Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2016-041

The Masha Krupp Translation Group Ltd.

v.

Canada Revenue Agency

Order and reasons issued Wednesday, October 17, 2018

Canada

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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 the Canadian International Trade Tribunal's determination and recommendation issued on March 15, 2017.

BETWEEN

THE MASHA KRUPP TRANSLATION GROUP LTD. **Complainant**

AND

THE CANADA REVENUE AGENCY **Government Institution**

ORDER

The Canadian International Trade Tribunal hereby recommends that the Canada Revenue Agency compensate The Masha Krupp Translation Group Ltd. in the amount of $[redacted], representing one third of The Masha Krupp Translation Group Ltd.'s lost profits for the value of services actually purchased by the Canada Revenue Agency under the contract resulting from the Request for Proposal from mid-October 2016 until January 2018 inclusive.

The Canadian International Trade Tribunal further recommends that the Canada Revenue Agency provide additional compensation to The Masha Krupp Translation Group Ltd. for the costs of mitigating its losses in the amount of $[redacted].

The Canadian International Trade Tribunal further recommends that the Canada Revenue Agency pay interest on each the above sums (separately calculated) in accordance with the interest provision in the contract resulting from the Request for Proposal using the method proposed by the Canada Revenue Agency in its letter filed June 4, 2018.

The Canadian International Trade Tribunal further recommends that the Canada Revenue Agency provide compensation to The Masha Krupp Translation Group Ltd. for each month from February 2018 until a new contract is awarded, calculated as follows: [redacted] percent of the Canada Revenue Agency's payments to CLS Lexi-tech Ltd. under the contract resulting from the Request for Proposal, per month, divided by three.

Rose Ritcey

Rose Ritcey

Presiding Member

STATEMENT OF REASONS

[1] On March 15, 2017, the Canadian International Trade Tribunal (Tribunal) issued its determination in this matter, finding the complaint of The Masha Krupp Translation Group Ltd. (MKTG) regarding a Request for Proposal (RFP) (Solicitation No. 1000329852) issued by the Canada Revenue Agency (CRA) for translation and editing services valid in part. The Tribunal recommended that the procurement be retendered. The Tribunal also recommended that the CRA compensate MKTG for its lost opportunity (that is, the amount of profit it would reasonably have made divided by the number of bidders compliant with the mandatory criteria in the RFP), for the period from contract award (to CLS Lexi-tech Ltd. (CLS)) until the retendering is complete.

[2] The Tribunal's task is to fix the quantum of compensation to be paid by the CRA to MKTG consistent with the Tribunal's determination above, as well as to provide reasons for its decisions regarding the parties' requests for production of documents described below.[1]

BACKGROUND

[3] The Tribunal issued its determination on the validity of MKTG's complaint on March 15, 2017, and the statement of reasons for its determination on March 20, 2017.

[4] In its determination, the Tribunal recommended that the parties negotiate the quantum of compensation and gave the parties 40 days to submit an approximate time frame for retendering the procurement and completing negotiations. On three separate occasions (April 24, 2017, June 27, 2017, and August 21, 2017), the parties informed the Tribunal that they were still negotiating compensation. On January 11, 2018, MKTG filed a further letter informing the Tribunal that the Federal Court of Appeal had, on November 22, 2017, dismissed the CRA's application for judicial review of the Tribunal's determination but that the parties had reached an impasse on compensation.

[5] On January 23, 2018, the CRA requested that the Tribunal, under the authority of rule 23.1(1) of the *Canadian International Trade Tribunal Rules*,[2] order MKTG to produce copies of (a) its tax returns as filed for the period from 2012 to date and (b) its audited financial statements for the same period. In the alternative, if audited financial statements were unavailable, the CRA requested unaudited financial statements covering the same period.

[6] On January 31, 2018, MKTG filed its submissions opposing the request for production. MKTG's position was that the CRA had not provided sufficient justification for its request and that the documents identified by the CRA were irrelevant or unnecessary to the Tribunal's compensation determination.

[7] On February 5, 2018, the Tribunal provided the parties a copy of its statement of reasons on compensation issued on December 29, 2017, in File No. PR-2015-051 (*Oshkosh Defense Canada*

1. Page citations herein are to the PDF (not hard copy) pages of the exhibits and submissions as filed with the Tribunal, which include a cover exhibit page added by the Tribunal's registry. For example, page 3 of the confidential submissions of MKTG filed March 6, 2018, corresponds to page 2 of 18 of the hard copy submission.
2. *Canadian International Trade Tribunal Rules*, SOR/91-499 [*Rules*].

Inc. v. Department of Public Works and Government Services),[3] which had not yet been published on the Tribunal's website, and provided them each with an opportunity to make supplementary submissions on any aspect of that decision relevant to the request for production.

[8] On February 13 and February 20, 2018, respectively, the CRA and MKTG filed supplementary submissions based on *Oshkosh*.

[9] On February 21, 2018, the Tribunal issued an order granting the CRA's request for production of documents, with reasons to follow.

[10] On February 28, 2018, MKTG filed its tax returns and unaudited financial statements. On March 1, 2018, the Tribunal served the tax returns and financial statements on the CRA's counsel.

[11] On March 6, 2018, MKTG filed its submissions on compensation.

[12] On April 6, 2018, the CRA filed its responding submissions on compensation, following an extension of time that was requested (on consent of the parties) and granted by the Tribunal on April 3, 2018.

[13] On April 12, 2018, MKTG requested an order for the CRA to produce various documents related to the third bidder on the RFP. On April 19, 2018, the CRA filed a letter opposing the request in its entirety. On April 24, 2018, MKTG filed its reply to the CRA's arguments. On April 26, 2018, the Tribunal issued an order denying MKTG's request for a production order, with reasons to follow.

[14] On May 1, 2018, MKTG filed its reply to the CRA's submissions on compensation filed on April 6, 2018.

[15] On May 10, 2018, the Tribunal requested further information and documents from the parties on certain issues regarding compensation. On June 4, 2018, the parties filed their submissions in response to the Tribunal's letter. On June 11, 2018, the parties filed their replies to each other's submissions.

[16] On July 3, 2018, the Tribunal requested further information and documents from MKTG. On July 13, 2018, MKTG filed its response, to which the CRA replied on July 20, 2018.

REQUESTS FOR PRODUCTION

The CRA's Request for Production Order

Position of the Parties

[17] In requesting MKTG's tax returns and financial statements, the CRA submitted that they were relevant to an assessment of the revenues and expenses incurred by MKTG in providing translation services for the most recent period, including when it provided the CRA those services historically.

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3. *Oshkosh Defense Canada Inc. v. Department of Public Works and Government Services* (29 December 2017), PR-2015-051 (CITT) [*Oshkosh*].

[18] MKTG opposed the production, arguing that the only information relevant to the calculation of lost profits was the revenues that would have flowed had the contract been awarded to MKTG and any variable costs incurred to generate that revenue. It claimed that its tax returns and financial statements revealed aggregate financial information not related to this determination. MKTG also submitted that the CRA already had better evidence at hand in the form of the historical revenues relating to translation work, the work performed by CLS to date, and MKTG's expenses (detailed in invoices and other evidence that had been provided to the CRA during the course of the compensation negotiations) that were the basis for the global expenses found in the financial statements.

Analysis

[19] In order for a party to obtain a production order at the Tribunal, it must demonstrate that the requested information and documents are relevant to an issue in dispute and that the request does not impose a disproportionate burden on the other parties or the Tribunal in terms of time and expense.[4] Additionally, as parties do not have a general right to discovery at the Tribunal, the request must not be a mere "fishing expedition".[5] The CRA's request meets these conditions.

[20] Regarding relevance, in *Oshkosh*, the Tribunal held that the "calculation of lost profits is not simply (or even primarily) an expert accounting exercise"; rather, "a reasonable net profit rate should be estimated based on historical and/or qualitative evidence of firm- and industry-specific net (not gross) profit rates for similar goods or services".[6] Thus, as will be discussed below, while the revenue-less-expenses methodology generally provides the best estimate of lost profits, it is not the only relevant evidence. Reference to other more general types of evidence is also useful for purposes of benchmarking or verifying the reliability of the revenue-less-expenses methodology, as well as the reasonableness of the profit margin as a whole. Tax returns and financial statements can serve this purpose by providing the Tribunal a wider-angled view, especially where, as here, a significant portion of the complainant's historical business comprised translation work for the CRA.[7] Indeed, the Tribunal's own *Procurement Compensation Guidelines* specifically contemplate the complainant submitting with its compensation submission "such financial statements, reports, records, projections and other economic information or data as are necessary to substantiate the complainant's requested

4. In prior decisions, the Tribunal has stated that it is "incumbent on parties to produce any and all relevant documents necessary for the Tribunal to properly dispose of the complaint". *Stenotran Services Inc. and Atchison & Denman Court Reporting Services Ltd. v. Courts Administration Service* (24 July 2014), PR-2013-046 (CITT) at para. 78. This "necessary and relevant" standard addresses the proactive disclosure obligation of parties at the commencement of an inquiry; it does not purport to limit the type of documents that parties may request be produced at a later point.
5. See, for example, *Enterasys Networks of Canada Ltd. v. Department of Public Works and Government Services* (10 September 2010), PR-2010-004 and PR-2010-006 (CITT) at para. 70 (the Tribunal "will not allow complainants to have access to documents when the sole objective is to find evidence to use in a complaint. . . . the mere inclusion of general allegations in a complaint does not entitle complainants to have an unlimited access to documents in the possession of government institutions. This would open the door to impermissible fishing expeditions into the records of government institutions."). Previously, this approach has primarily been applied to complainants seeking the production of documents by government institutions during an inquiry; here the Tribunal applies this criterion in the same manner to the CRA.
6. *Oshkosh* at para. 71.
7. Confidential submissions of MKTG filed March 6, 2018, at 16, Vol. 4A.

level of compensation".[8] Therefore, these documents are relevant and its request does not constitute a mere fishing expedition.

[21] Regarding proportionality, MKTG did not argue that these documents would be difficult to produce. They are tax and accounting documents kept by most companies in the ordinary course of business. Accordingly, the CRA's request is not disproportionate either.

[22] Therefore, because the CRA met all of the conditions for a production order, the Tribunal granted its request.

MKTG's Request for Production Order

Position of the Parties

[23] MKTG's request for a production order seeks the following documents:

a. The third bidder's bid;

b. The consensus scoring grid for the third bidder for the point-rated criteria;

c. All individual evaluation grids for both the mandatory and point-rated criteria;

d. All correspondence between the CRA and the third bidder, not already produced; and

e. All internal or external correspondence of the CRA referencing the third bidder.

[24] In support, MKTG argued that the CRA's position that the third bidder submitted a responsive bid contradicts information provided by [redacted] of CRA to MKTG at its debriefing. MKTG argued that the third bidder should only be considered a potentially successful bidder if it met all mandatory, point-rated and pre-contract award conditions. MKTG also argued that it needed individual scoring sheets because the consensus scoring grid provided by the CRA was undated and there were discrepancies between individual and consensus scoring grids in MKTG's and CLS' evaluations.

[25] The CRA opposed MKTG's requests. It pointed out that the Tribunal ruled in its determination that potential success would be assessed only with reference to compliance with the mandatory criteria—therefore, the scoring grids for the point-rated criteria were irrelevant. The individual scoring grids were also irrelevant because compliance was based only on the consensus scoring grids. The CRA also argued that the correspondence sought was irrelevant because compliance was assessed based on the third bidder's bid as filed, and not on any correspondence between itself and the third bidder.

[26] As for the third bidder's bid, the CRA submitted that it has found no case where the Tribunal has ordered that a third-party bid be disclosed at the compensation stage. Further, the *Guidelines* refer to basing compensation on "the number of potential bidders", which in this instance the Tribunal has determined is the number of bidders compliant with the mandatory criteria. The CRA

8. *Procurement Compensation Guidelines* (2014) [*Guidelines*], art. 4.1.1, online at: http://www.citt-tcce.gc.ca/en/Procurement_compensation_guidelines_e.

also argued that ordering production would add unnecessary complexity, be time consuming and might require the participation of the third bidder.

[27] In reply, MKTG argued that the Tribunal, in paragraph 84 of its determination, made a finding of fact that only two bidders (MKTG and CLS) submitted responsive bids and, thus, to the extent that the CRA took a different position in the compensation phase, MKTG was entitled to information that would allow it and the Tribunal to assess whether the third bidder was in fact in a position to win the contract. MKTG argued that the requests are supported by the fact that, in its original complaint, MKTG identified irregularities and contradictions between CLS' point-rated individual and consensus scoring grids; therefore, it had a reasonable basis for wanting to confirm whether such issues tainted the third bidder's bid as well. Finally, MKTG submitted that failing to order the production of these documents would violate procedural fairness because it would be deprived of information necessary to answer the CRA's case.

Analysis

[28] As explained above, in order for a party to obtain a production order at the Tribunal, it must demonstrate that the requested information and documents are relevant to an issue in dispute; that the request is proportionate; and that the request is not a mere fishing expedition.

[29] With regard to the request for the consensus scoring grid for the point-rated criteria, the Tribunal has already ruled in its determination that the *only* relevant issue for purposes of determination of the lost opportunity denominator is compliance with the mandatory criteria. As only the mandatory criteria are relevant, the consensus scoring grid for the point-rated criteria does not tend to prove (or disprove) any relevant fact in dispute; therefore, the request for this document fails the requirement of relevance.

[30] Individual scoring sheets are also not relevant to the issue currently before the Tribunal. In situations where scoring is done by consensus, the consensus score is treated as the final score for purposes of proposal evaluation—indeed, this RFP expressly advised that a "committee composed of representatives of CRA will evaluate the proposals . . . ".[9] Further, the individual scoring sheets for the point-rated criteria are irrelevant because the Tribunal has already ruled that potential success for purposes of compensation will be determined by the mandatory criteria, as the point-rated criteria scoring was where the breach had occurred. In regard to the individual scoring sheets for the mandatory criteria, MKTG submitted that there may be discrepancies or irregularities based on errors it alleged were found in CLS' individual and consensus scoring sheets. However, as a preliminary matter, the Tribunal's determination did not reference any such discrepancies or irregularities. Further, MKTG has provided no case or other authority supporting its argument that an evaluation error should be inferred simply on account of a discrepancy between individual scores and consensus scoring (which is to be expected in a panel). The courts have upheld Tribunal decisions rejecting such complaints where the evidence shows that the individual scores were merely the "starting point" for discussion and debate and, as such, that it is reasonable that the consensus scores "would not always reflect the averages or medians of individual scores".[10] They have also found that "deviation from the median individual scores" is not, by itself, "a sufficient basis for demonstrating

9. Exhibit PR-2016-041-01 at 48, Vol. 1.
10. *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation*, 2015 FCA 272 (CanLII) at para. 83.

unfairness".[11] Here, it is not contested that the individual scoring was anything other than a starting point for discussion and debate to be finalized at the consensus scoring stage. Therefore, MKTG has failed to identify any relevance to the individual scoring sheets, even for the mandatory criteria.

[31] With regard to the requests for the CRA's correspondence with the third bidder, MKTG has identified no reason why these documents would be relevant or would assist the Tribunal to determine the third bid's compliance with the mandatory criteria. Evaluation of compliance with the mandatory criteria in an RFP is based on an objective review of the proposal submitted by a bidder; the CRA's internal and external correspondence plays no part in this evaluation process. Indeed, the CRA has already produced information necessary to establish that the third bid was evaluated as meeting the mandatory criteria: namely, the consensus scoring sheet.[12] MKTG has identified no irregularity in this document supporting its position that it is necessary to look to correspondence, other than the fact that the consensus scoring sheet is undated. However, the Tribunal notes that none of the consensus scoring sheets were dated or even had a date line.

[32] The only support that MKTG offers for its position that the third bidder was not compliant is a statement that was allegedly made by a CRA official, during MKTG's debriefing, that there were only two compliant bidders.[13] However, accepting that this statement was made by the CRA, it does not follow that the third bidder's proposal was non-compliant with the mandatory criteria—the CRA representative may have described the proposal as "non-compliant", even if it met the mandatory criteria, if it failed to achieve the minimum point-rated technical score.[14] There is no evidence that the CRA specifically was asked or stated that the third bidder was non-compliant with the mandatory criteria. For the above reasons, the Tribunal therefore finds that the documents requested are not relevant.

[33] Finally, with regard to the request for the third bidder's bid, granting this request would unduly expand and complicate the scope of compensation proceedings. MKTG has identified no case in which the Tribunal has ever granted (or even entertained) such a request. The consequences to the Tribunal's compensation inquiries would be immense if every complainant could, as of right, demand full disclosure of all other bidders' proposals to review for compliance simply for the purpose of making submissions on the appropriate denominator for a lost opportunity recommendation. It would result in the possible duplication (or triplication or more) of the time, expense and work incurred by parties, legal counsel and the Tribunal in adjudicating bid challenge disputes. It would also likely require the Tribunal to give the third bidder an opportunity to intervene and make submissions. However, the adversarial process could be severely attenuated because the third bidder, even though it would be the person most capable of defending its proposal, would have

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11. *TPG Technology Consulting Ltd. v. Canada*, 2014 FC 933 (CanLII) at para. 151.
12. Confidential submissions of the CRA, filed April 6, 2018, at Tab 4 (protected), Vol. 4A.
13. Confidential reply submissions of MKTG filed May 1, 2018; Affidavit of Masha Krupp sworn May 1, 2018, at paras. 20-21, Vol. 4B.
14. In the reasons supporting its determination, the Tribunal observed tentatively that the third bidder "apparently submitted a bid that was non-responsive" (para. 84). This was an inference based on the fact that although three bids had been received and evaluated, the GIR only referred to one other responsive bidder, CLS. Exhibit PR-2016-041-11 at paras. 15 and 21-22, Vol. 1A. The Tribunal further commented that it "could not determine, from the evidence currently on file, whether this 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". Contrary to what MKTG argues, by making that pronouncement, the Tribunal did not find that only two bidders were compliant.

little incentive to spend time and money participating in the proceeding. While there may be circumstances in which a review of a government institution's determination of another bidder's compliance would be warranted in a compensation inquiry, here MKTG has provided no reason for the Tribunal to take such an extraordinary measure; it has identified no evidence of irregularity, inconsistency, inadequate record-keeping, bad faith or other similar grounds justifying a review of the CRA's determination of compliance as evidenced by the consensus scoring sheet and the e-mail to the third bidder. The request is, therefore, inconsistent with the Tribunal's mandate to provide timely, efficient, accessible compensation recommendations. The Tribunal denies the request for the third bidder's proposal, therefore, as irrelevant and disproportionate.

COMPENSATION

Key Issues and Overview of Decision

[34] The crux of the dispute between the parties regarding compensation comprises six discrete issues:

1. Should revenues be based on the published estimated contract award value, the historical revenues earned by MKTG under the prior CRA contract, or the work actually procured by the CRA from CLS under the current contract?

2. Should the methodology used to determine profits be based on revenue-less-expenses, industry/firm-wide profit margins, or a reasonable profit margin guidepost?

3. Which categories of costs should be deducted from revenues in determining MKTG's compensation?

4. Should MKTG be compensated for its expenses in mitigating its damages?

5. What should the denominator for lost opportunity be, i.e. should MKTG's estimated lost profits be divided by one (if it was the only compliant bidder), two (if CLS was also compliant), or three (if MKTG, CLS and the third bidder were all compliant)?

6. Should compensation include a premium for the time value of money?

[35] The goal in any compensation inquiry is to determine compensation using a transparent methodology that is simple yet fair, that can be applied using reliable evidence or assumptions that are reasonably supported, and that is verifiable by the opposing parties and the Tribunal in a non-onerous manner.

[36] In this case, as is detailed below, the Tribunal has decided that the fairest way to determine the amount of compensation owed to MKTG is as follows:

- Determine the revenue that MKTG would have earned under the contract had it been successful by applying MKTG's bid price to the actual volume of work that the CRA has given to CLS under the current contract.

- Determine lost profits by using a revenue-less-expenses framework, relying primarily on MKTG's historical financial statements during which time it was the translation service provider to the CRA. The expenses to be deducted include those that have a nexus to the CRA contract in issue.

- As there were three bidders that met the mandatory criteria, the final amount of the compensation to MKTG will be its lost profits divided by three, given that it stood a one in three chance of winning the contract.

- In accordance with the Tribunal's *Guidelines*, the Tribunal also recommends that MKTG be compensated for the time value of money. The Tribunal is of the view that the methodology stated in the CRA's letter of June 4, 2018, is appropriate for this calculation, particularly because it is grounded in the terms of the RFP.

Issue A: Basis for Revenue (Contract Award Value, Historical Value or Actual Work Procured to Date)

Position of the Parties

[37] MKTG submits that revenue should be based on the published contract award value ($8,630,000 for the first two years).

[38] The CRA submits that revenue should be based on the volume of work the CRA has actually procured under the contract resulting from the RFP. The CRA argues that, consistent with the general principles articulated in Oshkosh, revenue should be calculated based on the terms of the RFP and MKTG's financial proposal. In this case, that means calculating revenue based on the volume of work procured under the resulting contract (measured in word count) multiplied by the per-word rate in MKTG's proposal. As all of the CRA's requirements have been procured through CLS, the CRA proposed multiplying the volume of work tendered to CLS by MKTG's bid rates for the period from when CLS began supplying the contract (October 2016) to the date that the contract is retendered. The CRA proposed that compensation can be calculated for the months following January 2018 until the date of retender by repeating the calculation using monthly CLS word-count data multiplied by MKTG's bid rate and whatever profit margin percentage the Tribunal ultimately fixes.

[39] MKTG submitted that using the published contract award price is consistent with procurement case law, that this may not actually be the maximum price because amendments may result in greater work awarded, and that MKTG determined its bid price for the RFP based in part on its experience during the contract it had with the CRA, including historical annual dollar values. MKTG also noted that the quantity of translation work it has carried out on its contracts with other federal government departments has reached the published contract value. Thus, MKTG asserts, the CRA's reference to the minimum contract value in the RFP is only relevant for exceptional circumstances.

[40] In the alternative, MKTG submits that MKTG's historical revenues are a more reliable basis for calculating lost revenue than CLS' actual word counts. MKTG submits that Oshkosh eschews reliance on contemporaneous data instead of the expectations of the parties at the time of bidding. It further argues that the CRA has not explained why CLS' word-count volumes are lower than MKTG's under the previous contract. It speculates this may be due to lack of sufficient staff with secret security clearances.

Analysis

[41] *Oshkosh* stands for the proposition that the Tribunal should not recommend compensation for goods or services not actually purchased by the government because they may in fact never be

procured; thus, awarding compensation for them might result in a windfall to the complainant. In paragraph 100 of *Oshkosh*, the Tribunal explained the following:

> In this context, the Tribunal finds that, as a matter of policy and discretion, it should be very wary of conducting a fact-finding inquiry into whether options would or would not in fact be exercised. In the context of a military procurement with a potential 20-year term involving nearly one billion dollars, such an exercise is inherently speculative, given the sums involved and likely changes in government during the term. Further, it unnecessarily intrudes into the purview and deliberations of the government in a highly sensitive area – as Oshkosh's request for potential cabinet confidences illustrates. Such an inquiry might be necessary if the Tribunal had no authority to craft a flexible recommendation including compensation if and when options are exercised, but that is not the case here. To the contrary, the risk lies entirely in making a premature yet final decision now whether to include options or not.

[42] Although the issue here is revenues expected over the term of a contract rather than revenues expected afterwards from options, the principle is the same: complainants should not be compensated for goods or services that the government has not procured. In *Oshkosh*, it could not be known whether the goods and services would actually be procured; therefore, the Tribunal conditioned its compensation recommendation on the options actually being exercised. Here, that part of the compensation involving future work should likewise be conditioned on the actual volume of services procured from CLS until the new contract is issued after retendering.

[43] The arguments MKTG relies on for using published contract award value or its historical volumes rather than the actual amount of work procured by the government are misplaced. The Supreme Court of Canada case cited for the proposition that published contract award value is the correct measure of lost revenue merely observes that the normal measure of damages, under the common-law, is "the contract price".[15] That is not the same as the published contract value, which is only an estimate published by a government institution on the government's official electronic tendering website (buyandsell.gc.ca) in compliance with the trade agreements. It is not a legally binding commitment by the government to either the contract awardee or anyone else. That commitment can only be found in the RFP and any resulting contract.

[44] Here, the RFP expressly provided that the government was not obligated to award any amount of work above the minimum contract value. Contrary to MKTG's submissions, minimum contract value clauses are relevant. They are essential to the formation of Contract A in the procurement context by establishing the value of the work being bid on. In fact, it is the terms of the RFP and its related documents (amendments, Questions and Answers, etc.) which define the scope of the expectation of the parties. The private information that MKTG relied on in determining its bid price based on its historical revenues and costs is not part of Contract A or Contract B or the expectation of the parties but rather simply that of one party.

[45] The distinction in *Oshkosh* between the "expectation of the parties" at the time of bidding and "contemporary data" involved the factual question of the assessment of reasonable profit margin, not the legal question of liability under the RFP. The Tribunal's statements were based on the observation that evidence regarding the expectation of a party before bid closing (in terms, for

15. *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58 (CanLII) at para. 73.

example, of analyses prepared at the time of bid to calculate bid price and expected profit margin)[16] may be more authentic and objective than contemporary data (prepared for litigation purposes long after bidding during a compensation inquiry) applied to scenarios speculating how the complainant would have performed the contract had it been awarded it.[17]

[46] MKTG's arguments about the variance between the CRA's historical and current volumes (or other departments' procurement volumes) are also irrelevant. For the same reason articulated in *Oshkosh* that the Tribunal does not attempt to forecast the value of options or other future work, it does not inquire about why current volumes of work procured vary from historical volumes. The exercise would be wholly speculative. It would require an inquiry into a government institution's contract administration practices, which is potentially outside the scope of the Tribunal's jurisdiction and, regardless, well beyond Parliament's intended mandate for the Tribunal to expeditiously hear and decide cases as a quasi-judicial adjudicator. As the Tribunal explained in *Oshkosh*, its procedures and remedies complement rather than duplicate those of courts available in common law wrongful procurement actions based on contract law. If a supplier wants compensation based on something other than the actual work procured by the government, it must seek it, if it can, in another forum.

[47] At tab 8 of its submissions, the CRA presented a summary chart showing (for the period of October 16, 2016, to January 31, 2018) the number of words (premium, regular and urgent) commissioned by the CRA for translation and editing each month, and the revenues MKTG would have earned based on its bid prices. The revenues for the entire period, net of tax, total $[redacted][18] or $[redacted] per month.[19] The Tribunal finds that this is the appropriate figure for MKTG's lost revenue under the current contract, up to January 31, 2018. The Tribunal agrees with the CRA that that revenue can be calculated for the months following January 2018 until the date of retender by repeating the calculation using monthly CLS word-count data multiplied by MKTG's bid rate.

Issue B: Revenue-less-Expenses, Industry/Firm-Wide or Guidepost Methodology

Position of the Parties

[48] MKTG submits that the Tribunal should adopt the revenue-less-expenses methodology for calculating lost profits. In MKTG's view, the Tribunal has the benefit of credible, concrete evidence of costs in the form of MKTG's experience as the incumbent for several years under the previous CRA translation-services contract. There is, accordingly, no need to resort to more generalized, high-level evidence such as industry and firm-wide profitability, or to use a reasonable profit guidepost.

[49] The CRA opposes a revenue-less-expenses methodology, arguing that because the parties disagree on the particular cost elements that should be appropriately attributed to the CRA contract had MKTG won it, and that his approach would lead to the sort of interminable, unproductive inquiries eschewed by the Tribunal in *Oshkosh*. Instead, the CRA proposes that the Tribunal recognize a net profit margin of [redacted] percent based on an Industry Canada report from 2006

16. See, for example, *Rockwell Collins Canada Inc. v. Department of Public Works and Government Services* (28 May 2018), PR-2017-006 (CITT) at paras. 41-42.
17. *Oshkosh* at para. 143.
18. Confidential submissions of the CRA filed April 6, 2018, at 6 and Tab 8, Vol. 4A.
19. Dividing by 15.5 months (the period from October 16, 2016, to January 31, 2018).

surveying the profitability of the Canadian translation industry and MKTG's firm-wide profitability based on its financial statements for the 2012-2017 period.

[50] In reply, MKTG argues that in *Oshkosh* the Tribunal recognized that the revenue-less-expenses approach remains the standard framework for assessing compensation, only to be departed from where the necessary evidence and submissions for performing such a calculation are unavailable or impractical. Here, by contrast, MKTG was the incumbent for several years and has the necessary data to objectively and practically estimate what its expenses would have been had it been awarded the contract.

[51] MKTG submits that should the Tribunal opt to use a profit-margin guidepost framework, the appropriate margin is [redacted] percent, not [redacted] percent. MKTG argues that the 10 percent benchmark used in *Oshkosh* involved goods, not specialized services. MKTG has above-average productivity due to its technology investments and 12 years of institutional and employee experience. The industry report relied on by the CRA is outdated. Finally, reliance on the financial statements is misplaced because they reflect other contracts and costs, including irrelevant decisions related to tax planning, charitable donations and executive compensation.

Analysis

[52] *Oshkosh* does not stand for the proposition that evidence of lost profits related to the specific procured work should be ignored, but only that other evidence can be useful to supplement or verify such evidence and, if necessary, serve as a substitute when the former is not readily available, credible or substantiated. Compensation for lost profits remains, in the first instance, based on the expected profits for the individual contract at issue as governed by the terms of the solicitation documents. There is no basis in law for the Tribunal to, when better evidence is reasonably available, calculate compensation solely on a complainant's firm-wide profitability, which is affected by a multitude of factors entirely unrelated to the procurement process at issue. Indeed, doing so would effectively deprive potential suppliers with low or no firm-wide profitability of an effective monetary remedy for a procurement process conducted in violation of the trade agreements.

[53] Further, the decision of which methodology to adopt is not strictly binary. Even when using a revenue-less-expenses methodology for estimating lost profits, the Tribunal will also consider the more general types of evidence discussed in *Oshkosh* to test the soundness of the resulting profit margin, as an extremely high or low figure may suggest that the revenue-less-expenses methodology is not reliable.[20]

[54] In this case the relevance and usefulness of the cost data is high because several years' worth of it is available based on MKTG's well-kept records as the incumbent translation services provider for the CRA. Further, with the exception of labour costs, the analysis proposed by MKTG is sound as it estimates expenses by pro-rating historical firm-wide expenses based on the proportion of revenues attributable in those periods to the CRA work, which was relatively steady year-over-year.

[55] Where MKTG's analysis fails, however, is in its estimate of what labour costs would have been if it had retained the CRA contract. The estimate provided for labour costs (which, [redacted]

20. *Oshkosh* at para. 148; *Rockwell Collins* at para. 48.

[redacted])[21] consists of a capacity analysis in which unidentified members of MKTG's staff identified a list of employees who would have been assigned to the CRA contract, and then assigned an allocation percentage to each resource, indicating how much of their time (and expense) would be attributed to CRA work. MKTG's owner then reviewed the capacity analysis and modified the percentage allocations where appropriate based on her experience and opinion.

[56] The Tribunal found this methodology opaque and, therefore, asked MKTG, by letter dated May 10, 2018, the following:

> Please explain in detail the methodology used by MKTG for determining the estimate of the percentage of work time that the named personnel would have been allocated to the CRA contract, as found in Exhibit 1 to the Affidavit of David Mirsky sworn March 6, 2018. This explanation should provide more detail than what is in the Affidavit of Masha Krupp, sworn March 6, 2018.

[57] In a supplementary affidavit, MKTG's owner affirmed that the percentages she assigned were based on her many years of experience in the translation industry and working on the prior CRA contract. She allocated a percentage to each employee based on the CRA's four broad areas of specialty, her translators' individual areas of expertise, and an anticipated minimum of two million words of work per month.[22] She further stated that her allocation based on anticipated word count allowed MKTG to determine the labour costs that formed the basis of its price per word and that, given that historical volumes were consistent with the posted contract value, she felt her assumptions were reasonable.[23]

[58] The Tribunal does not question that the estimation of labour costs attempted by MKTG's owner was made in good faith. However, her estimation is not based on a methodology that is transparent, replicable or otherwise verifiable. It represents an attempt to estimate labour costs as granularly as possible but without using any independent quantifiable evidence, data or supporting documentation.

[59] MKTG could have produced evidence of average word counts per employee and then substantiated its capacity analysis using a methodology that linked average word counts per employee to the monthly word count procured by the CRA. This did not require expert consultations or extensive data gathering. Even a reasonable back-of-the-envelope calculation would have enhanced the reliability of the capacity analysis.[24] However, MKTG provided no evidence created at the time of bidding to show how it estimated its costs and expected profitability to develop its pricing. This type of contemporaneous evidence is the most useful to the Tribunal because of its authenticity.[25]

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21. Confidential submissions of the CRA filed April 6, 2018, at Tabs 14-18, Vol. 4A.
22. Supplementary affidavit of Masha Krupp sworn June 4, 2018, at paras. 5-8, Vol. 4B.
23. *Ibid.* at para. 9.
24. See, for example, the chart at Exhibit A of the (protected) affidavit of Masha Krupp sworn May 1, 2018, Vol. 4B, showing productivity of top translators by word count.
25. See *Rockwell Collins* at para. 48.

[60] Further, the labour capacity analysis diverges from MKTG's own preferred methodology for calculating other costs, which more simply (1) identifies costs from (apparently)[26] current expense ledgers in its accounting books; and (2) pro-rates them, based on the ratio between MKTG's revenues from the prior CRA contract and its total revenues for the fiscal year ending March 31, 2016 (the last year MKTG worked on the contract it had with the CRA).

[61] No explanation was initially provided for why MKTG took a different approach in estimating labour versus non-labour costs. When asked, MKTG stated that labour costs should be treated differently because they are more material and more complex; therefore, the Tribunal should defer to the capacity analysis MKTG prepared, which reflected a team consistent with MKTG's bid. However, MKTG submitted no contemporaneous evidence to indicate that the team it has used in its capacity analysis was in fact the team MKTG used in determining its bid price. Further, MKTG's owner acknowledges in her own supplementary affidavit that labour expenses would have decreased "proportionally with the decrease in work volume" (as reflected in CLS versus historical word count).[27] Indeed, her claim for mitigation of costs based on layoffs and retraining corroborates that MKTG had the flexibility to proportionately reduce labour costs as necessary to accommodate lower work volumes. Moreover, the capacity analysis results in labour costs that are significantly lower than those reflected in the historical financial statements for the period when MKTG held the CRA contract.

[62] By MKTG's own calculations, in the fiscal year ending March 31, 2016, [redacted] percent of MKTG's revenues were from the contract it held with the CRA.[28] In its letter dated May 10, 2018, the Tribunal asked MKTG to provide a revised estimate of what MKTG's expenses would have been for the current CRA contract using the word count of work performed by CLS. As noted previously, CLS' word-count volume is about one third[29] less than MKTG's historical volume—thus, one would expect the revenue percentage to diminish from [redacted] percent to around [redacted] percent.[30] Comparing what MKTG's CRA revenues would have been for the most recent (interim) fiscal year for the period of April 1, 2017, to January 31, 2018, MKTG's accountant estimates that they would have constituted [redacted] percent of MKTG's total revenues. On this basis, he submits that it is reasonable to allocate [redacted] percent of MKTG's expenses as those that would have been incurred under the current CRA contract.[31]

[63] Accordingly, the Tribunal finds that [redacted] percent is a reasonable proxy figure for estimating *all* of MKTG's expenses under the current CRA contract.

[64] In terms of the sources of the labour and non-labour expenses against which this [redacted] percent proxy will be applied, MKTG appears, as mentioned above, to have based its analysis on current rather than historical expenses. The Tribunal finds that historical expenses as reflected in the

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26. The Tribunal asked for the source of MKTG's non-labour expense figures in both of its RFIs, but MKTG's responses were not clear. It appears that MKTG's accountant has obtained the monthly expense items from MKTG's working account books, i.e. they are current, not historical, monthly expenses.
27. Supplementary affidavit of Masha Krupp sworn June 4, 2018, at para. 19, Vol. 4B.
28. Confidential submissions of MKTG filed March 6, 2018, at 15, Vol. 4A.
29. Supplementary affidavit of Masha Krupp sworn June 19, 2018, at para. 16, Vol. 4B.
30. Supplementary affidavit of Masha Krupp sworn June 4, 2018, at para. 16, Vol. 4B.
31. Supplementary affidavit of David Mirsky sworn June 4, 2018, at paras. 5-6, Vol. 4B (estimating [redacted] percent); and confidential submissions of MKTG filed July 13, 2018, at 4 and Exhibit B, Vol. 4B (updating prior estimate to [redacted] percent).

financial statements are more appropriate because those were the expenses incurred while MKTG was performing the previous CRA contract. Expenses incurred currently, in the absence of a contract with the CRA, will be less representative.

[65] In response to a RFI from the Tribunal, MKTG submitted that the Tribunal should rely on the labour and non-labour expenses from only the last three years in which MKTG held the contract; however, the Tribunal finds that relying on the last five fiscal years is preferable because it helps to avoid any unrepresentative year-to-year variations.

[66] Accordingly, the Tribunal finds that the appropriate labour and non-labour expenses to be prorated are the averages of such expenses over the last five years for which MKTG performed the CRA contract, drawn from MKTG's financial statements for the fiscal years 2012-2016.

Issue C: Which Costs to Deduct

Position of the Parties

[67] The CRA submits that, consistent with *Oshkosh*, the Tribunal should deduct both the relevant variable and fixed costs.

[68] MKTG submits that *Oshkosh* was wrongly decided and that the Tribunal should not subtract non-incremental fixed costs from revenues in order to determine lost profits.

Analysis

[69] In *Oshkosh*, the Tribunal found that compensation should be based on "net income, not gross margin, which includes an appropriate deduction for fixed (overhead) costs . . . fairly allocated to the contract"[32].

> 166. First and foremost, that is the profit margin Oshkosh actually used in preparing its proposal for the RFP – it is therefore directly tied to its bid, the competition, and its own expectations. Second, the complainant cannot actually perform the contract without at least some amount of overhead, whether incremental or not – just as it cannot win the RFP without incurring some bid preparation costs. There is no reason why some portion of that overhead (and all of the bid preparation costs, especially given the RFP provision barring recovery of same) should not be allocated to the Resulting Contracts. Oshkosh does not allege that all its overhead has already been assigned to other work – in which case some additional incremental costs would need to be assigned anyways. Regardless, the Tribunal's compensation practices should not result in the government implicitly providing a windfall in terms of general overhead for contractors: treating each contract as incremental results in every contract being incremental, with no (fairly allocated) deduction for overhead in any contract.
>
> 167. Third, while the Tribunal has endorsed the exclusion of non-incremental fixed costs in the past, that was based on an approach of simply by default mirroring the common-law approach to calculation of damages. Since *Envoy* and *Almon*, however, the Federal Court of Appeal has made clear that the Tribunal should not slavishly adopt common-law limitations

32. *Oshkosh* at para. 165.

> as its own. Fourth, even under the Tribunal's prior practice, it recognized exceptions "where a contract would have seen a large increase in revenue, [in which case] overhead costs would inevitably rise, at least incrementally, and therefore should be deducted accordingly". This RFP involved nearly a billion dollars of revenues over 20 years – it is unlikely there would have been no incremental increase in overhead as a result. Fifth, historically, except in cases where the complainant would otherwise be left with no compensation, the Tribunal has deducted both direct and indirect costs from gross revenue to derive lost profit, including bid preparation costs and an amount allocated for overhead.

[70] The Tribunal's decision in *Oshkosh* is well-grounded in its history. In particular, in *Antian Professional Services Inc. v. Department of Public Works and Government Services*, the Tribunal held the following to be "a reasonable formula that it would typically use to calculate profit margins for service providers . . . contract revenues less contract direct costs (e.g. supplies, personnel) less a pro rata share of other costs, including indirect labour and total overhead costs, based on revenue"[33].

[71] The Tribunal finds no reason to depart from *Oshkosh* or *Antian* in this instance. In *Oshkosh*, the Tribunal held that lost profits should include an appropriately allocated deduction for all expenses necessary to perform a contract. Those, by definition, include costs that must be incurred for a firm to perform work on the contract at issue, even if they are not incremental to that contract. However, the scope and magnitude of the deductions for such non-incremental costs will vary according to nature of the goods or services being procured and the type of information provided in the compensation phase of each case.

[72] The costs that the Tribunal considers appropriate to deduct in this instance are analyzed below.

a. Labour costs

– **Position of the Parties**

[73] Labour costs include costs related to the translators, editors, management and support staff required to service the contract, which MKTG has evidenced by way of the capacity analysis discussed above.

[74] The CRA challenges the capacity analysis as insufficiently substantiated for the reasons provided by the Tribunal above. It submits that the Tribunal should instead rely on the financial statements, which itemize labour expenses under the categories of "[redacted]" and "[redacted]" under the heading "[redacted]"; and "[redacted]" and "[redacted]" under the heading "[redacted]".[34]

[75] MKTG responds that the financial statements are not as reliable as its capacity analysis because the financial statements include expenses that bear no relation to the contract it held with the CRA.

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33. (15 August 2007), PR-2006-024 (CITT) [*Antian*] at para. 17.
34. Confidential submissions of the CRA filed April 6, 2018, at 15 and footnote 33, Vol. 4A.

– **Analysis**

[76] For the reasons provided above, the Tribunal has found that the capacity analysis prepared by MKTG's staff and owner is not reliable or verifiable. In the absence of any other evidence of labour costs, it will therefore rely on the categories of labour costs found in the historical MKTG financial statements for fiscal year 2012-2016.

[77] Each of the financial statements has a page titled "[redacted]" with lines (starting from top to bottom of the page) for "[redacted]", "[redacted]", "[redacted]", "[redacted]", "[redacted]", "[redacted]", "[redacted]", etc.

[78] The relevant lines for the purpose of the Tribunal's inquiry are "[redacted]" and "[redacted]".[35] In terms of labour costs, the former includes line items for "[redacted]" and "[redacted]", and the latter includes line items for "[redacted]" and "[redacted]".

[79] The RFP expressly prohibits subcontracting any of the work performed under the contract.[36] Therefore, MKTG could not have subcontracted any CRA work and, consequently, would not have incurred any expenses under this line item. During periods of high volume, MKTG has typically [redacted]. However, [redacted]. Therefore, the Tribunal finds that subcontracting expenses should not be deducted in the calculation of MKTG's lost opportunity.

[80] MKTG does not challenge that the "[redacted]" category contains relevant labour costs information. MKTG also has not challenged "[redacted]" and "[redacted]" *per se*—for example, its capacity analysis includes [redacted].[37] [redacted].[38]

[81] The Tribunal is not persuaded that it should treat [redacted]. First, MKTG itself has admitted that some of these constitute relevant labour costs, even though they are found in the financial statements under the "[redacted]" heading. Second, while MKTG is correct that not all of these costs are attributable to the previous CRA contract, some are. MKTG has itself identified [redacted] percent as a reasonable proxy for the percentage of total expenses attributable to the previous CRA contract. The fact that [redacted]

35. For the fiscal year 2016 financial statement, the second group of expenses is simply labelled "[redacted]".
36. Exhibit PR-2016-043-01 at 34 (Solicitation Amendment #1, Q7), Vol. 1.
37. Confidential submissions of MKTG filed March 6, 2018, Annex C, affidavit of David Mirsky sworn March 6, 2018, at para. 11 and Exhibit 1, Vol. 4A.
38. Confidential reply submissions of MKTG filed May 1, 2018, at 9, 14-15, Vol. 4B.

[redacted] may have been tied to [redacted] is irrelevant, because the complainant is seeking compensation as a corporation, not an individual. Accordingly, there is no reason the proxy used for other expenses is not equally reasonable as a proxy for [redacted] compensation.

[82] Using the average of the figures appearing in the financial statements for the years ended March 31, 2012-2016, MKTG's total labour costs were as follows:

[redacted]: $[redacted]

[redacted]: $[redacted]

[redacted]: $[redacted]

Subtotal: $[redacted]

Reasonable CRA Proxy ([redacted] percent): $[redacted]

[83] The Tribunal therefore finds that labour costs attributable to the CRA contract, had MKTG won, would total $[redacted] annually or $[redacted] monthly.

b. Technology costs

[84] Technology costs include two e-commerce solutions required under the RFP: membership in the Ariba supplier network and the Synergy Tunnel.

[85] MKTG initially represented (without substantiation) that the Ariba network, an electric purchasing and invoicing service, cost approximately $[redacted] annually.[39] It later revised this figure downward to $[redacted] per year and provided invoices from 2015 and 2017 showing costs of $[redacted] and $[redacted] respectively.[40]

[86] MKTG represented that the Synergy Tunnel, a special secure internet connection service provided by Telus, cost $[redacted] annually ($[redacted] per month), which it substantiated with a copy of its Telus customer agreement from 2015-2016.[41]

[87] The CRA did not challenge the validity or quantum of these costs.

[88] The Ariba membership cost apparently varied year-to-year, possibly based on the number of transactions sent through the system.[42] The documentation MKTG has filed is consistent with an average cost of $[redacted] per year during the period MKTG held the prior contract. Given the evidentiary support and lack of objection, the Tribunal finds the $[redacted] per year ($[redacted] per month) figure reasonable. For the same reasons, the Tribunal finds the Synergy Tunnel cost of $[redacted] annually ($[redacted] per month) reasonable.

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39. Affidavit of Masha Krupp sworn March 6, 2018, at para. 7, Vol. 3B.
40. Confidential submissions of MKTG filed July 13, 2018, at 6 and Exhibits D-2 and D-3, Vol. 4B.
41. *Ibid.* at 6 and Exhibit E.
42. *Ibid.* at 6 and Exhibit D-4.

[89] The Tribunal therefore finds that direct technology costs total $[redacted] per month.[43]

c. Other costs

– **Position of the Parties**

[90] Aside from "[redacted]" and "[redacted]" discussed above, MKTG's financial statements identify the following categories under "[redacted]":[44]

- "[redacted]";
- "[redacted]";
- "[redacted]";
- "[redacted]";
- "[redacted]";
- "[redacted]";
- "[redacted]";
- "[redacted]";
- "[redacted]";
- "[redacted]";
- "[redacted]";
- "[redacted]";
- "[redacted]";
- "[redacted]";
- "[redacted]";
- "[redacted]";
- "[redacted]";
- "[redacted]";

43. These are the only costs not subject to the [redacted] percent proxy, because they were required by the previous CRA contract and their exact figures were directly available.
44. These are the categories listed in the FY 2016 financial statements. The statements for the remaining years are essentially the same with only minor variations in wording.

- "[redacted]"; and
- "[redacted]".

[91] MKTG asserts that only the following are related to its previous CRA contract: [redacted].

[92] If the Tribunal declines to adopt its proposal to use a simple proxy rate to determine lost profits, the CRA submits that, in addition to the above, the Tribunal should include rent; amortization of property and equipment; insurance and utilities.

[93] MKTG objects to these additional deductions. MKTG submits that it entered into its lease well before it obtained its first CRA contract; it has committed to a rental term exceeding the life of the contract at issue; the RFP contained no requirements regarding the size of facilities; and nothing in its lease assigns any part of the floor space to the CRA contract. Therefore, rent has not been affected by the loss of the CRA contract and should not be included. Amortization is a non-cash expense that is not typically included in EBITDA (earnings before interest, taxes, depreciation and amortization). The CRA did not require MKTG to carry insurance, certifications or professional fees. Nor were private sector expenses such as meals/entertainment or advertising, promotion, or travel necessary.

– **Analysis**

[94] The Tribunal finds that MKTG has identified the appropriate costs that would have been required to perform the current CRA contract.

[95] Regarding rent, the RFP required the supplier to have a work facility that met certain security and other requirements.[45] However, it did not specify particulars, so the nexus between the RFP's requirements and the quantum of rent incurred by suppliers is weak. For MKTG's lease in particular, there is no evidence that it was selected or affected by the current CRA contract.

[96] Amortization of property and equipment applies to expenses already incurred and thus is unaffected by the loss of the CRA contract. It should therefore not be included.

[97] The RFP did not require MKTG to carry insurance. Therefore, it should not be included.

[98] Regarding utilities, the CRA contract included a requirement to deliver some translation services work on an "urgent" basis, but this does not mean necessarily overnight or otherwise require availability 24 hours a day, 7 days a week. In the Q&As to the RFP, the CRA described the urgent requirement thusly: "In exceptional situations, the contractor may be called upon to work after business hours, during weekends, or over a statutory holiday."[46] The RFP expressly describes this as "exceptional". The Tribunal finds such an exceptional expense should not be included for utility expenses added by the landlord for work primarily performed for other contracts.

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45. Exhibit PR-2016-041-01, Exhibit 1, Solicitation Amendment 2 at R16 and Exhibit 3, Article 7.7 "Security Requirements", Vol. 1.
46. Exhibit PR-2016-041-01 at 30, Vol. 1.

[99] Based on the above, the Tribunal finds that the appropriate categories of additional costs are as follows: [redacted] ($[redacted]); [redacted] ($[redacted]); [redacted] ($[redacted]); [redacted] ($[redacted])[47]; [redacted] ($[redacted]).[48] When reduced to [redacted] percent to reflect the CRA contract proxy, these total $[redacted] per year or $[redacted] per month.

Conclusion Regarding Profit Margin

[100] In accordance with the above findings, the Tribunal concludes that the monthly profit margin on the current CRA contract for MKTG should be calculated as follows:

Revenues:	$[redacted]
minus Labour Costs:	$[redacted]
minus Technology Costs:	$[redacted]
minus Other Costs:	$[redacted]
Profit (percent):	$[redacted] ([redacted] percent)

[101] When using a revenue-less-expenses methodology for estimating lost profits, the Tribunal will also consider the more general types of evidence discussed in *Oshkosh* to test the soundness of the resulting profit margin, as an extremely high or low figure may suggest that the methodology is not reliable.[49] In *Oshkosh*, the Tribunal observed that, under normal circumstances, a reasonable profit margin will often be around 10 percent (plus or minus 5 percent).[50]

[102] While the profit margin here may be at the top end of reasonable profit margins, it is within the range of reasonability for a specialized service contract.[51] Further, it is based on MKTG's actual expenses, as revealed by its financial statements, under the prior CRA contract. That distinguishes this case from those in which the complainant had no historical experience providing the work

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47. [redacted]
48. [redacted]
49. *Oshkosh* at para. 148.
50. *Oshkosh* at para. 71.
51. *Dr. John C. Luik* (28 November 2000), PR-99-035 (CITT) (57 percent lost profits on $100,000 consumer study with minimal expenses); *Knowledge Circle Learning Services Inc.* (24 June 2014), PR-2013-014 (CITT) (45.2 percent on $171,282 for French language training); *Foundry Networks Inc.* (10 October 2002), PR-2001-048 (CITT) (23%); *Freebalance Inc.* (4 July 2012), PR-2011-041 (CITT) (17.06 percent for software licences); *Almon Equipment Limited* (14 October 2011), PR-2008-048R (CITT) at para. 29 (15-20 percent range for service contracts, with higher rates for specialized services).

tendered under the contract for the government institution. The Tribunal also finds that MKTG's over ten years[52] of experience on the contract and its investment in translation software technology[53] have likely increased its productivity in terms of word count per hour. This was not a contract to provide translation services to the government generally, but to provide them to one specific institution, with its own unique terminology, jargon and stylistic requirements.[54] Therefore, the opportunity for specialization here was salient. As profitability for this service contract turned largely on labour costs, higher labour productivity entails a higher profit rate.

Issue D: Compensation for Expenses Required to Mitigate Damages

Position of the Parties

[103] MKTG submits that it is entitled to compensation for the cost of its reasonable attempts to mitigate its lost profits. [redacted].[55]

[104] The CRA argues that the Tribunal excluded such compensation in its determination on the merits of the complaint by holding that MKTG was to be compensated for its lost opportunity based on the amount of profit it would have made divided by the number of bidders compliant with the mandatory criteria. Thus, the Tribunal is now *functus officio*. The CRA further argues that MKTG earned additional revenues as a result of its effort to mitigate. It finally argues that the expenses have not been substantiated.

[105] In response, MKTG argues that the Tribunal's complaint determination neither expressly provided for mitigation expenses nor ruled them out. However, these flow implicitly from the "but for" analysis and the duty to reasonably mitigate expenses discussed in the *Guidelines*. MKTG acknowledges that the total quantum of compensation for its mitigation expenses should be divided by whatever denominator the Tribunal selects as appropriate for lost opportunity.

[106] In its letter dated May 10, 2018, the Tribunal requested further details from MKTG regarding its mitigation claim, including the legal basis for the payouts; the number of months of notice/severance these payouts represented; and whether MKTG could have avoided payments by providing notice of termination to its employees in advance of the RFP results.

[107] In her supplementary affidavit dated June 4, 2018, which was then refiled in a revised and resworn form on June 19, 2018, Ms. Krupp provided further detail. [redacted]. The resulting contract required MKTG to have a minimum number of on-site translators, editors and a client manager with security clearances in place prior to contract award. [redacted].

52. Confidential reply submissions of MKTG filed May 1, 2018, Affidavit of Masha Krupp sworn May 1, 2018, at paras. 2, 5, 10, Vol. 4B.
53. *Ibid.* at paras. 2-9.
54. *Ibid.* at para. 9; Exhibit PR-2016-041-01 at Annex A, art. 2.10.1, at 53 of 96, Vol. 1.
55. Public Submissions of MKTG filed March 6, 2018, Annex A; Affidavit of Masha Krupp sworn March 6, 2018, at paras. 14-18, Vol. 3B.

[108] [redacted][56].

[redacted][57].

[109] The CRA replies that, based on Exhibit 2 of Ms. Krupp's supplementary affidavit, it appears that she may be the only actual employee of MKTG because the document only shows annual burdens for CPP and EI for her. It also objects that MKTG did not append the employment contracts for the relevant employees to substantiate the claim. As for retraining, the CRA objects that internal administrative costs of this nature (loss of employee paid time that could have been used in other matters) is not compensable because it is not an actual expense. The CRA also argues that mitigation costs should only be awarded where the Tribunal makes a recommendation for lost profits, not lost opportunity, because in the latter case the complainant may not have won the contract and, consequently, would not be entitled for expenses due to layoffs and retraining.

Analysis

[110] The Tribunal finds that MKTG should be compensated by one third of its claimed expenses of $[redacted] for [redacted] and $[redacted] for [redacted].

[111] The *Guidelines* are clear that complainants have a duty to mitigate their losses, so that the government is not liable for expenses that could (and should) have been avoided.[58] The corollary to this is that complainants will have the right to be compensated for their reasonable costs of mitigation. This principle has been recognized by courts in the common-law procurement framework.[59] It is consistent with the Tribunal's role in federal procurement reviews to ensure that suppliers are fairly compensated when their rights under the trade agreements are breached.[60] MKTG's reason for not providing notice of termination before the results of the procurement were made known is reasonable. Given the particular requirements of this RFP (which may very well not apply in other cases), it would have been an unreasonable risk to put its employees on notice of termination (the purpose of which is to give them time to find new employment), the result of which would have been some or all of them leaving by the time the RFP results were known.

[112] Most of the CRA's arguments are legitimate bars, in theory, to the recovery of mitigation costs, but they do not apply on the facts here. Generally speaking, the doctrine of *functus officio* means that a decision-maker or tribunal cannot revisit a final decision.[61] The Tribunal's complaint determination did not address whether mitigation costs would be included in compensation one way or another. The parties did not submit arguments on it and it was not a live issue before the Tribunal at that time. Accordingly, there has been no final decision on this issue, and, therefore, the doctrine does not apply.

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56. Confidential supplementary affidavit of Masha Krupp, sworn July 19, 2018, at para. 28, Vol. 4B.
57. *Ibid.* at para. 31.
58. *Guidelines* at art. 3.2.3.
59. *618369 Alberta Ltd. v. Canadian Turbo (1993) Inc.*, 2004 ABQB 283 (CanLII) at para. 65.
60. *Canada (Attorney General) v. Envoy Relocation Services*, [2008] 1 FCR 291, 2007 FCA 176 (CanLII) at para. 29.
61. *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848, 1989 CanLII 41 (SCC) at 861.

[113] The CRA's argument that MKTG has earned additional revenues from its mitigation is factually unsupported. MKTG has permanently lost the revenues associated with [redacted] employees. It has had to retrain [redacted] others in order to maximize their earning capacity, which otherwise would be foregone. Its losses absent these [redacted] payments and [redacted] costs would have been higher. Therefore, in mitigating its losses, it has fulfilled its duties and is entitled to compensation for their costs.

[114] As for substantiation, MKTG has filed two affidavits including exhibits showing each [redacted] employee's annual salary, name, seniority and total years, the weeks of pay in lieu of notice paid, and the total amount of notice, severance and vacation pay. The CRA has not challenged this evidence as unreasonable or not credible through cross-examination or reference to provincial employment standards law—nor did it file a request or motion for any documents to be produced. In these circumstances, it was reasonable for the complainant to rely on the evidence it has submitted.[62]

[115] As for the CRA's argument that Ms. Krupp appeared to be the only employee of MKTG based on the CPP and EI burdens appearing only for her in Exhibit 2 of her June 4, 2018, supplementary affidavit, this was a clerical error corrected in the June 19, 2018, revised affidavit. MKTG sought permission to re-file the corrected affidavit, to which the CRA consented.[63]

[116] As for the objection to compensation for internal administrative costs, these types of costs are clearly recoverable as a bid preparation cost if they are reasonable and "reflect[s] actual salaries or invoiced charges and do[es] not include opportunity costs"[64]. They are being claimed here in the compensation framework, but there is no principled reason to treat them differently: the alternative to retraining the employees would have been to terminate them, which would have resulted in higher labour costs in terms of severance and notice payments. The amounts claimed are not large and are based on reasonable hourly salaries and total time spent. Therefore, the Tribunal finds that they should be included in the compensation recommendation.

[117] Finally, regarding the CRA's argument that mitigation costs may only be awarded in circumstances of lost profit, and not lost opportunity, this objection is addressed by MKTG's acknowledgement that such costs will be divided by the number of potential bidders. Therefore, this objection is not valid.

Issue E: Number of Potential Bidders to Calculate Lost Opportunity

[118] As indicated above, given that MKTG was awarded compensation for lost opportunity, its lost profits must be divided by the number of compliant bidders, reflecting the fact that it may or may not have actually won the contract but for the breach.

Position of the Parties

62. *Rockwell Collins* at para. 42.
63. MKTG letter to Tribunal dated June 21, 2018, attaching e-mail from D. Rasmussen to A. Tomkins dated June 15, 2018, RE: MKTG re CRA – PR-2016-041, Vol. 3D.
64. *BancTec (Canada) Inc. v. Department of Public Works and Government Services* (10 July 2001), PR-2000-041 (CITT) at 2; *Procurement Costs Guideline* at arts. 3.5.1 and 3.6.1.

[119] MKTG submits that it was the only compliant bidder or, alternatively, only it and CLS were compliant. Therefore, it argues, the Tribunal should recommend an award of full lost profits or, alternatively, fifty percent of lost profits.

[120] MKTG argues that CLS did not meet the requirement for contract award of having in its employ the obligatory number of translators holding a secret security clearance; therefore, it is not a responsive bidder. MKTG acknowledges that there is a distinction between the RFP's requirements and a requirement in the resultant contract B (in which this condition precedent is found). MKTG also acknowledges that the Tribunal has already held that this ground of complaint is untimely. However, it argues that for purposes of determining compensation, the Tribunal should resolve this issue directly on the merits to determine the likelihood of MKTG winning the contract.

[121] MKTG reiterates the evidence it relied on in the determination on the merits supporting its position that CLS did not, at the time of contract award, meet the security clearance requirement. It observes that subclause 6.1(2) of the RFP permits the CRA to postpone the contract award date to allow the bidder to acquire the requisite number of secret security-cleared translators. It argues, however, that no such extension was provided in this case and that such an extension would have been lengthy and impractical because of the timeline (12 to 18 months) for an individual to obtain a secret security clearance.

[122] MKTG argues that it is irrelevant that CLS was in fact awarded the contract and has been performing it on an ongoing basis; if it has not met the preconditions for contract award, the award and work performed is unlawful. Based on all the above, MKTG submits that the Tribunal should follow the principle stated in *Oshkosh* that while the number of compliant bidders is usually the correct denominator for calculating lost opportunity, "parties are free to present any additional relevant evidence they think might assist the Tribunal in determining the probability of success. The goal is a probabilistic assessment founded in the evidence and common sense."[65]

[123] Alternatively, MKTG submits that the Tribunal should divide the lost profits by two on the basis that it found in its determination that only two bidders (CLS and MKTG) submitted responsive bids.

[124] The CRA submits that the Tribunal should divide lost profits by three on the basis that the Tribunal in its determination ruled that compensation would be "divided by the number of bidders that were compliant with the mandatory criteria".[66] The mandatory criteria, which were "pass or fail", are found at pages 23-28 of 96 of the RFP. The consensus evaluation sheet for CLS shows that the evaluators determined that CLS complied with the mandatory criteria.[67]

[125] The CRA describes MKTG's attempt to relitigate this issue as an abuse of process, because the Tribunal has already rejected this ground of complaint as untimely (as it was raised only after the GIR was filed). In *Oshkosh*, the Tribunal considered a similar attempt by a party to relitigate a closed issue during the compensation phase. The Tribunal referred to the Supreme Court of Canada's decision in *Danyluk*, which established that issue estoppel applies where (1) the same question has

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65. *Oshkosh* at para. 177.
66. *The Masha Krupp Translation Group Ltd. v. The Canada Revenue Agency* (15 March 2017), PR-2016-041 (CITT) at paras. 85 and 95.
67. Confidential submissions of the CRA filed April 6, 2018, at Tab 2, Vol. 4A.

been decided; (2) the prior judicial decision was final; and (3) the parties are the same in both proceedings.[68] Here, the ground was already rejected as untimely; the Tribunal did not reserve any discretion to the question of whether CLS met the mandatory criteria or how compensation should be determined (i.e. by reference to mandatory criteria only); and the parties are the same.

[126] In addition to CLS, the CRA argues, the Tribunal should find that the third bidder met the mandatory criteria. In support, the CRA submitted the consensus scoring sheet for the third bidder, in which all the criteria are described by the evaluators as met, and an e-mail from the CRA to the third bidder informing it of the results of the competition.[69]

[127] In reply, MKTG submits that the Tribunal's focus in compensation should be on whether MKTG would have won the contract. The Tribunal has a more robust record now than it did during the complaint inquiry on the likelihood of whether CLS or the other bidder would have won the contract. MKTG argues that the Tribunal only resolved whether CLS met Mandatory Criterion 4 in its proposal to show how it will meet security requirements, not the preconditions to award of the contract. MKTG also argues that the Tribunal's earlier refusal (on timeliness grounds) to consider whether CLS met the security preconditions is irrelevant to a compensation analysis.

[128] As for the other bidder, MKTG submits that it is unlikely that the other bidder could have complied with the precondition requiring 31 secret security-cleared resources. MKTG further notes that at its debriefing, it was informed that only two bidders were compliant.

Analysis

[129] In *Oshkosh*, the Tribunal addressed the same issue that arises here. One party wanted to make new submissions in the compensation phase based on evidence and arguments that were not timely presented in the complaint inquiry phase. In *Oshkosh*, the Tribunal held that its earlier decision was final and that it was *functus officio* for purposes of revising it.[70]

[130] The Tribunal sees no reason to proceed otherwise here. MKTG has provided no arguments for distinguishing *Oshkosh* from the present case. That case also involved evidence considered for different purposes (liability versus compensation), yet for reasons of issue estoppel, the Tribunal refused to decide the matter again.

[131] In its determination, the Tribunal ruled that MKTG did not bring its ground of complaint regarding CLS not meeting the contract preconditions within the prescribed time limits. That ruling applies throughout the entire proceeding, including the compensation phase. The stages of bid challenge review at the Tribunal are not watertight compartments, wherein each legal issue can be re-examined afresh. To the contrary, the entire legislative and regulatory framework and case law is focussed on expeditious identification and resolution of issues to minimize disruptions to procurement processes. MKTG had notice on the day that the Tribunal's determination was released as to the type of remedy it had recommended. Indeed, the Tribunal is statutorily required to determine the nature of the remedy to be granted in its determinations—not at a later date. MKTG did not seek judicial review of the Tribunal's decision to base compensation on lost opportunity

68. *Oshkosh* at para. 32 citing *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 SCR 460, 2001 SCC 44 (CanLII) at para. 25.
69. Confidential submissions of the CRA filed April 6, 2018, at Tab 4, Vol. 4A.
70. *Oshkosh* at para. 37.

divided by the number of bidders compliant with the mandatory criteria. To permit it to relitigate the issue and receive a fresh decision from the Tribunal would be to effectively grant it another chance to seek judicial review over a year after its original opportunity expired. This would not only be unfair but would seriously disrupt the settled expectations of the parties and, in particular, significantly impair the ability of government institutions to determine how and whether to accept the Tribunal's recommendations and make procurement process planning decisions based on them. Accordingly, the Tribunal finds itself *functus officio* for purposes of reconsidering this ground of complaint.

[132] With regard to the other bidder, in its determination the Tribunal decided, based on the facts in the record, that likelihood of winning the contract had to be assessed by the mandatory criteria, not the point-rated criteria, because the latter were unreliable due to the breaches identified in the process. The CRA has filed the evaluators' assessments finding that the other bidder did in fact meet the mandatory criteria. It has also filed the regret e-mail sent to that bidder notifying it that its bid was not the highest rated and providing its total score. As discussed more fully above, MKTG has identified no grounds for questioning the validity or authenticity of these documents. Accordingly, the Tribunal finds that the third bidder met the mandatory criteria of the RFP. Thus, in determining the quantum of compensation to be awarded to MKTG for lost opportunity, the Tribunal will divide by three.

Issue F: Premium for Time Value of Money

Position of the Parties

[133] MKTG submits that it is entitled to compensation for the time value of money in the form of interest on the lost profits it would have earned from October 2016 to date. It relies on article 3.1.6 of the *Guidelines*, which recognizes that the Tribunal "may increase the amount of compensation recommended to account for the time value of money", being the interest it would have earned by investing the profits. MKTG proposes a rate of three percent per annum based on prior Tribunal decisions.

[134] The CRA submits that the Tribunal should only award interest consistent with the terms of the resulting contract, which provide for a calculation based on simple, not compound, interest.

[135] In reply, MKTG notes that in *Systemes Equinox Inc*. the Federal Court of Appeal expressly held that the Tribunal has the authority in compensation recommendations to include prejudgment interest in recognition of the time value of money.[71] MKTG argues that under the common-law, compound interest is the norm. It argues that the terms of the resulting contract are irrelevant because they relate to interest a government institution owes a contractor for overdue accounts. MKTG is not currently performing the contract nor is it a party to it; therefore, it is not bound by it.

Analysis

[136] The Tribunal finds that an amount should be included in the compensation recommendation to reflect the time value of money for the lost profits for the period of October 2016 to the date of this order.

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71. *Systèmes Equinox Inc. v. Canada (Public Works and Government Services)*, 2012 FCA 51 (CanLII) at para. 13.

[137] To a large extent, the terms of the solicitation document inform the terms of compensation in Tribunal proceedings. Thus, it is irrelevant whether or not under the common-law compound interest is the norm in the *absence* of a contractual term—here, there is a contract term for interest. Admittedly, MKTG is not bound by the terms of the resulting contract, but its claim for compensation is based on the trade agreements, which require government institutions to abide by the terms of their tender documents. The resulting contract and all of its terms were incorporated into the RFP. Importantly, MKTG has identified no reason for the Tribunal to impose its own terms for prejudgment interest in lieu of the terms included in the RFP by the CRA and agreed to by MKTG when it submitted its proposal.

[138] Accordingly, the Tribunal finds that the amount of compensation shall include an amount for time value of money based on the terms of the resulting contract in the RFP, specifically, "General Conditions-Higher Complexity Services", clause 2035 17 "Interest on Overdue Accounts". In its letter dated May 10, 2018, the Tribunal asked the CRA to propose a method for calculating the time value of money based on this term. The CRA provided a method in its letter filed June 4, 2018. MKTG raised no objections to the CRA's proposed method. Therefore, the Tribunal recommends that the compensation include an amount for time value of money to be calculated in accordance with the detailed method proposed by the CRA in its letter filed June 4, 2018.[72]

CONCLUSION

[139] Based on all of the above, the Tribunal recommends that the CRA compensate MKTG in the amount of $[redacted],[73] representing one third of MKTG's lost profits is for the value of services actually purchased by the CRA under the contract resulting from the RFP from mid-October 2016 until January 2018 inclusive.

[140] The Tribunal further recommends that the CRA provide additional compensation to MKTG for the costs of mitigating its losses in the amount of $[redacted].

[141] The Tribunal further recommends that the CRA pay interest on each the above sums (separately calculated) in accordance with the interest provision in the contract resulting from the RFP using the method proposed by the CRA in its letter filed June 4, 2018.

[142] The Tribunal further recommends that the CRA provide compensation to MKTG for each month from February 2018 until a new contract is awarded, calculated as follows: [redacted] percent of the CRA's payments to CLS under the contract resulting from the Request for Proposal, per month, divided by three.

Rose Ritcey

Rose Ritcey

72. Public submissions of the CRA, filed on June 4, 2018, Vol. 3D.
73. Calculated as follows: monthly net margin of $[redacted] divided by 3 times 15.5.

Presiding Member