



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2011-061

The Masha Krupp Translation
Group

v.

Public Health Agency of Canada

*Order and reasons issued
Wednesday, June 20, 2012*

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IN THE MATTER OF a complaint filed by Masha Krupp Translation Group Limited pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

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

BETWEEN

THE MASHA KRUPP TRANSLATION GROUP LIMITED

Complainant

AND

THE PUBLIC HEALTH AGENCY OF CANADA

**Government
Institution**

ORDER

In its determination of May 28, 2012, the Canadian International Trade Tribunal, pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, awarded the Public Health Agency of Canada its reasonable costs incurred in responding to the complaint. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for the complaint case was Level 1, and its preliminary indication of the amount of the cost award was \$1,000. After considering the submissions of the parties concerning that determination, the Canadian International Trade Tribunal hereby confirms its preliminary indications by awarding the Public Health Agency of Canada its costs in the amount of \$1,000 for responding to the complaint and directs Masha Krupp Translation Group Limited to take appropriate action to ensure prompt payment.

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

STATEMENT OF REASONS

INTRODUCTION

1. In a determination issued on May 28, 2012, the Canadian International Trade Tribunal (the Tribunal), under section 30.16 of the *Canadian International Trade Tribunal Act*,¹ awarded the Public Health Agency of Canada (PHAC) its reasonable costs incurred in responding to the complaint. In its determination, the Tribunal's preliminary indication of the level of complexity for the complaint was Level 1, and its preliminary indication of the cost award was \$1,000, in accordance with its *Guideline for Fixing Costs in Procurement Complaint Proceedings*.

2. On June 8, 2012, the Tribunal received submissions from The Masha Krupp Translation Group Limited (MKTG) concerning its disagreement with the preliminary indication of the level of complexity for the complaint. On June 13, 2012, the PHAC responded to those submissions. The Tribunal reviewed the submissions of the parties and determined that its preliminary indication of the level of complexity for the complaint, namely Level 1, was appropriate.

POSITION OF THE PARTIES

MKTG's Position

3. MKTG contended that in the circumstances of this complaint, the Tribunal should exercise its discretion not to award any costs against the unsuccessful party. In support of its position, MKTG pointed to the Tribunal's finding that MKTG did not comply with mandatory requirements M2. MKTG argued that this ground had not been raised by either MKTG or the PHAC in their respective submissions.

4. In addition, MKTG maintained that the Tribunal had in fact validated some of MKTG's concerns regarding the procurement procedure, as MKTG was "... determined to have legitimate concerns about the procurement procedure."¹ MKTG submitted that the cost award, combined with comments made by the PHAC prior to the complaint being filed, had given MKTG the impression that it is being discouraged from accessing the bid challenge procedures.

The PHAC's Position

5. In response to MKTG's submissions, the PHAC denied that there was any justification for departing from the principle that costs should be awarded to the PHAC, as the successful party. In so arguing, the PHAC asserted that MKTG had, in its own submissions, admitted that its proposal did not meet the second point-rated requirement (PR2) contained in the RFSO.

6. With regard to MKTG's contention that the Tribunal had ruled against it on the basis of grounds which had not been raised by either party, the PHAC asserted that "the Tribunal found that MKTG failed to meet mandatory requirements in M2 because of its admitted failure to satisfy the point-rated requirements in PR2."² The PHAC therefore asked the Tribunal to confirm its original costs order.

1. Submissions on costs from MKTG, 8 June 2012, para. 4.

2. Reply submission from the PHAC on the issue of costs, 13 June 2012, at 2.

TRIBUNAL'S ANALYSIS

7. As a preliminary matter, the Tribunal notes that, at this stage, its analysis must be restricted solely to the amount of the cost award, as the determination on costs was issued on May 28, 2012. The Tribunal has carefully reviewed all the submissions by the parties on this matter.

8. In the Tribunal's decision regarding the merits of the complaint, the Tribunal quite clearly indicated that MKTG's proposal did not comply with the mandatory requirements of the solicitation and that the PHAC had conducted the procurement in accordance with the *Agreement on Internal Trade*.³ While the Tribunal was of the view that the additional listing of projects contained in MKTG's response to PR2 ought to have been duly considered, the Tribunal concluded that MKTG's bid was, in any event, non-compliant with two mandatory requirements of the solicitation. As such, MKTG's complaint was in no way "validated" by the Tribunal and the Tribunal sees no reason to waive costs on this ground.

9. Nor does the Tribunal accept MKTG's contention that costs ought to be waived because the Tribunal found against MKTG on the basis of a ground that had not been raised by either MKTG or the PHAC in their respective submissions. In the reasons for its determination, the Tribunal confirmed the PHAC's conclusion that MKTG's proposal did not comply with mandatory requirements contained in the RFSO and explained that, with the point-rated requirements being clearly connected to the mandatory requirements of the RFSO, MKTG's overall PR2 score was not incompatible with the non-responsiveness of its proposal to M2. As such, the Tribunal finds MKTG's submissions on this point to be without merit.

10. Finally, the Tribunal is not persuaded by MKTG's assertion that a cost award against it would give MKTG the impression that it is being discouraged from accessing the bid challenge procedures. In *Canada v. Georgian College of Applied Arts and Technology*, the Federal Court of Appeal explicitly stated that:

The CITT has a practice of awarding costs to successful complainants. There is no justification for adopting a policy of depriving the Crown of costs when it is successful.

Furthermore, in *Georgian College*, this Court expressly found that it was not appropriate for the CITT to refuse to award the Crown costs on the grounds that it wanted to encourage complaints in order to ensure Canada's compliance with international obligations arising under trade agreements.⁴

As the above statement confirms, the Tribunal may not waive costs against an unsuccessful complainant simply to encourage complainants to utilize the bid challenge procedures of the Tribunal. Consequently, the Tribunal does not agree that costs ought to be waived against MKTG on this ground.

11. In light of the foregoing, the Tribunal does not consider this to be an appropriate situation in which to waive costs against MKTG. Therefore, the Tribunal confirms that its preliminary indication of the level of complexity for the complaint case is Level 1. The amount of the cost award made by the Tribunal remains \$1,000.

3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [AIT].

4. [2005] 2 FCR 209 at paras. 18 and 19.

CONCLUSION

12. In its determination of May 28, 2012, the Tribunal, pursuant to section 30.16 of the *CITT Act*, awarded the PHAC its reasonable costs incurred in responding to the complaint. The Tribunal's preliminary indication of the level of complexity for this complaint case was Level 1, and its preliminary indication of the amount of the cost award was \$1,000. Having considered the submissions of the parties concerning that determination, the Tribunal finds that there is no justification to revise its determination. Therefore, the Tribunal confirms its preliminary indications by awarding the PHAC its costs in the amount of \$1,000 for responding to the complaint and directs MKTG to take appropriate action to ensure prompt payment.

Pasquale Michaele Saroli

Pasquale Michaele Saroli
Presiding Member