



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2015-031

Eclipsys Solutions Inc.

*Decision made
Monday, October 19, 2015*

*Decision and reasons issued
Tuesday, October 20, 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

SHARED SERVICES CANADA

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.

Serge Fréchette

Serge Fréchette
Presiding Member

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.

2. The complaint relates to a procurement (Solicitation No. 10040747/A) by Shared Services Canada (SSC) for the provision of data centre server and storage infrastructure services.

3. Eclipsys Solutions Inc. (Eclipsys) alleges that it was unfairly excluded from the solicitation by SSC.

4. As noted above, subsection 30.11(1) of the *CITT Act* provides that a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request that the Tribunal conduct an inquiry into the complaint. Section 30.1 of the *CITT Act* defines the term “designated contract” as “. . . a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations”.

5. Subsection 3(1) of the *Regulations* designates, for the purposes of the definition of “designated contract” in section 30.1 of the *CITT Act*, “. . . any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Article 1001 of [the *North American Free Trade Agreement*],^[3] in Article 502 of the Agreement on Internal Trade,^[4] in Article II of the Agreement on Government Procurement,^[5] in Article Kbis-01 of Chapter Kbis of the [*Canada-Chile Free Trade Agreement*],^[6] in Article 1401 of Chapter Fourteen of the [*Canada-Peru Free Trade Agreement*],^[7] in Article 1401 of Chapter Fourteen of the [*Canada-Colombia Free Trade Agreement*],^[8] in Article 16.02 of

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

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

3. *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) [*NAFTA*].

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.ait-aci.ca/agreement-on-internal-trade/>> [*AIT*].

5. *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> (entered into force 6 April 2014) [*AGP*].

6. *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) [*CCFTA*]. Chapter Kbis, entitled “Government Procurement”, came into effect on September 5, 2008.

7. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs, Trade and Development < <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/perou/perou-toc-perou-tdm.aspx?lang=eng> (entered into force 1 August 2009) [*CPFTA*].

8. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs, Trade and Development < <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/can-colombia-toc-tdm-can-colombie.aspx?lang=eng> (entered into force 15 August 2011) [*CCOFTA*].

Chapter Sixteen of the [*Canada-Panama Free Trade Agreement*],^[9] in Article 17.2 of Chapter Seventeen of the [*Canada-Honduras Free Trade Agreement*]^[10] or in Article 14.3 of Chapter Fourteen of the [*Canada-Korea Free Trade Agreement*],^[11] that has been or is proposed to be awarded by a government institution”

6. However, Article 1018(1) of *NAFTA*, Article 1804 of the *AIT*, Article XXIII(1) of the *AGP*, Article *Kbis-16*(1) of the *CCFTA*, Article 1402(1) of the *CPFTA*, Article 1402(1) of the *CCOFTA*, Article 16.03 of the *CPAFTA*, Article 17.3 of the *CHFTA*, and Article 14.3 of the *CKFTA* allow exceptions to the provisions of the respective trade agreements where national security is involved.

7. In this regard, Article 1.4 of Part 1, **GENERAL INFORMATION**, of the Invitation to Qualify provides as follows:

1.4 National Security Exception

1.4.1 The procurement of the [data centre server and storage infrastructure services] is subject to a National Security Exception and, as a result, none of the trade agreements apply to this procurement.

8. The Tribunal therefore finds, as it did in similar previous cases,¹² that the procurement at issue, being subject to a national security exception, is exempt from the provisions of the relevant trade agreements. That being the case, the Tribunal finds that the complaint does not relate to a “designated contract”, as required by subsection 30.11(1) of the *CITT Act*. Accordingly, the Tribunal finds that it does not have jurisdiction to conduct an inquiry into the matter.

9. Therefore, the Tribunal will not conduct an inquiry and considers the matter closed.

DECISION

10. Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Serge Fréchette
Serge Fréchette
Presiding Member

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9. *Free Trade Agreement between Canada and the Republic of Panama*, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/panama-toc-panama-tdm.aspx>> (entered into force 1 April 2013) [*CPAFTA*].
10. *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) [*CHFTA*].
11. *Free Trade Agreement between Canada and the Republic of Korea*, online: Department of Foreign Affairs, Trade and Development <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-corea/toc-tdm.aspx?lang=eng>> (entered into force 1 January 2015) [*CKFTA*].
12. *Integritys Ltd.* (5 March 2010), PR-2009-103 (CITT); *Corporate Special Events Catering Inc., d.b.a. BBQ Catering* (3 June 2010), PR-2010-015 (CITT); *Adlerhorst International, Inc.* (18 December 2012), PR-2012-034 (CITT).