



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2016-023

Vurtur Communications Group Inc.
(OpenPlus)

*Decision made
Tuesday, July 26, 2016*

*Decision issued
Friday, July 29, 2016*

*Reasons issued
Thursday, August 11, 2016*

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

VURTUR COMMUNICATIONS GROUP INC. (OPENPLUS)

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

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.

Jason W. Downey
Jason W. Downey
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.

SUMMARY OF COMPLAINT

2. On July 19, 2016, the Tribunal received a complaint from Vurtur Communications Group Inc. (OpenPlus) regarding a procurement (Solicitation No. G9292-200741/B) conducted by the Department of Public Works and Government Services for the provision of a hosted managed web service (MWS), including a content delivery network, analytics and hosting environments.

3. On June 30, 2016, OpenPlus attempted to file a complaint with the Tribunal regarding this procurement.³ As part of the documents submitted in connection with File No. 2016-017, OpenPlus included the tender of another bidder. Its complaint was incomplete, as the Tribunal did not receive an answer to its request for authorization to file the tender of that other bidder.

4. Given this history, the Tribunal sent OpenPlus a request on July 20, 2016, for an explanation of how the present complaint differed from the complaint in File No. 2016-017 and asked for OpenPlus's consent to transfer the record of the previous complaint to the record of the present proceeding.

5. On July 21, 2016, OpenPlus objected to the transfer of the record of the previous complaint to the record of the present file stating that “[w]e expressly forbid you to transfer any files from PR-2016-017 because the information in that complaint contains a bid, which according to the CITT does not belong to Vurtur Communication Group Inc. operating as OpenPlus.” In the same correspondence, OpenPlus answered that it is “. . . a prospective bidder and as such by the above definition we are indeed a ‘potential supplier’.”

6. On July 26, 2016, the Tribunal acknowledged that the complaint was complete.

7. On July 26, 2016, pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal decided not to conduct an inquiry into the complaint. The reasons for that decision are as follows.

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].
3. File No. PR-2016-017.

ANALYSIS

8. The complaint concerns alleged non-compliance by the winning bidder with one mandatory requirement of the RFP,⁴ which provides as follows:

Num.	Requirements
M1.1	The MWS must be fully web based and must interoperate with the following: Internet Browser standard – Microsoft Internet Explorer 11, (2) previous major versions <i>and</i> require no locally installed software.

[Emphasis added]

9. OpenPlus alleges that it has received reports that the winning bid does not meet either of the dual conditions set out in M1.1. OpenPlus alleges that users have had, *inter alia*, to resort to other browsers and to install local software as remedial measures when using the winning technical solution.

10. At the outset, the Tribunal wishes to state that it is concerned by OpenPlus's allegations that the procurement has resulted in a winning bid which is not compliant with the terms of the RFP and therefore technically flawed. If there is any validity to these concerns, there is a responsibility for the contracting authority and the winning bidder to remedy any such issues without burdening government users, taxpayers and public recipients of government services.

11. Nevertheless, the Tribunal cannot accept OpenPlus's complaint for inquiry as it does not meet the requirements of the *Regulations*.

12. Pursuant to sections 6 and 7 of the *Regulations*, the Tribunal may only conduct an inquiry if all of the following conditions are met:

- the complaint has been filed within the time limits prescribed by section 6 (i.e. not later than 10 working days after the basis of the complaint became known to the potential supplier or within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief);
- the complainant is an actual or potential supplier;
- the complaint is in respect of a designated contract; and
- the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.

Complaint was not Filed Within the Time Limits

13. As set out above, 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

4. The Tribunal understands the other allegation as not concerning compliance with evaluation criteria but compliance with the Statement of Requirements (specifically page 10 of Annex A to the RFP where it provides that “[t]he MWS must not hinder the Government of Canada from being compliant with the following Acts, Policies and instruments: 10. Web Experience Toolkit Guideline”. The Tribunal does not find any reasonable indication that this allegation and evidence supplied to support it could substantiate a breach of the trade agreements. In any event, its comments on the timeliness of the complaint apply to this ground as well.

days after the day on which its basis became known or reasonably should have become known to the potential supplier.” This was not done in this case.

14. OpenPlus provided two pieces of documentation in its complaint form which relate to the allegations of breaches of the requirements of the RFP:

- An e-mail chain with a representative of OpenPlus dated April 4, 2016, regarding difficulties with the Internet Explorer browser;
- An online discussion board dated May 28, 2015 (which appears to have been printed on July 5, 2016) regarding issues with Web Experience Toolkit (WET).⁵

15. The dates of this documentation clearly show that the complaint was not filed in a timely manner, i.e. 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 OpenPlus. The most recent document provided by OpenPlus to support the grounds for its complaint is dated April 4, 2016; the complaint was filed over three months later.

16. OpenPlus stated that “[i]t was only within the last 10 days in which we were able to find a GoC document which validated both our suspicions and the rumours which have been spreading in the community – the Adobe solution did not and does not meet the mandatory requirements within this tender.”⁶ No such documents, originating from the Government of Canada or otherwise, were provided, certainly not ones which would convince the Tribunal that the complaint was timely. The Tribunal has previously stated that “[c]omplainants bear the onus of substantiating contentions made when bringing a complaint before the Tribunal.”⁷ OpenPlus has not satisfied this onus.

17. If the above statement is a reference to the online discussion which occurred in May 2015, that document is not probative with respect to the allegations made by OpenPlus. Even if the document was intended to be proof of some allegation, its date precedes the complaint by over a year. In these circumstances, the timing of the complaint based on this document does not meet the timeliness requirements.

18. OpenPlus’s comments regarding the delay and issues with the Access to Information requests dated April 23 and June 1, 2015, also have no relevance to its failure to comply with the above statutory deadline, given the actual evidence filed with the Tribunal.

19. Therefore, the Tribunal cannot accept the complaint for inquiry.

Potential Supplier and Other Issues

20. Although the above is sufficient to completely dispose of this matter, the Tribunal wishes to make the following additional comments.

21. Subsection 7(1) of the *Regulations* stipulates that, before deciding to conduct an inquiry into a complaint, the Tribunal must determine, *inter alia*, whether the complainant is a potential supplier.

5. See attachments to the complaint form. OpenPlus also provided the RFP, the winning bid and associated contract, and WET Onboarding Manuals, none of which are capable of proving the allegations of non-compliance.

6. Complaint form at 12.

7. *Trebor Management* (21 January 2015), PR-2014-049 (CITT) at para. 13.

22. Section 30.1 of the *CITT Act* defines “potential supplier” as follows:
... subject to any regulations made under paragraph 40(f.1), a bidder or prospective bidder on a designated contract.
23. When the Tribunal has applied these provisions to procurement complaints, it has found that “... there must be concordance between the identity of the supplier and that of the complainant.”⁸ To accept otherwise could lead to an untenable situation where a complaint is brought without the support of the actual bidder.
24. OpenPlus has acknowledged that it was not the bidder on the tender that was submitted with its complaint. Furthermore, there is no indication, despite a request by the Tribunal to provide one, that the bidder authorizes this complaint.
25. OpenPlus maintains that it was a potential or prospective supplier regarding the RFP and any ensuing contract. However, OpenPlus has not provided any evidence whatsoever that it was capable of bidding for or providing the services under the contract. On the contrary, the complaint contains a statement which contradicts this position, namely, that “... we were not able to prime a bid due to the convoluted list of mandatory requirements [in the RFP]”⁹
26. The complaint also states that “[w]e apologize for the delay in raising our complaint to the Tribunal, our ATIP response to this solicitation took one year to arrive, and when it did arrive it was redacted beyond any value.”¹⁰
27. If the Tribunal is to interpret this statement as taking issue with the terms of the RFP itself, the complaint would have had to be filed within 10 days after OpenPlus learned of the terms of the RFP, which presumably was some time after it was published on October 17, 2014, and received by OpenPlus in order to participate in the ensuing bids. No complaint was filed at that time. The Tribunal also has no jurisdiction to inquire into a complaint on such grounds.

DECISION

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

Jason W. Downey
Jason W. Downey
Presiding Member

8. *Alliance agricole internationale, made up of the Centre canadien d'étude et de coopération internationale, the Société de coopération pour le développement international and L'Union des producteurs agricoles–Développement international v. Canadian International Development Agency* (21 August 2006), PR-2006-003 (CIIT) at para. 18; *Juniper Networks* (29 April 2015), PR-2015-003 (CIIT) at para. 10.

9. Complaint form at 10.

10. *Ibid.* at 12.