Canadian International Trade Tribunal | Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2009-016

Microsoft Canada Co., Microsoft Corporation and Microsoft Licensing, GP

Decision made
Friday, June 19, 2009

Decision and reasons issued
Monday, June 29, 2009

Canada

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

BY

MICROSOFT CANADA CO., MICROSOFT CORPORATION AND MICROSOFT LICENSING, GP

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 decides not to conduct an inquiry into the complaint.

André F. Scott
André F. Scott
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

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 in issue relates to an alleged procurement by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Health (Health Canada), and potentially for other government departments, for the provision, or proposed provision, of an e-mail software solution.

3. Microsoft Canada Co., Microsoft Corporation and Microsoft Licensing, GP (collectively referred to as Microsoft) alleges that PWGSC improperly used the contract awarded following a Request for Proposal for the provision of a unified portal software solution for PWGSC and the Department of Agriculture and Agri-Food (Agriculture and Agri-Food Canada) (the UPSS contract) as a vehicle to now provide, or potentially provide, an Oracle e-mail software solution for Health Canada and possibly other government departments.

4. According to the information submitted with the complaint, on October 7, 2004, PWGSC issued a Request for Proposal (Solicitation No. EP265-04H009/A) for the provision of a unified portal software solution for itself and Agriculture and Agri-Food Canada (the UPSS RFP). According to the information on file, the UPSS contract was awarded to Sierra Systems, which proposed a software solution comprised of Oracle applications, on May 27, 2005.

5. On March 26, 2009, Microsoft sent an e-mail to PWGSC objecting to any interpretation of the UPSS contract that would allow PWGSC to use the Oracle e-mail software solution for Health Canada and other government departments. On April 30, 2009, PWGSC provided a partial response to Microsoft and requested that it clarify its position. On May 7, 2009, Microsoft requested that PWGSC confirm that the Oracle e-mail software solution would not be provisioned for Health Canada. On May 22, 2009, PWGSC confirmed that Health Canada was using Lotus Domino as its e-mail software solution and indicated that the long-term Government of Canada e-mail software solution would be acquired competitively. On May 25, 2009, Microsoft requested that PWGSC confirm that it would not use a ". . . hosted e-mail service that relies in any way on licenses for Oracle software acquired through the UPSS contract . . . ." It also requested clarification with respect to the response provided by PWGSC on May 22, 2009. On June 2, 2009, PWGSC advised Microsoft that, as it had indicated a potential for a complaint being filed with the Tribunal, a response would be provided as soon as possible after PWGSC had obtained legal advice.

6. On June 9, 2009, Microsoft sent a letter to PWGSC advising that it intended to file a complaint with the Tribunal on June 12, 2009. On June 12, 2009, Microsoft filed its complaint with the Tribunal.

---

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. S.O.R./93-602 [*Regulations*].

7. On June 16, 2009, Microsoft provided the Tribunal with a copy of a letter that it received from PWGSC at the end of the day, on June 12, 2009. In this letter, PWGSC indicated that it had not acquired anything beyond the goods and services contemplated in the UPSS RFP. It also noted that it had abided by the terms and conditions of the UPSS RFP and the UPSS contract and would continue to do so.

8. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal ". . . 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." Subsection 6(2) 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."

9. These provisions make it clear that a complainant has 10 working days from the date on which it first becomes aware or reasonably should have become aware of its ground of complaint to either object to the government institution or file a complaint with the Tribunal.

10. While the information submitted with the complaint indicates that Microsoft made an objection to PWGSC on March 26, 2009, there is no information to indicate when or how it first became aware of its ground of complaint. In its March 26, 2009, e-mail to PWGSC, Microsoft simply stated that certain information had come to its attention, without providing any further particulars. As a result, the Tribunal has no factual grounds upon which to determine the starting point of the limitation period stipulated in section 6 of the *Regulations*.

11. In *TPG Technology Consulting Ltd. v. Canada (Public Works and Government Services Canada)*,[3] the Federal Court of Appeal provided the following guidance with respect to the handling of complaints that are based on allegations gathered from leaked evidence:

> [30] . . . The starting point of a time-barring period, which is the demarcation of a period which allows for the exercise, or the loss, of a right, cannot revolve exclusively around unauthorized communications in the nature of "water-cooler gossip".
>
> . . .
>
> [41] The Tribunal had the duty to go back to the first principles of the bid process and determine whether the allegations were the result of an open process. In the end it could only decline to handle the complaint, on the basis that it was premature given that there had been no communication by PWGSC. The fairness, openness and impartiality of the process required an authorized line of communication if the process is to meet the purposes of the [CITT] Act . . . .

12. In the present case, the Tribunal finds it reasonable to assume that, if there had been authorized communications by PWGSC prior to March 26, 2009, Microsoft would have included them as part of its complaint. Therefore, in the absence of such communications, the Tribunal is of the view that the complaint may well be based primarily on speculation and would therefore be premature.

13. In addition to the above, and more importantly, the Tribunal is also of the view that the information submitted with the complaint does not provide any indication that the complaint concerns an aspect of the procurement process that relates to a designated contract.

---

3. 2007 FCA 291 (CanLII).

14. Subsection 7(1) of the *Regulations* sets out three conditions which must be met before the Tribunal may conduct an inquiry in respect of a complaint. One of the conditions is that the complaint be in respect of a designated contract.

15. Section 30.1 of the *CITT Act* defines a 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".

16. Microsoft submitted that the issues raised in its complaint are in respect of a designated contract, which would be either the UPSS contract or any new contract for an e-mail software solution that has been or is proposed to be awarded.

17. Although the UPSS contract is arguably a designated contract, the Tribunal notes that subsection 30.11(1) of the *CITT Act* only allows for the filing of complaints that concern an aspect of the "procurement process" that relates to a designated contract. All four trade agreements similarly provide that the "procurement process" begins after an entity has decided on its procurement requirement and continues through to, and including, contract award.[4] As the basis for Microsoft's complaint concerns PWGSC's alleged wrongful interpretation of the UPSS contract, the Tribunal finds that this is a matter which falls outside the procurement process that relates to the UPSS contract and, as such, is not within the Tribunal's jurisdiction.

18. As for Microsoft's contention that the designated contract is any new contract for an e-mail software solution that has been or is proposed to be awarded, the Tribunal finds that the information submitted with the complaint fails to establish the existence of such a contract. Although it can reasonably be inferred from communications made by PWGSC after March 26, 2009, that it may have a different interpretation of the scope of the UPSS contract than Microsoft, this does not, in itself, constitute evidence that a contract (or an amended contract) has been or is proposed to be awarded. The Tribunal is of the view that, at this time, Microsoft's complaint is the result of pure speculation regarding the actions that PWGSC may take in the future with respect to the UPSS contract. Therefore, in the absence of any evidence regarding the existence of any new designated contract, the Tribunal does not have jurisdiction to conduct an inquiry into the complaint. As stated by the Federal Court of Appeal in *Novell Canada Ltd. v. Canada (Minister of Public Works and Government Services)*,[5] ". . . there is no jurisdiction in the Tribunal under subsection 30.11(1) [of the *CITT Act*] to conduct an at-large inquiry into the procurement processes of the government."

19. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint.

---

4. See Article 514(2)(a) of the *Agreement on Internal Trade*, 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm>; Article 1017(1)(a) of the *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); General Note 2 of the *Agreement on Government Procurement*, 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>; General Note 5 of Chapter K*bis* of the *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).
5. 2000 CanLII 15324 (F.C.A.).

DECISION

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

André F. Scott
André F. Scott
Presiding Member