



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File No. PR-2008-011

144314 Canada Inc./Nexys

v.

Department of Human Resources  
and Social Development

*Determination and reasons issued  
Thursday, July 24, 2008*

**TABLE OF CONTENTS**

DETERMINATION OF THE TRIBUNAL.....i

STATEMENT OF REASONS ..... 1

    PROCUREMENT PROCESS..... 1

    BACKGROUND..... 2

        Nexys..... 4

        HRSDC ..... 5

    TRIBUNAL’S ANALYSIS..... 6

CONCLUSION..... 10

    Remedy..... 10

    Costs ..... 11

DETERMINATION OF THE TRIBUNAL ..... 12

IN THE MATTER OF a complaint filed by 144314 Canada Inc./Nexys under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

**BETWEEN**

**144314 CANADA INC./NEXYS**

**Complainant**

**AND**

**THE DEPARTMENT OF HUMAN RESOURCES AND SOCIAL  
DEVELOPMENT**

**Government  
Institution**

**DETERMINATION OF THE TRIBUNAL**

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

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 Department of Human Resources and Social Development, within 30 days of the publication of this determination, re-evaluate the proposal submitted by 144314 Canada Inc./Nexys using the weighted criteria method and, if possible, by the initial evaluation team. The Canadian International Trade Tribunal further recommends that, in accordance with the evaluation plan regarding requirement M-3, 144314 Canada Inc./Nexys be considered to have provided sufficient proof that it was in business before January 2002.

If 144314 Canada Inc./Nexys's proposal turns out to be one of the three winning proposals, the Canadian International Trade Tribunal recommends that the Department of Human Resources and Social Development either award 144314 Canada Inc./Nexys a contract or compensate it for lost profits in being deprived of the contract. The basis for calculating the lost profits will be the price bid by 144314 Canada Inc./Nexys in the proposal that it submitted in response to Solicitation No. 9606-07-0007. In that event, the Canadian International Trade Tribunal recommends that the parties develop a joint proposal for compensation to be presented to the Canadian International Trade Tribunal within 60 days of the date of the publication of this determination. Should the parties be unable to agree on the amount of compensation, each party shall file a report with the Canadian International Trade Tribunal within the same 60-day period, after which the Canadian International Trade Tribunal will make its recommendation on the matter.

If, following the evaluation, 144314 Canada Inc./Nexys's proposal does not obtain the necessary passing mark, the Canadian International Trade Tribunal also recommends that, upon request, the Department of Human Resources and Social Development provide 144314 Canada Inc./Nexys with pertinent information concerning the reasons for not selecting its bid.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards 144314 Canada Inc./Nexys its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by the Department of Human Resources and Social Development. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated by the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Diane Vincent  
Diane Vincent  
Presiding Member

Rose Ritcey  
Rose Ritcey  
Acting Secretary

Tribunal Member: Diane Vincent, Presiding Member

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## STATEMENT OF REASONS

1. On April 25, 2008, 144314 Canada Inc./Nexys (Nexys) 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 the procurement (Solicitation No. 9606-07-0007) by the Department of Human Resources and Social Development (HRSDC) for the provision of translation and revision services in both official languages.

2. Nexys alleged that HRSDC improperly rejected its proposal before the weighted criteria review stage. Nexys specifically alleged that its proposal contained the requested information regarding the date of creation of the company, whereas HRSDC said that it had required a document as proof in this connection and that Nexys failed to include it in its proposal, which led to its proposal being rejected.

3. As a remedy, Nexys requested that HRSDC re-evaluate its proposal based on the weighted criteria, that it re-evaluate the bidders' proposals and that, if required, it terminate the contracts awarded. If applicable, Nexys requested that a new Request for Proposal (RFP) be issued or that it be compensated. It requested its complaint and proposal preparation costs. It also requested that the Tribunal order HRSDC to postpone awarding any contract until the Tribunal determined the validity of the complaint.

4. On May 5, 2008, the Tribunal informed the parties that it had accepted the complaint for inquiry, as it met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>2</sup> It also issued, under subsection 30.13(3) of the *CITT Act*, a postponement of award of contract order pertaining to this procurement until the Tribunal determined the validity of the complaint. On May 16, 2008, HRSDC informed the Tribunal that three contracts had been awarded. On May 20, 2008, the Tribunal rescinded the postponement of award of contract order issued on May 5, 2008. On May 30, 2008, HRSDC filed the Government Institution Report (GIR). Nexys did not submit any comments on the GIR.

5. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on the record.

## PROCUREMENT PROCESS

6. On January 14, 2008, HRSDC made available through MERX<sup>3</sup> an RFP for contracts regarding the provision of translation and revision services in both official languages, with a closing date of February 22, 2008. Three amendments were subsequently made to this RFP. According to HRSDC, 10 proposals were received, including the one from Nexys. On April 11, 2008, HRSDC sent a letter to Nexys indicating that its bid had not been selected because it did not meet all the mandatory requirements. The letter stated that, after reviewing the documentation provided, HRSDC had concluded that Nexys had not met mandatory requirement M-3<sup>4</sup> (requirement M-3). That letter also included the names of the three bidders whose proposals had been selected. That same day, Nexys contacted HRSDC to ask for more information and to express its disagreement with the reason cited for summarily rejecting its proposal. It also asked what steps it should take to challenge that decision. On April 18, 2008, Nexys again contacted HRSDC, which then

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

2. S.O.R./93-602 [*Regulations*].

3. Canada's electronic tendering service.

4. RFP at 20.

sent written confirmation of its response of April 11, 2008, namely, that Nexys's proposal had been rejected because it did not meet requirement M-3 and that it therefore had not carried on with the evaluation of the weighted criteria. Nexys then submitted to HRSDC that its proposal contained mention of the date of creation of the company and that the wording of requirement M-3 did not set out any particular document in this connection. It objected to its proposal being rejected for the reason cited.

7. On April 25, 2008, Nexys filed its complaint with the Tribunal.

## BACKGROUND

8. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which in this case is the *Agreement on Internal Trade*.<sup>5</sup>

9. Regarding the evaluation of proposals, Article 506(6) of the *AIT* provides as follows:

... 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.

10. Regarding the complaint, the RFP contained the following provisions:

### SECTION "C"

#### EVALUATION CRITERIA – MANDATORY REQUIREMENTS

##### 1. MANDATORY REQUIREMENTS

...

The mandatory criteria listed below shall be rated as compliant or non-compliant.

**Any proposal that does not satisfy the following mandatory requirements shall be eliminated, shall not be subject to any further consideration and shall be deemed non-responsive.**

To be taken into consideration, the proposals **must** comply with all the following specifications and requirements and **must** contain the relevant documentation demonstrating their compliance. **Bids that fail to take account of any of the points shall be deemed non-responsive and shall not be subject to any further consideration.**

...

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5. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)> [AIT].

**2. MANDATORY EVALUATION CRITERIA**

Requirement Number	Description
...	...
M-3	The Bidder <b>MUST</b> have had a minimum of five full years of experience in the delivery of translation and revision services since 2002. The Bidder shall provide proof of this experience, in a document containing the date of creation of the Company, when submitting the bid.
M-4	These references shall indicate the name of the client, including the name and telephone number of the contact person for each client.  The Bidder <b>MUST</b> provide three references for translation work done during the last five years, since January 2002. Each reference shall include the client's name, including the name and the telephone number of the contact person for each client. The Bidder shall submit a sample of a translation from English to French and a sample of a translation from French to English done for the clients given in reference. Each sample shall consist of two pages.
...	...

**2. CRITÈRES D'ÉVALUATION OBLIGATOIRES**

<i>Numéro de l'exigence</i>	<i>Description</i>
...	...
<i>O-3</i>	<i>Le soumissionnaire <b>DOIT</b> compter un minimum de cinq années complètes d'expérience dans la prestation de services de traduction et de révision depuis l'an 2002. Il devra en fournir la preuve, document renfermant la date de création de la compagnie, lors de la remise de sa soumission.</i>
<i>O-4</i>	<i>Ces références doivent indiquer le nom du client, y compris le nom et le numéro de téléphone de la personne-ressource pour chaque client.  Les soumissionnaires <b>DOIVENT</b> fournir trois (3) références pour des travaux de traduction effectués au cours des cinq (5) dernières années depuis janvier 2002. Chaque référence doit comprendre le nom du client, y compris le nom et le numéro de téléphone de la personne-ressource pour chaque client. Les soumissionnaires doivent fournir un échantillon d'une traduction de l'anglais vers le français et un échantillon d'une traduction du français vers l'anglais effectuées pour les clients donnés en référence. Les échantillons doivent contenir deux (2) pages chacun.</i>
...	...



## SECTION "D"

## EVALUATION CRITERIA – RATED REQUIREMENT

## 1. RATED EVALUATION CRITERIA

Selection Method**Highest Combined Score for Technical Merit (80%) and Price (20%)**

The proposals shall be evaluated according to the criteria set out in "Evaluation Criteria." Only proposals that satisfy all **the mandatory requirements** and obtain a minimum total of 60% in the weighted criteria evaluation shall be considered responsive proposals.

...

## SECTION "F"

CERTIFICATION

...

## 2. BIDDER CERTIFICATION

'We hereby certify that all information provided herein is accurate. Furthermore we have satisfied ourselves that the personnel proposed by us for this requirement are capable of satisfactorily performing the requirement described herein. . . .'

As well, by affixing an authorized Company official signature hereunder, the bidder confirms acceptance in its entirety of the Professional Services Contracting Terms and Conditions applicable to this requirement.

\_\_\_\_\_  
Signature of Authorized Company Official

\_\_\_\_\_  
Date

...

**Nexys**

11. Nexys submitted that, on April 11, 2008, it received a letter<sup>6</sup> by fax from HRSDC informing it that its proposal had been rejected because it did not meet requirement M-3 in the RFP. That letter, written in English, stated the following:

Further to the Department's Request for Proposal for the above-mentioned services, your proposal was deemed non-compliant in meeting all mandatory criteria. Therefore, this is to regrettably inform you that your proposal was not rated as the successful bid. The successful bidders were: RTG Protech Inc., R&R International Translations and Lexi-Tech International Inc.

In our review of the documentation provided, the following mandatory requirement was not met:

**Section C - Mandatory Criteria M-3:**

*The Bidder **MUST** have had a minimum of five full years of experience in the delivery of translation and revision services since 2002. The Bidder shall provide proof of this experience, in a document containing the date of creation of the company, when submitting the bid.*

6. Complaint, exhibit B2.

12. According to Nexys, its complaint is based on a different interpretation of the second sentence in requirement M-3 (in the French version of the RFP), which reads as follows:

Le soumissionnaire **DOIT** compter un minimum de cinq années complètes d'expérience dans la prestation de services de traduction et de révision depuis l'an 2002. *Il devra en fournir la preuve, document renfermant la date de création de la compagnie, lors de la remise de sa soumission.*

[Emphasis added]

13. Nexys argued that this sentence (written in French) is grammatically incorrect and that it interpreted it as follows: "... The Bidder shall provide proof of this experience, **[the]**document containing the date of creation of the company, when submitting the bid"<sup>7</sup>[translation].

14. Nexys argued that it indicated the date of creation of the company three times in its proposal, namely, 1985, and that it certified that the information provided was accurate by placing its official signature on its proposal. It feels that it met requirement M-3 because its proposal contained, in three separate places, an indication of the date of creation of the company.<sup>8</sup> Again according to Nexys, requirement M-3 in no way specified the nature of such a document, nor a separate specific document, that could have been used as proof of the date of creation of the company.

15. Nexys argued that, not only was requirement M-3 subject to interpretation regarding the nature of the document containing the date of creation of the company and how that was to be demonstrated, but it was discriminatory because the translation firm whose services were to be selected under the RFP process could very well have been an individual, for whom the condition regarding the date of creation of the company would not apply.

16. Nexys argued that rejecting its proposal for non-compliance with requirement M-3 was unfounded because its proposal contained, in three separate places, mention of the date of creation of its company. According to Nexys, its proposal should have gone on to the next step, namely, evaluation of the weighted criteria.

17. Nexys did not submit any comments on the GIR.

18. Nexys requested that HRSDC re-evaluate its proposal based on the weighted criteria, that it re-evaluate the bidders' proposals and that, if required, it terminate the contracts awarded. If necessary, Nexys requested that a new RFP be issued or that it be compensated. It requested its complaint and proposal preparation costs.

## HRSDC

19. HRSDC argued that requirement M-3 required that a document "setting out the date of creation of the company"<sup>9</sup> [translation] be attached to the proposal. It gave, as an example, the certificates of incorporation that, it notes, were provided by the three bidders that received contracts. HRSDC argued that Nexys's simple mention of the date of creation of the company three times in its proposal was not sufficient to meet requirement M-3. It submitted that if such a mention were sufficient, it would have been unnecessary to require proof, as indicated in the wording of requirement M-3. It would simply have indicated that the bidder was to state the date of creation of the company in its proposal.

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7. Complaint, exhibit D2.

8. Exhibit B1 (confidential) of Nexys's service proposal at 7, 8, 32; and Annex C—Corporate Profile.

9. GIR, para. 13.

20. HRSDC acknowledged that the French version of requirement M-3 contained a grammatical error. In its view, the words “*dans un*” (in a) should definitely have preceded the word “*document*” that appears in the second sentence of the French version of the requirement.

21. However, according to HRSDC, reading the English version would have provided an immediate understanding that those two words were missing. In short, HRSDC submitted that it was reasonable to understand that a *separate document indicating*<sup>10</sup> [translation] the date of creation of the company was to be sent along with each bidder’s proposal, which, in its view, was understood by the other bidders. HRSDC also alleged that, if Nexys had been of the opinion that the RFP was not clear enough, it could have asked for information from the contracting authority, as stated in the RFP.<sup>11</sup>

22. Regardless of the presence or absence of certification of the date of creation of the company, HRSDC argued that Nexys’s proposal did not allow it to conclude that it had a minimum of five full years of experience in translation and revision *since 2002*. Since the proposal did not allow HRSDC to determine the type and number of contracts completed by Nexys since 2002, HRSDC is of the view that Nexys did not meet requirement M-3 anyway.

23. HRSDC argued that a review of the proposal would also indicate that Nexys had not met mandatory requirement M-4 (requirement M-4). HRSDC argued that Nexys dealt with requirement M-4 in Annex D of its proposal where, according to HRSDC, some necessary information was missing. HRSDC argued that there was nothing suggesting that the translations submitted by Nexys, as requested in requirement M-4, had been done before January 2002 and that there was nothing allowing it to determine whether Nexys had done translations from English to French or from French to English.

24. HRSDC noted that Nexys had provided, in its proposal, only certain parts of the required documents, but that, in its complaint to the Tribunal, it had included the same documents in their entirety. HRSDC argued that, in conducting its inquiry, the Tribunal had to review only the documents that were attached to Nexys’s proposal when it submitted its bid to HRSDC.<sup>12</sup>

25. Consequently, HRSDC argued that, even if the Tribunal were to find that Nexys’s complaint was valid with respect to requirement M-3, it should nevertheless find that Nexys did not meet requirement M-4. For these reasons, HRSDC argued that Nexys’s complaint was not valid.

26. According to HRSDC, even if the complaint were valid with respect to requirement M-3, no remedy should be recommended in this case.<sup>13</sup>

## TRIBUNAL’S ANALYSIS

27. First, the Tribunal points out that it will consider only the documents included in Nexys’s proposal when it was submitted to HRSDC, in their format at that time, and will not take into account other documents containing additional parts that were filed as part of this complaint.

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10. GIR, para. 19.

11. RFP at 6.

12. GIR, Annex C (confidential).

13. *Re Complaint Filed by Hickling Arthurs Low Corporation* (31 March 2004), PR-2003-071 (CITT); *Re Complaint Filed by Siemens Westinghouse Incorporated* (19 March 2001), PR-2000-039 (CITT).

28. In the Tribunal's view, HRSDC's rejection letter and the ensuing correspondence between the two parties show that the reason for rejecting Nexys's proposal was the lack of a document proving the creation of Nexys as a company, as per requirement M-3 in the RFP.

29. In the GIR, HRSDC analyzed Nexys's proposal with respect to its five full years of experience and puts that experience in doubt.<sup>14</sup> The Tribunal is of the view that there is no evidence demonstrating that this point had been reviewed in that way at the time the proposal was initially rejected and that the rejection was instead limited to the absence of a documentary as proof of the date of creation of the company. The Tribunal considers that a bid containing a document such as a certificate of incorporation establishing the date of creation of the company was sufficient for HRSDC to determine a proposal's compliance with requirement M-3, at the time that it was evaluating the proposals. To adopt a different interpretation of requirement M-3 at this time, namely, a more demanding approach that goes beyond just requiring the incorporation date, would risk discriminating against Nexys compared to the other bidders. The analysis of the compliance or non-compliance of Nexys's proposal with respect to requirement M-3 will essentially cover the date of creation of the company.

30. In this case, HRSDC rejected Nexys's proposal for non-compliance with the mandatory requirements and did not proceed with evaluating the proposal using the weighted criteria method. In its rejection letter, HRSDC states the following: "... your proposal was deemed non-compliant in meeting all mandatory criteria. . . . In our review of the documentation provided, the following mandatory requirement was not met: Section C – Mandatory Criteria M-3 . . . ." In that letter, the only requirement that was considered not to have been met is requirement M-3.

31. In the Tribunal's view, HRSDC wrongly interpreted the scope of requirement M-3 in this case by insisting that, based on the requirement, Nexys was required to attach to its proposal a separate document indicating the date of creation of the Nexys company, for example a certificate of incorporation.<sup>15</sup>

32. As indicated above, requirement M-3 provides as follows: "The Bidder **MUST** have had a minimum of five full years of experience in the delivery of translation and revision services since 2002. The Bidder shall provide proof of this experience, document containing the date of creation of the Company, when submitting the bid".

33. For both reasons set out below, the Tribunal is of the opinion that a request for a separate document cannot be found in the wording of requirement M-3. As such, rejecting the proposal on that count did not comply with Article 506(6) of the *AIT*, which reads as follows: "... 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."

### **Bilingualism**

34. The Tribunal's first reason for rejecting HRSDC's submissions is that they are based on a faulty application of the bilingualism obligations of the federal government.

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14. GIR, para. 23.

15. GIR, para. 13.

35. HRSDC's basis for insisting on a separate document containing proof of Nexys' creation as a commercial enterprise is recourse to the English version of mandatory requirement M-3, which reads as follows: «The Bidder **MUST** have had a minimum of five full years of experience in the delivery of translation and revision services since 2002. The Bidder shall provide proof of this experience, *in a document containing the date of the creation of the company*, when submitting the bid.” [emphasis added].

36. HRSDC submitted the following: “It is true that the French version of requirement M-3 contains a grammatical error; the words “*dans un*” should obviously have preceded the word “*document*”, which appears in the second sentence of the requirement. However, reading the English version provides an immediate understanding that those two words are missing”<sup>16</sup> [translation].

37. Indeed, were the Tribunal being asked to interpret a *legislative* text, HRSDC's approach would be correct. If reference to the English version of the legislation could resolve an apparent ambiguity in the French version it would be completely appropriate in accordance with the Supreme Court of Canada's “shared meaning rule.” If the English version were narrower and eliminated the ambiguity in the French version it would be incumbent on a court to accept it<sup>17</sup>

38. But HRSDC's procurement was not legislative in nature. Rather, it fell within the general communications of HRSDC. The Tribunal notes that the procurement solicitation was advertised on MERX, in French, and that the French version of the RFP showed both the contracting authority and bid receiving unit as being located in the National Capital Region.<sup>18</sup>

39. The Tribunal takes judicial notice of section 22 of the *Official Languages Act*<sup>19</sup>, which stipulates that “Every federal institution has the duty to ensure that any member of the public can communicate with and obtain available services from its head or central office in either official language, and has the same duty with respect to any of its other offices or facilities within the National Capital Region . . . .”

40. The Tribunal believes that the publication of the notice of the procurement opportunity and the distribution of the RFP in French, as well as the exchange of e-mails in French after bids had closed, are proof that HRSDC was attempting to observe the above section 22 of the *Official Languages Act* mentioned above by communicating in French with those of its “clients”, including potential suppliers, who elected French as their official language of choice for general communications purposes.

41. Therefore, the Tribunal finds that the language of communication between the parties for purposes of the procurement was French and that it would have placed an unforeseeable—and, in light of the *Official Languages Act*, unreasonable—burden on Nexys to expect it to go to the trouble of obtaining a copy of the English version of the RFP and comparing it with the French so as to resolve the trifling omission in mandatory requirement M-3.

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16. GIR, para. 18.

17. *R. v. Hinchey*, [1996] 3 S.C.R. 1128.

18. GIR, tab B.

19. R.S.C. 1985 (4th Supp.), c. 31.

42. Furthermore, the Tribunal notes that HRSDC chose to draft its April 11, 2008, rejection letter in the language that was not the language of Nexys's proposal.<sup>20</sup> After asking for explanations regarding the rejection of its proposal, Nexys was provided with requirement M-3 in English only. The Tribunal notes that this is inconsistent with the obligations in section 22 of the *Official Languages Act*. That approach resulted in the difference between the English and French wording being overlooked, a key issue in reviewing the complaint in question.

### Interpretation of the Contract

43. The Tribunal's second reason for rejecting HRSDC's arguments is that they are contrary to the rules of construction for interpreting contracts.

44. As alluded to above, the Tribunal is not being asked, in this complaint, to interpret a legislative text, but rather a contract. There is no question that a unilateral contract<sup>21</sup> is formed upon the submission of a proposal in response to a request for tenders or under similar terms and conditions, subject to those terms and conditions being met, as was the case here.<sup>22</sup> Therefore, the appropriate standard for the Tribunal to follow would be the rules of construction for interpreting contracts.

45. The Tribunal agrees with Nexys that it made perfect sense merely to add "the" in the requirement so that the sentence under scrutiny would read as follows: "The bidder shall provide proof, *the* document containing the date of creation of the company, when submitting its bid" [emphasis added, translation]. Even though the resulting sentence would not constitute good grammar, it would be an acceptable "shorthand" form of communication for tagging on a requirement to note the date of the company's creation in the proof portion of the proposal.

46. The Tribunal does not agree that the words "in a" should reasonably have been expected to be inserted by Nexys into requirement M-3 in order to understand that a requirement to annex a certificate of incorporation or equivalent documentation was contained in that clause. If that had been HRSDC's intention, it could have included specific and clear language to that effect. The Tribunal notes that requirement M-3 uses the word "containing" ("document *containing* the date of creation of the company") [emphasis added], whereas in paragraph 13 of the GIR, HRSDC infers the meaning of "containing" as "establishing" ("... requirement M-3 requires that a document *establishing* the date of the company ...") [emphasis added, translation]. The Tribunal is of the view that the word "containing" does not have the same meaning as the word "establishing". These two terms have different connotations. The former means that simple information is required, while the latter means that a fact must be proven. In the Tribunal's view, HRSDC's interpretation would create, after the fact, a more onerous contractual requirement for Nexys than the one expressly resulting from the RFP. When there is doubt, a contract must be interpreted against the

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20. Complaint, exhibit C1.

21. *Black's Law Dictionary*, 8th ed., s.v. "unilateral contract". "A contract in which only one party makes a promise or undertakes a performance . . ." For example, "if A says to B, 'If you walk across the Brooklyn Bridge I will pay you \$100,' . . . B cannot accept this offer by promising to walk the bridge. B must accept, if at all, by performing the act. Because no return promise is requested, at no point is B bound to perform. If B does perform, a contract involving two parties is created, but the contract is classified as unilateral because only one party is ever under an obligation . . ."

22. *The Queen (Ont.) v. Ron Engineering*, [1981] 1 S.C.R. 111.

person who stipulated the obligation.<sup>23</sup> Therefore, the Tribunal rejects the argument in the GIR that it was reasonable to conclude that a separate document indicating the date of creation of the company had to be provided with each bidder's proposal. Rather, in the Tribunal's view, it was reasonable for Nexys to believe that it had met the requirement regarding the year of creation of its company, a requirement which had been made confusing by the government party.

47. HRSDC argues that a detailed analysis of Nexys's proposal indicates that it contained no specific information regarding contracts performed since 2002 and that there was nothing in the document to suggest that Nexys had a minimum of five years of experience in the delivery of translation and revision services after 2002. For the reasons cited above, the Tribunal does not intend to restate the conditions of this requirement in a way other than the one contemplated by HRSDC in evaluating bids. However, the Tribunal notes that Nexys included in its proposal, in addition to stating three times that the company was formed in 1985, a document substantiating that the company had been in existence for at least five years. The Tribunal notes that the Security Screening Certificate and Briefing Form<sup>24</sup> issued by PWGSC, which contains a reference to the applicant's security clearance, indicates that the company existed before 2002.

## CONCLUSION

48. The Tribunal finds that Nexys met requirement M-3 dealing essentially with the date of creation of the company.

49. The Tribunal notes that HRSDC also questioned Nexys's ability to meet requirement M-4, based on the analysis of facts presented in the RFP regarding Nexys's situation and presented in the GIR. However, the Tribunal is of the opinion that HRSDC had already dealt with those issues in its rejection letter and in the ensuing correspondence, and the Tribunal will not substitute its judgment for that of the evaluators with respect to requirement M-4.

50. The Tribunal also notes that, when considering Nexys's proposal, HRSDC failed to submit to the Tribunal any documents certifying that it did indeed analyse the proposal based on the weighted criteria.

51. In short, the Tribunal finds that the original rejection of Nexys's proposal was not based on the other grounds present in this case, but on the simple fact that the certificate of incorporation was missing. In light of the foregoing, the Tribunal finds that the complaint is valid.

## Remedy

52. Before addressing potential remedies, it is necessary to comment on HRSDC's argument that no remedy should be recommended in the circumstances because, according to HRSDC, Nexys did not meet requirement M-4. The Tribunal is of the view that it would not be appropriate to exercise its jurisdiction on the issue of requirement M-4, since the requirement is an issue for HRSDC evaluators. The Tribunal does not usually substitute its judgment for that of the evaluators, unless the evaluators have not applied

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23. See, for example, section 1432 of the *Civil Code of Quebec*, which reads as follows: "In case of doubt, a contract is interpreted in favour of the person who contracted the obligation and against the person who stipulated it. In all cases, it is interpreted in favour of the adhering party or the consumer." Abella J.A. (as she then was) described the *contra proferentem* rule as follows: "... It is a rule meant to relieve the non-authorial party to a contract from an interpretation that party could not clearly discern from a plain reading of the document. This prevents the party who did draft and understand the contract from springing a hidden contractual burden on an unsuspecting signator...". *Lien Trustee v. Toronto-Dominion Plaintiff Bank* (1994), 17 O.R. (3d) 363.

24. Complaint, exhibit B3.

themselves in evaluating a bidder's proposal, have ignored vital information provided in a proposal, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.

53. In recommending a remedy, the Tribunal is required, under subsection 30.15(3) of the *CITT Act*, to consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including the following:

- a) the seriousness of any deficiency in the procurement process found by the Tribunal;
- b) the degree to which the complainant and all other interested parties were prejudiced;
- c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
- d) whether the parties acted in good faith; and
- e) the extent to which the contract was performed.

54. In determining the remedy to recommend in this case, the Tribunal considered the circumstances relevant to the procurement, including the above-mentioned considerations.

55. Nexys asked the Tribunal to recommend that HRSDC re-evaluate its proposal based on the weighted criteria and, if required, terminate any contracts awarded. If necessary, it asked that a new RFP be issued or that it be compensated.

56. The Tribunal recommends that HRSDC proceed with the next stage of evaluating the proposal submitted by Nexys, namely, the evaluation based on the weighted criteria. The Tribunal recommends that HRSDC, in its evaluation, consider only the translation documents, in the format in which they existed when Nexys submitted them to HRSDC, and not consider other documents containing additional parts that were submitted in the context of this complaint. If Nexys's proposal receives the necessary passing mark and proves to be one of the three winning proposals, the Tribunal recommends that Nexys be awarded a contract. In the alternative, the Tribunal recommends that Nexys be compensated for the profit that it would have earned if it had been awarded the contract.

### Costs

57. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Nexys its reasonable costs incurred in preparing and proceeding with the complaint.

58. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates classification of the level of complexity of cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The Tribunal's preliminary view is that this complaint case has a complexity level corresponding to the first level of complexity referred to Appendix A of the *Guideline*. The complexity of the procurement was low, since it concerned the provision of consulting services, a subject which was not in issue. The complexity of the complaint was low, in that it was based on a simple pass-or-fail list of easily measurable features. The complaint proceedings were also of low complexity, as there was no intervener, no additional submissions from parties were filed, the 90-day time frame was respected, and no public hearing was held. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.



**DETERMINATION OF THE TRIBUNAL**

59. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid.

60. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends, as a remedy, that HRSDC, within 30 days of the publication of the determination in this matter, re-evaluate the proposal submitted by Nexys using the weighted criteria method and, if possible, by the initial evaluation team. The Tribunal further recommends that, in accordance with the evaluation plan regarding requirement M-3, Nexys be considered to have provided sufficient proof that it was in business before January 2002.

61. If Nexys's proposal turns out to be one of the three winning proposals, the Tribunal recommends that HRSDC either award Nexys a contract or compensate it for lost profits in being deprived of the contract. The basis for calculating the lost profits will be the price bid by Nexys in the proposal that it submitted in response to Solicitation No. 9606-07-0007. In that event, the Tribunal recommends that the parties develop a joint proposal for compensation to be presented to the Tribunal within 60 days of the date of the publication of the determination in this matter. Should the parties be unable to agree on the amount of compensation, each party shall file a report with the Tribunal within the same 60-day period, after which the Tribunal will make its recommendation on the matter.

62. If, following the evaluation, Nexys's proposal does not obtain the necessary passing mark, the Tribunal also recommends that, upon request, HRSDC provide Nexys with pertinent information concerning the reasons for not selecting its bid.

63. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards Nexys its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by HRSDC. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated by the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Diane Vincent

Diane Vincent  
Presiding Member