



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## ORDER AND REASONS

File No. PR-2014-060

Marcomm Systems Group Inc.

v.

Department of Public Works and  
Government Services

*Order and reasons issued  
Wednesday, April 22, 2015*

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IN THE MATTER OF a complaint filed by Marcomm Systems Group Inc. 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*;

AND FURTHER TO a notice of motion filed by the Department of Public Works and Government Services on March 23, 2015, pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*, for an order dismissing the complaint on the basis that the Canadian International Trade Tribunal does not have jurisdiction to continue its inquiry.

**BETWEEN**

**MARCOMM SYSTEMS GROUP INC.**

**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 hereby dismisses the complaint.

Peter Burn  
Peter Burn  
Presiding Member

## STATEMENT OF REASONS

### COMPLAINT

1. On February 24, 2015, Marcomm Systems Group Inc. (MSGI) filed a complaint with the Canadian International Trade Tribunal (the Tribunal), pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.<sup>1</sup> The complaint concerned a procurement (Solicitation No. 47931-158149/A) by the Department of Public Works and Government Services (PWGSC) on behalf of the Canada Border Services Agency (CBSA) for the supply and installation of an upgraded closed-circuit television system at the Rainbow Bridge in Niagara Falls, Ontario, and in the Windsor-Detroit Tunnel in Windsor, Ontario.
2. MSGI alleged that the successful bid was improperly evaluated. Specifically, MSGI argued that the Canadian Content Certification (included as a conditional limitation in the Request for Proposal) was impossible for the successful bidder to have attained.
3. On March 4, 2015, the Tribunal informed the parties that the complaint had been accepted 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*.<sup>2</sup>
4. On March 23, 2015, PWGSC filed a motion for an order dismissing the complaint, pursuant to rule 24 of the *Canadian International Trade Tribunal Rules*.<sup>3</sup> It submitted that the solicitation at issue was subject to a national security exception and, therefore, exempt from all otherwise applicable trade agreements. PWGSC acknowledged that the national security exception had not been indicated in the solicitation documents, but maintained that it had been properly invoked pursuant to correspondence from the Assistant Deputy Minister of Acquisitions, PWGSC, which predated the solicitation.<sup>4</sup>
5. MSGI responded to the motion by way of submissions dated March 26 and 30, 2015. It argued that PWGSC's manner of administering the solicitation process did not demonstrate a national security interest (i.e. security measures during the site visit, level of security clearance required for personnel to be performing the work, etc.), and that it was therefore inconsistent for PWGSC to claim a national security exception on the solicitation as a whole. Additionally, MSGI submitted that PWGSC did not follow proper procedures when attempting to invoke the national security exception. It pointed to PWGSC's Supply Manual policies which, it submits, direct the contracting officer to include a statement indicating the existence of the national security exception in the solicitation documents. It maintained that this procedure was not followed and, moreover, that the solicitation documents instead stated that the procurement would be subject to certain trade agreements.
6. PWGSC did not provide a reply to its motion.

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

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

3. S.O.R./91-499.

4. PWGSC filed correspondence between the CBSA and Liliane saint pierre, Assistant Deputy Minister, Supply Operations Service, PWGSC, dated April 4 and May 1, 2007, for a national security exception to apply to certain agreements. Additional correspondence was filed between the CBSA and Tom Ring, Assistant Deputy Minister, Acquisitions Branch, PWGSC, dated May 4 and July 12, 2010, to extend the national security exception to all of Canada's trade agreements, current and future (the second letter is dated July 12, 2009, but PWGSC indicated this was a typographical error).

## TRIBUNAL'S ANALYSIS

7. Article 1018(1) of the *North American Free Trade Agreement*,<sup>5</sup> Article 1804 of the *Agreement on Internal Trade*,<sup>6</sup> Article XXIII(1) of the *Agreement on Government Procurement*,<sup>7</sup> Article Kbis-16(1) of the *Canada-Chile Free Trade Agreement*,<sup>8</sup> Article 1402(1) of the *Canada-Peru Free Trade Agreement*,<sup>9</sup> Article 1402(1) of the *Canada-Colombia Free Trade Agreement*,<sup>10</sup> Article 16.03(1) of the *Canada-Panama Free Trade Agreement*<sup>11</sup> and Article 17.3(1) of the *Canada-Honduras Free Trade Agreement*<sup>12</sup> allow exceptions to the provisions of these trade agreements where national security is involved.

8. It is well established that the Tribunal does not have jurisdiction to review the federal government's determination that a particular matter relates to national security; the Tribunal's jurisdiction under the trade agreements in these matters is limited to assessing whether the national security exception has been properly invoked.<sup>13</sup>

9. MSGI identified the main issue as whether or not PWGSC followed the appropriate procedure to invoke the national security exception for this procurement: "I am not disputing PWGSC's right to invoke a [national security exception]; the pertinent question . . . is whether or not, in this instance, the [national security exception] was **properly invoked**?"<sup>14</sup> As has been found by the Tribunal in the past, the Assistant Deputy Minister of the Acquisitions Branch at PWGSC has the necessary authority to invoke the national security exception,<sup>15</sup> as a result of the authority delegated by the Government of Canada to the Minister of

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5. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994).

6. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)>.

7. *Protocol Amending the Agreement on Government Procurement*, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm)> (entered into force 6 April 2014).

8. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997). Chapter *Kbis*, entitled "Government Procurement", came into effect on September 5, 2008.

9. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx>> (entered into force 1 August 2009).

10. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/anc-colombia-toc-tdm-can-colombie.aspx>> (entered into force 15 August 2011).

11. *Free Trade Agreement between Canada and the Republic of Panama*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/panama-toc-panama-tdm.aspx>> (entered into force 1 April 2013).

12. *Free Trade Agreement between Canada and the Republic of Honduras*, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/honduras/toc-tdm.aspx>> (entered into force 1 October 2014).

13. *Opsis, Gestion d'infrastructures Inc. v. Department of Public Works and Government Services* (10 June 2011), PR-2010-090 (CITT) [*Opsis*] at paras. 13-14; affirmed in *Opsis, Gestion d'infrastructure inc. v. Canada (Public Works and Government Services)*, 2012 FCA 42 (CanLII).

14. MSGI's response dated March 30, 2015, to PWGSC's motion.

15. *Opsis* at para. 22; *Mistral Security Inc. v. Department of Public Works and Government Services* (3 May 2013), PR-2012-035 (CITT) [*Mistral*] at para. 29. The Assistant Deputy Minister, Supply Operations Service, PWGSC, was also found to hold the necessary authority in *Lotus Development Canada Limited, Novell Canada, Ltd. and Netscape Communications Canada Inc.* (14 August 1998), PR-98-005, PR-98-006 and PR-98-009 (CITT).

PWGSC under section 6 of the *Department of Public Works and Government Services Act*,<sup>16</sup> in conjunction with paragraph 24(2)(d) of the *Interpretation Act*.<sup>17</sup> The letters submitted by PWGSC, dated May 1, 2007, and July 12, 2010, indicate that that authority has been exercised for this matter.

10. MSGI argued that, to properly invoke the national security exception, it must be expressed to the bidders during the bid solicitation process. The trade agreements do not prescribe the manner in which the national security exception must be invoked by the federal government. Furthermore, the Tribunal has held in the past that the national security exception can be invoked at any time during the procurement process and that it need not be announced publicly in the solicitation documents.<sup>18</sup>

11. Therefore, while publication of the national security exception in a timely manner is desirable both in the interest of efficiency of the competitive procurement process and for the bid challenge mechanism provided for in the *CITT Act*, such procedures are not required by the trade agreements. Similarly, MSGI's argument that such a practice would be consistent with PWGSC's internal policy speaks to the helpfulness of this practice, but not to obligations under the trade agreements.<sup>19</sup>

12. Finally, MSGI's submissions regarding other security measures that PWGSC could have taken during the procurement process are not relevant to the Tribunal's determination of whether the national security exception was properly invoked. Those considerations therefore lie outside of the Tribunal's jurisdiction on this motion.

13. The Tribunal finds that the national security exception was properly invoked by way of the letters dated May 1, 2007, and July 12, 2010, signed by the Assistant Deputy Ministers of PWGSC. That the existence of the national security exception was not communicated to the bidders until after the present complaint was filed, while unfortunate, has no impact on the validity of the national security exception itself.

14. Therefore, the subject procurement is exempt from the provisions of all trade agreements, and the Tribunal does not have jurisdiction to inquire into the complaint, since it does not concern a "designated contract", as prescribed by subsection 30.11(1) of the *CITT Act*. The Tribunal allows PWGSC's motion and dismisses the complaint pursuant to paragraph 10(a) of the *Regulations*.

Peter Burn

Peter Burn

Presiding Member

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16. S.C. 1996, c. 16.

17. R.S.C., 1985, c. I-21.

18. *Mistral* at paras. 16-17.

19. The Tribunal has held in the past that internal policies do not dictate the requirements of the trade agreements, nor is specific compliance with these policies required for compliance with the trade agreements. See, for example, *Patlon Aircraft & Industries Limited* (31 July 2003), PR-2003-015 (CITT); *Flir Systems Ltd.* (25 July 2002), PR-2001-077 (CITT).