



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

ORDER AND REASONS

File No. PR-2014-019

Oracle Canada ULC

v.

Department of Public Works and
Government Services

*Order and reasons issued
Monday, November 17, 2014*

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

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

BETWEEN

ORACLE CANADA ULC

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

ORDER

Pursuant to paragraph 10(a) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, the Canadian International Trade Tribunal orders the dismissal of the complaint because it has determined that the complaint has no valid basis.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by Oracle Canada ULC. In accordance with the *Procurement Costs Guideline*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,750. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian international Trade Tribunal, as contemplated in article 4.2 of the *Procurement Costs Guideline*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the cost award.

Ann Penner

Ann Penner
Presiding Member

STATEMENT OF REASONS

SUMMARY

1. On July 8, 2014, Oracle Canada ULC (Oracle) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a Request for Proposal (RFP) (Solicitation No. EN578-130092/B) by the Department of Public Works and Government Services (PWGSC) for the provision of common and shared case management software solutions (CMSSs) within the federal government.

2. Oracle put forward two grounds of complaint, both of which allege that certain actions by PWGSC that occurred after contract award amounted to sole-source procurements in violation of the trade agreements.² The first ground alleges that PWGSC improperly accepted the delivery of software that was not bid and that did not meet the mandatory requirements of the RFP, in that it was not commercially available or publicly announced before the bid closing date. The second ground alleges that PWGSC wrongly issued certain task authorizations to the successful bidder, Sierra Systems Group Inc. (Sierra), and thereby violated the terms of the RFP.

3. For the reasons that follow, the Tribunal has determined that there is no valid basis to the grounds of complaint. Accordingly, the complaint is dismissed.

PROCEDURAL HISTORY

4. On March 21, 2013, PWGSC issued an RFP for the CMSS with a bid closing date of April 30, 2013. A total of 10 amendments to the RFP were issued between April 9 and May 16, 2013, and the bid closing date was extended to May 23, 2013.

5. On December 20, 2013, PWGSC awarded a contract to Sierra for its proposed CMSS, Microsoft Dynamics CRM 2011 (MSD 2011). On March 20 and 31, 2014, PWGSC issued amendments to the contract for the purpose of purchasing additional licences and maintenance and support services. PWGSC also issued various task authorizations to Sierra for the installation of the CMSS and for other work on Canada's technical environments.

6. On June 27, 2014, Oracle became aware, through a response to an Access to Information request, that PWGSC actually received Microsoft Dynamics CRM 2013 (MSD 2013) instead of MSD 2011. This information formed the basis of its complaint.

7. On July 15, 2014, the Tribunal accepted Oracle's complaint for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.³ However, as the complaint indicated that the contract had already been awarded, the Tribunal did not order a postponement of the contract award.

8. On July 22, 2014, Sierra requested intervener status, which was granted by the Tribunal on July 24, 2014.⁴

9. On July 28, 2014, Microsoft Canada Inc., Microsoft Corporation and Microsoft Licensing, GP (Microsoft) requested intervener status. This status was granted by the Tribunal on August 5, 2014.⁵

10. On August 11, 2014, PWGSC filed a Government Institution Report (GIR).

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

2. Exhibit PR-2014-019-01, Vol. 1; Exhibit PR-2014-019-42, Vol. 1F.

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

4. Exhibit PR-2014-019-09, Vol. 1D.

5. Exhibit PR-2014-019-12, Vol. 1D.

11. On August 15, 2014, Oracle filed a motion for an order requiring PWGSC to produce certain documents. PWGSC and Sierra submitted comments opposing this motion on August 20, 2014. Oracle submitted its reply to these comments on August 22, 2014.

12. On September 2, 2014, the Tribunal granted Oracle's motion in part.⁶ The reasons for the Tribunal's decision are found below.

13. On September 11, 2014, Sierra and Microsoft submitted their comments on the GIR.

14. On September 15, 2014, Oracle submitted its reply to the GIR and the comments of the interveners. On September 17, 2014, Sierra objected to Oracle's reply on the grounds that it raised new arguments and evidence, and requested that these new arguments and evidence be struck from the record. On September 24, 2014, PWGSC also objected to Oracle's reply on the basis that it raised new grounds of complaint and requested that it and the interveners be given an opportunity to reply. On September 19 and 26, 2014, Oracle replied to Sierra's and PWGSC's objections respectively.

15. Upon consideration of these submissions, the Tribunal found that, while Oracle had properly submitted rebuttal arguments and evidence in reply to allegations made for the first time in the GIR and in the interveners' submissions, portions of Oracle's reply and supporting evidence raised new grounds of complaint. Accordingly, the new grounds of complaint and supporting evidence were struck from the record.⁷

16. Given that there was sufficient information on the record, the Tribunal decided that an oral hearing was not required and disposed of this matter on the basis of the written information on the record.

OVERVIEW OF THE PROCUREMENT AT ISSUE

17. As noted above, the RFP sought to procure software solutions for use within the federal government. The relevant parts of the RFP are set out below.

18. The RFP set out certain criteria that the software had to meet. Notably, article 5.4 provides as follows:

*Any software bid to meet this requirement must be "off-the-shelf" . . . meaning that each item of software is commercially available and requires no further research or development and is part of an existing product line with a field proven operational history If any of the software bid is a fully compatible extension of a field-proven product line, it must have been publicly announced on or before the bid closing date.*⁸

[Emphasis added]

19. The RFP included details about the required related licences and associated installation, training, maintenance and support services. Article 7.19 provides as follows:

7.19 Maintenance and Support Services

With respect to the provisions of Supplemental General Conditions 4004:

. . .

- (c) **Maintenance Releases:** Include all commercially available enhancements, extensions, improvements, upgrades, updates, releases, versions, renames, rewrites, cross-grades, components and back grades and other modifications to the Licensed Software made commercially available. The Contractor must deliver to Canada, within three months of the release(s) date by the Software Publisher of an upgrade to the Licensed Software and/or

6. *Oracle Canada ULC v. Department of Public Works and Government Services* (2 September 2014), PR-2014-019 (CITT).

7. Exhibit PR-2014-019-51, Vol. 1F.

8. Exhibit PR-2014-019-01, tab H, Vol. 1.

when changes are made to the Licensed Software either because of packaging changes, rename or because of acquisition, a table which validates all sub-components and validates where the functionalities reside within the revised product list. The Contractor must, over the course of the contract as technology evolves, add new functionalities and/or additional features associated with the Licensed Software as part of the Maintenance and Support Services to ensure that Canada is able to offer to the Clients a feature-rich Case Management Software Solution.⁹

20. Article 7.19 of the RFP refers to the *Supplemental General Conditions 4004 - Maintenance and Support Services for Licensed Software*,¹⁰ which were incorporated by reference into the RFP.¹¹ The relevant provisions of that document are as follows:

“Maintenance Releases” means all commercially available enhancements, extensions, improvements, upgrades, updates, releases, versions, renames, rewrites, cross-grades, components and back grades or other modifications to the Licensed Software developed or published by the Contractor or its licensor;

...

4004 03 (2008-05-12) Maintenance Releases

During the Software Support Period, the Contractor must provide to Canada all Maintenance Releases, in object-code form, at no additional cost. All Maintenance Releases will become part of the Licensed Software and will be subject to the conditions of Canada’s license with respect to the Licensed Software. Unless provided otherwise in the Contract, Canada will receive at least one Maintenance Release during any twelve (12) month maintenance period.

21. Article 1.2 of the RFP provides as follows:

1.2 Summary

...

Training and professional services will be required to install the Case Management Software Solution, as described in 7.24 – Professional Services, within Canada’s designated technical environments. Professional services to be requested under task authorizations will be limited to installing the Licensed Software in two or more distinct environments (in accordance with approved Installation Plan by Canada) for the purpose of creating a functioning development environment. Canada will be required to use other procurement vehicles to acquire services to configure, tailor and deploy the Licensed Software to meet the needs of each Business Unit. . . .¹²

22. The RFP defined Canada’s technical environment and its general architecture. Annex D to the RFP provides as follows:

Annex D

Canada Technical Environment

...

1.1 General Architecture

The CMSS will be comprised of up to 4 environments: (a) development, (b) test, (c) pre-production and (d) production environment.

The development environment will be used for configuration, integrations with third-party systems and development of client functionality that will be promoted to testing. The test environment will be

9. *Ibid.*

10. Exhibit PR-2014-019-13, tab 4, Vol. 1D. See, also, <https://buyandsell.gc.ca/policy-and-guidelines/standard-acquisition-clauses-and-conditions-manual/4/4004/4>.

11. Article 7.4 of the RFP, Exhibit PR-2014-019-01, tab H, Vol. 1.

12. Exhibit PR-2014-019-01, tab H, Vol. 1.

used to validate the solution. The pre-production environment will be used as a last level of quality control prior to the deliverable being promoted to production environment. The production environment will be used to host the case management software solution for the business units.¹³

23. A number of questions were posed by bidders. Questions and answers 009 and 010 are relevant to the complaint.

24. Question and answer 009 are as follows:

Question: After reviewing the solicitation, it is not clear which Government Departments, Departmental Corporations/Agencies, or other GoC bodies will deploy the successful CMSS under the resulting contract. Are these “two or more distinct environments” GoC Departments/Corporations/Agencies that have committed to implementing the solution? Or is PWGSC soliciting a CMSS on behalf of Canada in anticipation of future commitments, to which Departments/Corporations/Agencies have not yet committed to implementing the solution?

Answer: The first two adopters of the CMSS will be Industry Canada who will offer the CMSS to a variety of internal business units and PWGSC (Shared Services Integration) *who will offer the CMSS as a service to various departments and agencies’ business units*. Canada is also expecting future commitments from any of the potential Clients listed in Part 7, Article 7.1 (b) *who may require deployment, in part or in whole, of the CMSS within their technical environments*.¹⁴

[Emphasis added]

25. Question and answer 010 are as follows:

Question: It is not clear what services are being sought under this solicitation. Part 1, Article 1.2 of the RFP states “Training and professional services will be required to install the Case Management Software Solution, as described in 7.24 – Professional Services, within Canada’s designated technical environments”; however, the RFP also states “Canada will be required to use other procurement vehicles to acquire services to configure, tailor and deploy the Licensed Software to meet the needs of each Business Unit. By submitting a bid, Bidders agree that if their bid is successful and a contract is issued for the purchase of their Licensed Software, Canada has a right to acquire through a competitive process any or all additional professional services to integrate and to configure the Licensed Software into Canada’s technical environment on the Government Electronic Tendering System or, alternatively, using any pre-established professional services instruments to satisfy Canada’s integration and customization requirements.”

Answer: The successful bidder will be responsible for the installations of the proposed commercially available CMSS within Canada’s technical environments as described in 7.24 in order to gain acceptance from Canada Technical Authorities. Canada will then use other procurement vehicles to acquire services to further configure, tailor and deploy the Licensed Software to meet the needs of each Business Unit.¹⁵

TRIBUNAL’S ANALYSIS

Motion by Oracle for the Production of Documents

26. As noted above, Oracle filed a motion on August 15, 2014, to request the production of documents that it claimed should have been included in the GIR. In its view, the requested documents would assist the Tribunal in reaching its determination and in assessing whether there was an evidentiary basis for the position that PWGSC presented in the GIR.¹⁶ The documents sought by Oracle were as follows:

13. *Ibid.*

14. Exhibit PR-2014-019-13, exhibit 5, Vol. 1D.

15. Exhibit PR-2014-019-01, exhibit 5, Vol. 1D.

16. “Notice of Motion” at para. 8, Exhibit PR-2014-019-24, Vol. 1E.

- unredacted/confidential versions of the two amendments to the contract between Sierra and PWGSC that were issued on March 20 and 31, 2014, as well as any further amendments to the contract;
- unredacted/confidential versions of task authorizations PWGSC TA-001, 002 and 003;
- unredacted/confidential versions of task authorizations IC CIO TA-001, IC CIO TA-001 amendment 1, IC CIO TA-002, IC CIO TA-002b and IC CIO TA-003;
- non-confidential edited versions or non-confidential summaries of task authorizations PWGSC TA-004, 005 and 006, and IC CIO TA-001;
- the most up-to-date approved installation plan issued against the contract and its amendments;
- an unredacted/confidential version of the contract between Sierra and PWGSC dated December 20, 2013;
- an unredacted version of the bid made by Sierra; and
- all communications between and amongst PWGSC, any other government department, Sierra and Microsoft relating to the switch from MSD 2011 to MSD 2013.¹⁷

27. In response, PWGSC argued that the requested documents were not relevant to the matters in issue and were not necessary to resolve Oracle's complaint. PWGSC stated that, for the contract, the amendments and some of the task authorizations, the only information that was redacted was personal information and pricing. PWGSC also submitted that the approved installation plan submitted with the GIR was the most up-to-date version.¹⁸

28. Sierra submitted that all the requested documents, except for its bid, related to contract administration and were thus not relevant to the Tribunal's inquiry, as the inquiry could only focus on the bid evaluation process, up to contract award.¹⁹

29. Oracle replied that the pricing information was relevant to show whether or not PWGSC in fact paid the same price for the MSD 2013 licences as it had contracted for the MSD 2011 licences.²⁰ If not, this information would rebut PWGSC's argument that article 7.19 of the RFP allowed it to acquire MSD 2013 as an update to MSD 2011.

30. On September 2, 2014, the Tribunal communicated its decision on this motion to the parties. In accordance with subsection 17(2) and paragraph 46(1)(b) of the *CITT Act*, the Tribunal found the following documents to be relevant to the complaint and ordered their production by PWGSC:

- unredacted/confidential versions of the two amendments to the contract between Sierra and PWGSC that were issued on March 20 and 31, 2014, as well as any further amendments to the contract;
- unredacted/confidential versions of task authorizations PWGSC TA-001, 002 and 003;
- unredacted/confidential versions of task authorizations IC CIO TA-001, IC CIO TA-001 amendment 1, IC CIO TA-002, IC CIO TA-002b and IC CIO TA-003;
- non-confidential edited versions or non-confidential summaries of task authorizations PWGSC TA-004, 005 and 006, and IC CIO TA-001;
- an unredacted/confidential version of the contract between Sierra and PWGSC dated December 20, 2013;
- an unredacted version of the bid made by Sierra; and

17. "Factum of the Complainant" at para. 38, Exhibit PR-2014-019-24, Vol. 1E.

18. Exhibit PR-2014-019-28, Vol. 1E.

19. Exhibit PR-2014-019-29, Vol. 1E.

20. Exhibit PR-2014-019-30, Vol. 1E.

- all communications between and amongst PWGSC, any other government department, Sierra and Microsoft relating to the switch from MSD 2011 to MSD 2013.

31. The Tribunal considered these documents to be relevant to the complaint insofar as they related to PWGSC's rebuttal argument that it was entitled to receive MSD 2013 pursuant to article 7.19 of the RFP and the provisions of the *Supplemental General Conditions 4004 - Maintenance and Support Services for Licensed Software*, both of which required that all updates be provided at no additional cost. If the redacted pricing information showed that Canada was charged an additional cost per licence for MSD 2013, then PWGSC could not rely on article 7.19 as a justification for its acceptance of MSD 2013 rather than MSD 2011.

32. Similarly, the Tribunal considered communications between the parties regarding the switch from MSD 2011 to MSD 2013 to be relevant insofar as they could reveal whether there had been any negotiation between the parties regarding the provision of MSD 2013 or if it was provided as a matter of course.

33. Finally, the Tribunal ordered PWGSC to produce non-confidential edited versions or non-confidential summaries of task authorizations PWGSC TA-004, 005 and 006, and IC CIO TA-001 so that parties that were not privy to the confidential information submitted as part of this proceeding could gain a reasonable understanding of the substance of the information, as required by paragraph 46(1)(b) of the *CITT Act*.

34. The Tribunal did not order the production of the most up-to-date approved installation plan, as it accepted PWGSC's statement that the one provided in the GIR was the most current version.

Complaint is Timely

35. In its comments on the complaint and the GIR, Sierra argued that Oracle's complaint was not timely. It claimed that Oracle knew, or reasonably should have known, that the successful bidder would be required to provide PWGSC with the newest versions of the CMSS, as this was set out in the RFP. As a result, it suggested that Oracle knew, or should have known, the basis of its first ground of complaint as of March 14, 2014, when it received a copy of the contract between Sierra and PWGSC and discovered that Sierra had bid MSD 2011.²¹ Since Oracle did not submit its complaint until July 8, 2014, Sierra maintained that Oracle had not properly filed its complaint within the 10-day time frame required by subsection 6(1) of the *Regulations*.

36. The Tribunal does not agree. To be sure, the RFP required the provision of the most up-to-date version of the software that was being procured. However, the Tribunal does not accept that Oracle knew, or reasonably should have known, the specific terms of the contract between Sierra and PWGSC and, in particular, if and when PWGSC accepted MSD 2013 after the contract award.

37. Instead, the Tribunal accepts Oracle's position that it became aware of the two grounds of its complaint only after receiving a response to its Access to Information request on June 27, 2014.²² Oracle filed its complaint on July 8, 2014, thereby meeting the requisite 10-day time limit of the *Regulations*. The complaint is therefore timely.

21. Sierra's comments at para. 25, Exhibit PR-2014-019-40, Vol. 1F.

22. Oracle's complaint at para. 54, Exhibit PR-2014-019-01, Vol. 1.

Complaint has no Valid Basis

38. In both grounds of complaint, Oracle claimed that PWGSC's behaviour after contract award amounted to a sole-source procurement under the guise of a competitive process, which is contrary to the trade agreements.²³ In the Tribunal's view, allegations such as the ones made by Oracle that put into question the integrity of the competitive procurement system are matters relating to the procurement process as opposed to matters of contract administration.²⁴

39. Given that the Tribunal has jurisdiction over "any aspect of the procurement process", it has considered whether and when it may intervene in complaints similar to that of Oracle. As a general rule, the Tribunal has not intervened when complaints have extended beyond the procurement process itself and into the phase of "contract administration". The very few instances in which the Tribunal has previously intervened pertained to situations where procuring entities had knowingly accepted delivery of goods or services that had not been authorized by the procurement processes at hand.²⁵

40. In this case, however, there is no evidence of such behaviour by PWGSC. Instead, as will be explained below, the record shows that PWGSC accepted delivery of precisely what had been requested in the solicitation (ground one) or effectively did not accept delivery of anything at all (ground two). As such, there is no basis for either ground of complaint.

Oracle's First Ground of Complaint

41. In its first ground of complaint, Oracle argued that PWGSC improperly accepted delivery of software that was not bid and that did not meet the mandatory requirements of the RFP. Specifically, Oracle alleged that MSD 2013 contravened article 5.4 of the RFP because it was not "commercially available" or "publicly announced" before bid closing date, but only available six months and publicly announced two

23. Oracle's complaint at paras. 5-6, Exhibit PR-2014-019-01, Vol. 1. According to Oracle, "...PWGSC has an obligation to conduct a competitive procurement whenever it wishes to obtain new products - save where the conditions imposed on limited tendering are met, which is not the case here", Oracle's reply at para. 44, Exhibit PR-2014-019-42, Vol. 1F. In support of this argument, Oracle noted that "Article 1016 of NAFTA restricts the award of sole source contracts wherein it provides that an entity may, in certain circumstances and subject to certain conditions, use limited tendering procedures provided that such procedures are not used with a view to avoid maximum possible competition or in a manner that would constitute a means of discrimination between suppliers of the other parties or protection of domestic suppliers", Oracle's reply at para. 6(a), Exhibit PR-2014-019-42, Vol. 1F. Thus, the trade agreements permit sole-source procurements only where they do not unduly limit competition.

24. Article 1017(1)(a) of the *North American Free Trade Agreement*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994), limits the Tribunal's jurisdiction to "... bid challenges concerning any aspect of the procurement process, which for the purposes of this Article begins after an entity has decided on its procurement requirement and continues through the contract award". The *Agreement on Internal Trade*, 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm>, contains a similar provision at Article 514(2). The Tribunal's enabling legislation also limits the Tribunal's jurisdiction in this way. Subsection 30.11(1) of the *CITT Act* limits the Tribunal's jurisdiction to "... any aspect of the procurement process ...", which encompasses all elements of the procurement cycle up to and including contract award. Any discrepancy between the contract terms and the actual "deliveries" thereunder becomes a matter of contract administration, which is beyond the Tribunal's jurisdiction". See *Flag Connection Inc.* (3 July 2009), PR-2009-018 (CITT) at para. 16; *Airsolid Inc.* (18 February 2010), PR-2009-089 (CITT); *Secure Computing LLC v. Department of Public Works and Government Services* (23 October 2012), PR-2012-006 (CITT).

25. *AdVenture Marketing Solutions Inc. v. Department of Public Works and Government Services* (31 March 2011), PR-2010-074 (CITT); *Canyon Contracting v. Parks Canada Agency* (19 September 2006), PR-2006-016 (CITT).

months after that date.²⁶ Oracle also alleged that PWGSC could not accept MSD 2013 under the terms of the solicitation because it was a completely different or “new” and “revolutionary” product from what Sierra had bid.²⁷ Oracle argued that this amounted to a sole-source procurement.

42. Oracle is correct that MSD 2013 was neither commercially available nor publicly announced before the bid closing date. Indeed, that is a fact that none of the parties disputed. Nevertheless, Oracle is not correct to thereby conclude that MSD 2013 was in contravention of the RFP. Article 5.4 of the RFP pertains exclusively to the software proposed in a *bid* (“[a]ny software bid”). It does not apply to the software that PWGSC ultimately accepted delivery of at the time of contract performance. As such, article 5.4 does not extend to MSD 2013 for the simple reason that Sierra did not bid that product, but bid MSD 2011 instead, another fact that is not in dispute.²⁸

43. Furthermore, Oracle is not correct to argue that MSD 2013 was new or different from what Sierra had bid. Instead, the Tribunal finds that MSD 2013 simply “upgrades,” “enhances,” “improves” and/or “updates” MSD 2011 based on the clear and convincing evidence in submissions from all parties, including Oracle itself.²⁹ Oracle’s position that MSD 2013 is not an “upgrade” but an entirely “new” or “revolutionary” product belies the fundamental fact that MSD 2013 is in fact nothing other than a modified version of MSD 2011; it is MSD 2011 *plus* upgrades. Oracle’s argument that MSD 2013 was thereby outside the scope of the RFP denies the obvious; modifications and “newness” are implicit in the concepts of “upgrades,” “enhancements,” “updates” or “improvements”. Modified software will, by necessity, have modified, new or even revolutionary features, and be somewhat different as a result.

44. Setting qualifiers aside, irrespective of how big, small, major, minor, revolutionary or insignificant the differences between MSD 2011 and MSD 2013, the fact remains that article 7.19 of the RFP required the winning bidder to provide *all* updates, upgrades, versions and improvements of the software throughout the life of the contract. Had Sierra delivered MSD 2011 to PWGSC, it would have been required to provide any and all upgrades, updates, enhancements and improvements at some point after the contract award.³⁰ Stated another way, on the basis of the terms of the RFP, PWGSC was fully entitled to expect and require

26. Oracle’s complaint at paras. 64-66, Exhibit PR-2014-019-01, Vol. 1.

27. Sierra’s comments at para. 25, Exhibit PR-2014-019-42, Vol. 1F.

28. Microsoft’s comments at paras. 26-27, Exhibit PR-2014-019-41, Vol. 1F.

29. PWGSC’s submissions are replete with evidence demonstrating how MSD 2011 can be *updated* to MSD 2013 and how MSD 2013 is a new version/*upgrade* of MSD 2011 as reflected on Microsoft’s Web site. See Exhibit PR-2014-019-13, tab 17, Vol. 1D. Similarly, Microsoft submitted that (1) MSD 2013 is an *upgrade* of MSD 2011, as it builds upon MSD 2011 by “. . . adding certain improved features such as a modern mobile user interface to support changing trends in the industry, with a particular focus on touch-friendly solutions”, Microsoft’s comments at para. 11, Exhibit PR-2014-019-41, Vol. 1F; (2) “Dynamics 2013 includes the same core features and the same 3-tiered technical architecture as Dynamics 2011”, Microsoft’s comments at para. 11, Exhibit PR-2014-019-41, Vol. 1F; (3) “It is trite to note that since Dynamics 2011 can be upgraded to Dynamics 2013, Dynamics 2013 must by necessity be an upgrade of Dynamics 2011” [underlining omitted], Microsoft’s comments at para. 12, Exhibit PR-2014-019-41, Vol. 1F; (4) “. . . the *only upgrade* path to Microsoft Dynamics CRM 2013 is from Microsoft Dynamics CRM 2011. The *upgrade* process . . . is a well-documented ([publicly] available) process, with this information available online at no cost. . . [u]sers are able to seamlessly continue their program use and CRM activities without disruption from the *upgrade*” [emphasis added], Exhibit PR-2014-019-41, Exhibit A at paras. 16-17, Vol. 1F. See, also, Microsoft’s comments at paras. 33-41, Exhibit PR-2014-019-41, Vol. 1F. The Tribunal notes that Oracle’s submissions on this issue are inconsistent; some of Oracle’s submissions refer to MSD 2013 as an “upgrade” of MSD 2011 and state that MSD 2013 is designed to offer customers an “enhanced user experience”, Exhibit PR-2014-019-01, tab K, Exhibits F and G, Vol. 1; other submissions by Oracle describe MSD 2013 as an “entirely new user experience” and a “new way to get things done,” Oracle’s reply at paras. 27-28, Exhibit PR-2014-019-42, Vol. 1F.

30. GIR at 13, 15, Exhibit PR-2014-019-13, Vol. 1D; Sierra’s comments at paras. 36-40, Exhibit PR-2014-019-40, Vol. 1F.

delivery of MSD 2011 in its most up-to-date incarnation and, therefore, in the form of MSD 2013 at the time of contract performance.

45. In this sense, the RFP provided PWGSC with guarantees against obsolescence of what it was procuring for a requisite period. Sierra simply complied with its obligation to provide a fully up-to-date product at the time of delivery. PWGSC therefore accepted precisely what had been requested in the solicitation and was therefore squarely within the parameters of the RFP. Consequently, there is no basis for this ground of complaint.

Oracle's Second Ground of Complaint

46. In its second ground of complaint, Oracle alleged that PWGSC wrongly issued certain task authorizations to Sierra in violation of the terms of the RFP.³¹ Specifically, Oracle suggested that PWGSC wrongly issued task authorizations to Sierra to conduct work on Canada's "production environment", as defined in the RFP, and that these improper task authorizations amounted to an illegal sole-source procurement.³²

47. The Tribunal finds the foundation of Oracle's second ground of complaint to be fatally flawed. From a factual perspective, there is no basis for this ground of complaint whatsoever because none of the impugned task authorizations pertains to the "production environment". Only the draft "Installation Plan" (relating, albeit, to the "production environment") taken from Sierra's bid does.³³ In and of itself, that fact is enough to demonstrate that PWGSC did not accept delivery of anything related to that aspect of the contract, let alone attempt to tamper with any aspect of what the solicitation had intended to procure in that regard. In other words, there is no justiciable issue and, therefore, no basis for this ground of complaint.³⁴

31. Oracle's complaint at para. 6, Exhibit PR-2014-019-01, Vol. 1.

32. Oracle's complaint at paras. 72-78, Exhibit PR-2014-019-01, Vol. 1.

33. GIR at 21, Exhibit PR-2014-019-13, Vol. 1D; Sierra's comments at para. 62, Exhibit PR-2014-019-40, Vol. 1F.

34. In addition, Oracle's reading of the RFP is simply incorrect. The RFP states that Canada's technical environment for the CMSS is "... comprised of up to 4 environments: (a) development, (b) test, (c) pre-production and (d) production environment" [the four environments]. Answer 009 states that PWGSC and the Department of Industry (Industry Canada) would be the first two agencies to adopt the CMSS: Industry Canada for its own internal "business units" and PWGSC in order to provide the CMSS as a service to other government agencies' "business units". Answer 009 also demonstrates that PWGSC expected that other departments would adopt the CMSS for their *own* "business units" ("Canada . . . is . . . expecting future commitments"). Answer 10 states that "[t]he successful bidder will be responsible for the installations of the proposed commercially available CMSS within Canada's technical environments Canada will then use other procurement vehicles to acquire services to further configure, tailor and deploy the Licensed Software to meet the needs of each Business Unit." Because the CMSS is comprised of the four environments, and each department has its own "business units", Answer 10 informs Answer 9, and vice-versa. The successful bidder will be responsible for installing the CMSS (comprised of its four environments) at both PWGSC and Industry Canada; once that is done, further solicitations will be undertaken for customization and deployment at the "business units" of other departments that want to acquire the same CMSS or a similar one, either in their own right or through the service provided by PWGSC. GIR at 18-22, Exhibit PR-2014-019-13, Vol. 1D. Answer 113 warrants brief discussion. It provides as follows: "'There will be up to *two* installations of the CMSS'. Each installation includes the following environments: *Development, Testing, and Production*. An installation consists of all components required to provide the solution, including the software instances deployed for each environment" [emphasis added]. The Tribunal notes that answer 113 refers to "two installations" (PWGSC and Industry Canada as previously answered) but on only three environments, the "pre-production" environment of the four environments not being listed here; the Tribunal is of the view that this is of no consequence because Oracle's argument pertains to the "production" environment, which is listed in answer 113, as it is previously cited in these reasons. GIR at 9, Exhibit PR-2014-019-13, Vol. 1D.

ORDER

48. Pursuant to paragraph 10(a) of the *Regulations*, the Tribunal orders the dismissal of the complaint because it has determined that the complaint has no valid basis.

COSTS

49. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint.

50. To determine the amount of the cost award, the Tribunal considered its *Procurement Costs Guideline* (the *Guideline*), which contemplates classification of the level of complexity of cases on the basis of three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

51. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, as per Appendix A of the *Guideline*. The complexity of the procurement was medium, since it concerned a complex CMSS and its related licences and additional maintenance, installation, training and support services. The complexity of the complaint was medium, since it involved multiple grounds of complaint and complex legal issues. The complexity of the proceedings was medium, since it included two interveners, one motion for the production of documents and additional submissions concerning new grounds of complaint raised in Oracle's reply and required the use of the 135-day time frame.

52. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by Oracle. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 2, and its preliminary indication of the amount of the cost award is \$2,750. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated in article 4.2 of the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the cost award.

Ann Penner

Ann Penner

Presiding Member