appropriate amount of compensation. The Tribunal reserves jurisdiction to establish the final amount of compensation.

97. Each party will bear its own costs.

Rose Ritcey  
Rose Ritcey  
Presiding Member

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69. Exhibit PR-2016-041-11, tabs 8, 9 and 10, Vol. 1A. The e-mail from the third reference recalling that she had been contacted is dated November 25, 2016, which is after the complaint was filed, but confirms that she had verbally confirmed this to MKTG before the complaint was filed.