



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2006-020

Canadian Beaver Information
Technology Inc.

v.

Statistics Canada

*Determination and reasons issued
Tuesday, November 28, 2006*

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IN THE MATTER OF a complaint filed by Canadian Beaver Information Technology Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

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

BETWEEN

CANADIAN BEAVER INFORMATION TECHNOLOGY INC.

Complainant

AND

STATISTICS CANADA

**Government
Institution**

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that Statistics Canada terminate the existing procurement process and initiate a new solicitation. The Canadian International Trade Tribunal further recommends that Statistics Canada remove the portions of mandatory requirements 7.1 and 7.4 that relate to Microsoft certification or Microsoft products and include, for example, point-rated and vendor-neutral criteria for course content and bidder experience. The remainder of the requirements may be retained.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Canadian Beaver Information Technology Inc. its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by Statistics Canada. 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 \$2,400. 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 its *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

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STATEMENT OF REASONS

COMPLAINT

1. On July 25, 2006, Canadian Beaver Information Technology Inc. (CBIT) 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 procurement (Solicitation No. 65544-06-0003) by Statistics Canada for the provision of software training.

2. CBIT alleged that Statistics Canada unnecessarily restricted competition for the requirement to provide instructor-based training for Microsoft development tools and technologies and Microsoft SQL server. It requested, as a remedy, that the Tribunal recommend that Statistics Canada remove the mandatory requirements that relate to Microsoft certification, specifically, mandatory requirements 7.1 and 7.5, and that Statistics Canada re-issue the solicitation with specific point-rated and vendor-neutral criteria for course content, bidder experience and instructor qualifications. CBIT also requested its costs incurred in preparing and proceeding with the complaint.

3. On August 1, 2006, 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*.²

4. On August 29, 2006, CBIT submitted that it was concerned about possible disbursements against the resulting contract between the date of contract award and the date of the Tribunal's decision. On August 31, 2006, pursuant to subsection 30.13(3) of the *CITT Act*, the Tribunal issued a postponement of award order. On September 6, 2006, Statistics Canada filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On September 15, 2006, CBIT filed its comments on the GIR. On September 29, 2006, Statistics Canada filed an additional submission. On October 3, 2006, CBIT filed its comments on Statistics Canada's submission.

5. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the written information on the record.

PROCUREMENT PROCESS

6. The Notice of Proposed Procurement was posted on MERX⁴ on June 30, 2006. The original bid closing date of August 22, 2006, was subsequently amended to September 15, 2006.

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

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

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

4. Canada's electronic tendering service.

7. The RFP reads as follows:

...

7.0 Mandatory Requirements

7.1 Experience and References of Training Supplier

The supplier must be a *Microsoft Certified Partner Learning Solutions* and must demonstrate that the firm has been successfully delivering Microsoft Development Tools and Technologies & Microsoft SQL Server training services for a minimum of 2 years.

...

7.4 Courses and Courseware

The supplier must be able to deliver all mandatory Microsoft Official Curriculum courses found in Appendix B ... at the ITS training center and at its own training center. The manuals used during the course must be certified *Microsoft Official Curriculum*.

...

7.5 Qualifications and Experience of Instructors

The supplier must demonstrate that its instructors are *Microsoft Certified Trainers (MCT)* and have the necessary qualifications and experience to teach the Microsoft Development Tools and Technologies and/or Microsoft SQL Server courses ...

8. On July 5, 2006, CBIT filed an objection with Statistics Canada. Its objection raised some issues with respect to the mandatory requirements of the RFP and stated that the present conditions unfairly limited the competitive process. More specifically, CBIT requested that Statistics Canada remove mandatory requirements 7.1 and 7.5. On July 10, 2006, Statistics Canada posted the question and its response on MERX. Statistics Canada indicated that it would not remove those two mandatory requirements.

9. On July 10, 2006, and again on July 11, 2006, CBIT sent further requests to Statistics Canada for the elimination of those two mandatory requirements. On July 12, 2006, Statistics Canada responded once again that it would not remove mandatory requirements 7.1 and 7.5.

10. On July 13, 2006, CBIT requested the elimination of only mandatory requirement 7.1 and dropped its objection to mandatory requirement 7.5. On July 17, 2006, Statistics Canada responded that it would retain mandatory requirement 7.1. On July 25, 2006, CBIT filed its complaint with the Tribunal.

POSITIONS OF THE PARTIES

CBIT's Position

11. CBIT submitted that there is no reference to "Microsoft Certified Courses" in the stated solicitation objective, which is to provide instructor-based training for Microsoft development tools and technologies and Microsoft SQL server. It contended that the practice to mandate the use of official Microsoft learning products with Microsoft Certified Partners for Learning Solutions (MCPLS) enforces a monopoly in the area of Microsoft technical training. According to CBIT, including the requirement that the supplier must be a MCPLS requires all bidders to use the same courses and the same courseware and this has three implications: it facilitates the successful bid of a pre-selected vendor chosen by Statistics Canada; it reduces the competition to pricing and nothing else; and the quality of the methodology and the materials are not evaluated under these conditions.

12. With respect to mandatory requirement 7.5, CBIT argued that there was no need for the requirement that instructors be Microsoft Certified Trainers (MCTs). It submitted that all its instructors must first attend a trainer preparation course and are continually supervised by a senior technical trainer experienced in using Microsoft development technologies. CBIT also submitted that it uses MCTs who have a proven ability to write and teach production quality code using Microsoft technologies. It further submitted that it uses non-certified instructors who have a level of knowledge that surpasses most MCTs.

13. CBIT submitted that the mandatory requirements at issue limit the competitive process by pre-selecting a specific vendor's solution without competition or evaluation, and limit prospective suppliers to an extremely small number of companies. It submitted that there are only two MCPLSs in the Ottawa-Gatineau area.

14. CBIT submitted that there is no doubt that training is a legitimate operational requirement for Statistics Canada. However, training using a specific product, such as Microsoft Official Curriculum (MOC) courses, cannot be construed as an operational requirement. It also submitted that its request to have mandatory requirement 7.1 eliminated automatically brings about the elimination of mandatory requirement 7.4. CBIT further submitted that, contrary to Statistics Canada's argument that it did not challenge mandatory requirement 7.4 in its objection to Statistics Canada or in its complaint to the Tribunal, in its objection of July 5, 2006, it stated the following: "... We are not a **Microsoft Certified Partner Learning Solutions** as we offer an alternative that is more effective and more flexible than the equivalent MOC solution... It is our opinion that the stated conditions unfairly limit the competitive process to Microsoft approved suppliers only. Equivalent CTES-SETC courses exist for every Microsoft Official Curriculum course requested in the RFP document..." CBIT also submitted that, in its statement of complaint to the Tribunal,⁵ it stated the following: "... [i]t is important to note in this respect that the CTES training solution is in competition with *Microsoft Official Learning Products* and that as such, we could never be officially affiliated with Microsoft..."⁶ (emphasis added).

15. CBIT submitted that, if the MCPLS requirement were removed without the accompanying removal of the MOC requirement, the only companies allowed to bid would be those that hold the MCPLS certification and that, therefore, mandatory requirement 7.1 would still be in effect and any reasonable person would consider the MCPLS certification to be a mandatory requirement. Consequently, CBIT submitted that the only means through which the MCPLS certification requirement can be truly removed is through the accompanying removal of the MOC requirement.

Statistics Canada's Position

16. Statistics Canada submitted that CBIT is not a potential supplier. It submitted that CBIT is not an MCPLS and is therefore prohibited by Microsoft from offering MOC public courses. Statistics Canada submitted that CBIT is at liberty to partner with an MCPLS in order to meet the mandatory requirements of the RFP.

17. Statistics Canada submitted that the specialized training provided by the MOC is a legitimate operational requirement and that it is a mandatory requirement imposed and enforced by Microsoft that instructors of these courses be MCTs and that public courses be taught at an MCPLS location. It also submitted that the impugned mandatory requirements are necessary to recognize the exclusive rights held by

5. Complaint, para. 4.

6. Formerly known as Microsoft Official Curriculum/MOC course material. See Appendix B to the complaint, Appendix 5, "Glossary".

Microsoft and, further, that it would be a breach of copyright for a non-MCT to teach an MOC course. Statistics Canada contended that the RFP establishes a competitive process among training suppliers legally capable of offering MOC courses.

18. Statistics Canada noted that CBIT did not challenge mandatory requirement 7.4 in its objection to Statistics Canada or in its complaint to the Tribunal; however, in the comments on the GIR, CBIT claims that it "... did not request the elimination of the Microsoft Official Curriculum requirement ..." because it "... would have been redundant ...", given its challenge to mandatory requirement 7.1. Statistics Canada submitted that the requirement to describe an objection "... with sufficient specificity as to enable the Department to deal with it ..." ⁷ "... must necessarily prohibit the inclusion, 'automatically', 'logically' or otherwise, of grounds of objection not specified by CBIT ..." Statistics Canada contended that CBIT's ground of complaint regarding mandatory requirement 7.4 was filed outside of the time limit prescribed by subsection 6(1) of the *Regulations*.

19. Finally, Statistics Canada requested its costs incurred in responding to the complaint.

TRIBUNAL'S ANALYSIS

20. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this instance, are the *Agreement on Internal Trade*,⁸ the *North American Free Trade Agreement*⁹ and the *Agreement on Government Procurement*.¹⁰

21. Article 501 of the *AIT* provides that "... the purpose of this Chapter [Procurement] is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency."

22. To this end, Articles 504(1) and (2) of the *AIT* generally prohibit discrimination between goods and between suppliers. Article 504(3) provides that:

Except as otherwise provided in this Chapter, measures that are inconsistent with paragraphs 1 and 2 include, but are not limited to:

...

(g) the unjustifiable exclusion of a supplier from tendering.

7. *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)*, [2000] FCJ No. 1946, para. 74 (F.C.A.).

8. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/index_en/ait.htm> [AIT].

9. *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].

10. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [AGP].

23. The Tribunal notes that the purpose of the procurement was "... to seek instructor-based training for Microsoft Development tools and technologies (Visual Studio, .NET, Visual Basic) & Microsoft SQL Server."

24. CBIT submitted that the use of official Microsoft learning products with MCPLS limits bidders to use the same courses and the same courseware and reduces the competition to pricing, and that the quality of the teaching methodology and the materials are not evaluated under these conditions.

25. Statistics Canada submitted that the required training is a legitimate operational requirement and that Microsoft imposes certain mandatory requirements relating to the certification of trainers and location of courses. It further submitted that the RFP establishes a competitive process among Microsoft qualified suppliers.

26. The Tribunal notes that mandatory requirement 7.1, regarding the experience and references of the training supplier, states that the supplier must be an MCPLS. CBIT challenges this requirement and argues that the requirement limits competition to only suppliers that are MCPLSs and that suppliers that are not MCPLSs are capable of providing the instructor-based training services sought in the procurement at issue.

27. Article 1009(2)(b) *NAFTA* provides as follows:

2. The qualification procedures followed by an entity shall be consistent with the following:

...

(b) conditions for participation by suppliers in tendering procedures ... shall be limited to those that are essential to ensure the fulfillment of the contract in question.

28. Article VIII(b) of the *AGP* provides as follows:

...

(b) any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfill the contract in question ...

29. As indicated above, the purpose of the procurement is to seek training for certain applications used by Statistics Canada. The Tribunal recognizes that the need for training is clearly a legitimate operational requirement, and this fact is not in dispute by the parties. However, one of the issues in this matter is whether the requirement that the training be provided by an MCPLS also constitutes a legitimate operational requirement.

30. In its submissions, CBIT clearly demonstrated that it has offered, in the past, courses similar to those that are sought in the procurement at issue.¹¹ There is no reason to doubt that CBIT could offer training courses concerning the applications for which Statistics Canada is seeking training. As such, the Tribunal is of the view that CBIT is a potential supplier for the procurement at issue.

31. In its response to CBIT's objection of July 5, 2006, Statistics Canada stated the following:

...

The certification for *Microsoft Certified Partner Learning Solutions* is awarded to organizations that have demonstrated to Microsoft their expertise, commitment to minimal course delivery, to have exclusive Microsoft Certified Trainer, to meet minimum hardware and facilities requirements,

11. Complaint at 8.

commitment to customer satisfaction and commitment to quality control. Only a Microsoft Certified Partner Learning Solutions may take advantage of Microsoft course customization services for Official Microsoft Learning Products.¹²

...

32. In the Tribunal's opinion, to require that the services provided be those offered by a specific class of suppliers (namely, MCPLSs in this case), is not a legitimate operational requirement. Such a condition is inappropriate and constitutes a breach of Article 1009(2)(b) of *NAFTA* and Article VIII(b) of the *AGP*. It also constitutes a breach of Article 504(3)(g) of the *AIT*, as it unjustifiably excludes certain suppliers, including CBIT, from tendering.

33. Mandatory requirement 7.4 concerns the MOC courses that the supplier must be able to deliver. Statistics Canada contended that CBIT did not challenge this requirement in its objection to Statistics Canada or in its complaint to the Tribunal; it submitted that this ground of complaint was therefore filed outside the time limit prescribed by subsection 6(1) of the *Regulations*.

34. The Tribunal acknowledges that CBIT did not refer specifically to mandatory requirement 7.4 in its objections filed with Statistics Canada and its complaint to the Tribunal. However, both in its objections and its complaint, CBIT challenged the fact that the RFP, as drafted, required that MOC courses be given. For example, when filing its first objection with Statistics Canada, CBIT stated the following: "It is our opinion that the stated conditions unfairly limit the competitive process to Microsoft approved suppliers only. Equivalent CTES-SETC courses exist for every Microsoft Official Curriculum course requested in the RFP document..."¹³ In its complaint, CBIT stated the following: "...[t]he inclusion of mandatory requirement 7.1 requires all prospective bidders to use the same courses and the same courseware..."¹⁴ It also submitted the following in its complaint: "If the mandatory requirements are allowed to remain in effect and the structure of the RFP is not changed, the CTES training solution will be eliminated from the competition without evaluation or competition for no other reason than we are not officially affiliated with Microsoft Corporation. It is important to note in this respect that the CTES training solution is in competition with Microsoft Official Learning Products and that as such, we could never be officially affiliated with Microsoft..."¹⁵ Moreover, in terms of the remedy sought, CBIT requested that the RFP be re-issued with specific point-rated and vendor-neutral criteria for course content, bidder experience and instructor qualifications. Such a remedy implied the deletion of the requirement that the courses to be delivered apply the MOC. The Tribunal finds that the above constituted a timely challenge to both mandatory requirements 7.1 and 7.4.

35. Mandatory requirement 7.4 specifies that the courses to be delivered apply the MOC. Once again, in the Tribunal's opinion, the need for training is clearly a legitimate operational requirement. However, that the courses to be delivered apply the MOC is not. There might be, in the market, better courses that are offered, and the selection of courses must be made following a competitive process. To request that MOC courses be offered unjustifiably excluded suppliers, such as CBIT, that could offer courses that would fulfill the same purpose. Therefore, the Tribunal finds that mandatory requirement 7.4 breaches Article 504(3)(g) of the *AIT*.

12. GIR, Exhibit 7.

13. Complaint at 12.

14. Complaint at 8.

15. Complaint at 6.

36. CBIT also challenges mandatory requirement 7.5 that provides that the suppliers' instructors be MCTs. In the Tribunal's view, mandatory requirement 7.5 is significantly different from mandatory requirements 7.1 and 7.4, in that it does not limit competition to suppliers that provide a somewhat predetermined service. Mandatory requirement 7.5 can be seen as a technical qualification appropriate for establishing the technical capacity of suppliers. The legitimacy of this requirement is supported by the fact that CBIT submitted that it uses MCTs who have a proven ability to write and teach production quality code using Microsoft technologies. Therefore, the Tribunal finds that mandatory requirement 7.5 is not in breach of the *AIT*, *NAFTA* or the *AGP*.

37. In light of the foregoing, the Tribunal determines that CBIT's complaint is valid.

REMEDY

38. In recommending a remedy, the Tribunal is required, under subsection 30.15(3) of the *CITT Act*, to consider all the circumstances relevant to the procurement of the services to which the designated contract relates, including the following:

...

- (a) the seriousness of any deficiency in the procurement process found by the Tribunal;
- (b) the degree to which the complainant and all other interested parties were prejudiced;
- (c) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
- (d) whether the parties acted in good faith; and
- (e) the extent to which the contract was performed.

39. In determining the remedy to recommend in this case, the Tribunal considered the circumstances relevant to the procurement, including the above-mentioned considerations. The major factor applicable to this case is that the requirement for training services was limited to only those suppliers that had Microsoft certification and products. In addition, since the Tribunal issued a postponement of award order on August 31, 2006, no contract has been awarded and, therefore, no commitment has been made to any bidder.

40. In view of the foregoing, the Tribunal recommends that Statistics Canada terminate the existing procurement process and initiate a new solicitation. The Tribunal further recommends that Statistics Canada remove the portions of mandatory requirements 7.1 and 7.4 that relate to Microsoft certification or Microsoft products and include, for example, point-rated and vendor-neutral criteria for course content and bidder experience. The remainder of the requirements may be retained.

41. The Tribunal awards CBIT its reasonable costs incurred in preparing and proceeding with the complaint. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates classification of the level of complexity of cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The Tribunal's preliminary view is that this complaint case has a complexity level corresponding to the second level of complexity referred to in Appendix A of the *Guideline* (Level 2). The procurement was of medium complexity, as it involved the provision of software training services over a two-year period. The complaint was also of medium complexity, as it dealt with matters concerning the restrictive nature of some of the mandatory requirements. The complaint proceedings were straightforward, there were no interveners, and no motions were filed. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$2,400.

DETERMINATION OF THE TRIBUNAL

42. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid.

43. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that Statistics Canada terminate the existing procurement process and initiate a new solicitation. The Tribunal further recommends that Statistics Canada remove the portions of mandatory requirements 7.1 and 7.4 that relate to Microsoft certification or Microsoft products and include, for example, point-rated and vendor-neutral criteria for course content and bidder experience. The remainder of the requirements may be retained.

44. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards CBIT its reasonable costs incurred in preparing and proceeding with the complaint, which costs are to be paid by Statistics Canada. 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 \$2,400. 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 the *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Zdenek Kvarda
Zdenek Kvarda
Presiding Member