



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2015-032

Eclipsys Solutions Inc.

*Decision made
Monday, October 26, 2015*

*Decision issued
Monday, October 26, 2015*

*Reasons issued
Friday, November 6, 2015*

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

BY

ECLIPSYS SOLUTIONS INC.

AGAINST

THE CANADA BORDER SERVICES AGENCY

DECISION

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint. Since the complainant has not yet received a response to its objection to the government institution, the complaint is premature.

Serge Fréchette
Serge Fréchette
Presiding Member

The statement of reasons will be issued at a later date.

STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² a potential supplier may file a complaint with the Canadian International Trade Tribunal (the Tribunal) concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

COMPLAINT

2. Eclipsys Solutions Inc.'s (Eclipsys) first ground of complaint was that the CBSA allegedly procured new service-oriented architecture (SOA) interoperability software under the guise of obtaining licenses under the terms of an existing supply arrangement contract between the Government of Canada and IBM. Eclipsys alleged that the IBM contract was not competed on the basis of SOA interoperability software and, as a result, the CBSA effectively conducted an illegal sole source procurement. Eclipsys alleged that the CBSA should instead have either purchased licenses from it under its existing supply arrangement contract or issued a new RFP for the requirement.

3. Eclipsys' second ground of complaint was that the CBSA's decision-making process was biased, as former IBM employees were retained by the CBSA to evaluate the relative merits of the IBM software versus the Oracle software proposed by Eclipsys.

4. As a remedy, Eclipsys requested that the contract be terminated and awarded to Eclipsys.

Procurement Process

5. In June of 2012, following a Request for Proposals (RFP) issued on behalf of Statistics Canada, Eclipsys was awarded a contract for the provision of Enterprise Interoperability and Service Platform (EISP) software, which includes SOA interoperability software, and associated services (Contract No. 45045-110061/001/EEM). The contract contains a clause that allows the Government of Canada to add additional clients at any time, including any government department, corporation or agency covered by the *Financial Administration Act*.

6. Beginning in October of 2012, Eclipsys entered into discussions with the CBSA regarding the latter's requirements for SOA interoperability software and to explore whether the software available under the EISP contract would meet the CBSA's needs. These discussions continued over the following two and a half years.

7. On June 3, 2015, Eclipsys submitted a proposal, including pricing, for the CBSA to obtain licenses under the EISP contract. Revised pricing was submitted on June 12, 2015.

8. On June 24, 2015, Eclipsys met with CBSA officials, who informed Eclipsys that its proposal was under consideration, along with an option to obtain IBM licenses under another, unspecified, existing contract. Eclipsys requested further information regarding the IBM contract and expressed its concern that

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

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

the original RFP for the IBM contract had not included SOA interoperability software. According to Eclipsys, the CBSA “promised full transparency” but provided only minimal information regarding the IBM contract.

9. On October 1, 2015, the CBSA advised Eclipsys that it had obtained the IBM software via a transfer of unused licenses from another government department. Eclipsys again requested further details regarding the IBM contract. On October 6, 2015, in an email, Eclipsys repeated its request for further information regarding the IBM contract, in order to confirm whether the contract in fact covered the type of software that had been acquired. On the same day, the CBSA indicated by return email that it would need time to respond to Eclipsys’ latest correspondence.

ANALYSIS

10. Subsection 6(1) of the *Regulations* provides that, “[s]ubject to sections (2) and (3), a potential supplier who files a complaint with the Tribunal . . . shall do so not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.”

11. Subsection 6(2) of the *Regulations* provides that a potential supplier that has made an objection to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal “. . . within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.”

12. The Tribunal finds that Eclipsys made an objection, within the meaning of that term for the purposes of subsection 6(2) of the *Regulations*, to the CBSA regarding the procurement at issue on June 24, 2015, and that this was done within 10 working days of Eclipsys having discovered the basis of its complaint.

13. However, given that the CBSA has indicated, as of October 6, 2015, that it intends to respond, but has not yet provided a response to Eclipsys’ objection, the Tribunal finds that Eclipsys has not yet received a denial of relief with respect to its alleged ground of complaint, as set out in subsection 6(2) of the *Regulations*.

14. As a result of the foregoing, the Tribunal finds that this ground of complaint is premature.

15. The Tribunal’s decision does not preclude Eclipsys from filing a new complaint within 10 working days of receiving a denial of relief from the CBSA. Alternatively, if the CBSA fails to respond to Eclipsys’ objection within a reasonable amount of time, Eclipsys may file a new complaint with the Tribunal.

16. In either event, if Eclipsys does file a new complaint, it may request that the documentation already filed with the Tribunal be joined to the new complaint.

DECISION

17. Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint. Since the complainant has not yet received a response to its objection to the government institution, the complaint is premature.

Serge Fréchette
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Presiding Member