



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2009-056

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

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Friday, March 12, 2010*

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IN THE MATTER OF a complaint filed by Microsoft Canada Co., Microsoft Corporation, Microsoft Licensing, GP and Softchoice Corporation pursuant to 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 pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

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

Complainants

AND

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT
SERVICES**

**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 not valid.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaint, which costs are to be paid by Microsoft Canada Co., Microsoft Corporation, Microsoft Licensing, GP and Softchoice Corporation. In accordance with the *Guideline for Fixing Costs in Procurement Complaint Proceedings*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 3, and its preliminary indication of the amount of the cost award is \$3,000. 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 by the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

André F. Scott

André F. Scott
Presiding Member

Dominique Laporte

Dominique Laporte
Secretary

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STATEMENT OF REASONS

COMPLAINT

1. On October 29, 2009, Microsoft Canada Co., Microsoft Corporation, Microsoft Licensing, GP and Softchoice Corporation (M&S) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint concerned an alleged new procurement by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of Health (Health Canada), for which PWGSC used an existing 2005 contract with Sierra Systems Group Inc. (Sierra) for a unified portal software solution (UPSS).

2. M&S alleged that the UPSS contract provided for the purchase of a set of products from Oracle Corporation (Oracle), including certain licences for the Oracle Collaboration Suite (OCS). M&S submitted that Oracle discontinued the OCS in 2008 and offered Oracle Beehive licences as a replacement. M&S alleged that PWGSC has improperly been attempting to deploy an e-mail solution using Oracle Beehive licences, whereas licences with such functionality do not form part of the UPSS contract. Accordingly, M&S claimed that the products currently being procured are substantially different from the products described in the UPSS solicitation and that the ensuing procurement represents an improper acquisition of a new product, as no competitive solicitation was conducted.

3. As a remedy, M&S requested that PWGSC terminate the deployment of the alleged new e-mail solution at Health Canada and conduct a competitive procurement for the supply of e-mail software at Health Canada and any other department where the deployment of e-mail software under the UPSS contract is concluded, underway or proposed. In addition, M&S requested that the Tribunal recommend that M&S and PWGSC negotiate an appropriate compensation amount that recognizes M&S's lost opportunity to date, the seriousness of the deficiency in the procurement process and the prejudice to the integrity of the competitive procurement system. It also requested its costs on a solicitor-client basis.

BACKGROUND

4. On October 7, 2004, PWGSC posted the UPSS RFP on MERX.² Sixteen amendments that responded to 418 questions posed by prospective bidders were issued, and the bidding period closed on December 16, 2004. According to PWGSC, it received two bids, one each from Sierra and IBM (Canada) Ltd., both of which were compliant.

5. On May 27, 2005, in accordance with the evaluation and contract award provisions of the RFP, PWGSC awarded Sierra a contract to provide “. . . a Unified Portal Software Solution that includes, without limitation, Licensed Software, warranty, maintenance, support, training, documentation and related professional services and all of the licensing rights specified herein.” The contract further specified that “[i]t is the intent of Canada that the Unified Portal Software Solution will provide access to the [Government of Canada] web sites to Canadians and others through externally facing portal services (including Internet based services) and will provide access to government users . . . through internally facing portal services”³ The initial contract period was three years and included four irrevocable one-year options. To date, two option periods have been exercised.

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. Canada's electronic tendering service.
3. UPSS contract at 4.

6. The original contract called for Sierra to provide the OCS. However, in September 2008, due to Oracle's discontinuance of the OCS, Sierra began supplying Oracle Beehive instead. On the basis of the evidence in the complaint, on March 30, 2009,⁴ PWGSC exercised its right to purchase additional licences, including maintenance and support, for the use of the UPSS by Health Canada, as provided for in the original contract.

7. On June 12, 2009, Microsoft Canada Co., Microsoft Corporation and Microsoft Licensing, GP (Microsoft) filed a first complaint with the Tribunal,⁵ alleging the same ground as the one in the present complaint, as well as another allegation involving the interpretation of the UPSS contract.

8. On June 26, 2009, Microsoft filed a second complaint with the Tribunal,⁶ alleging the same grounds as those in the first complaint.

9. On June 29, 2009, the Tribunal issued its decision regarding the first complaint. The complaint was not accepted for inquiry. The Tribunal determined that it was premature and based primarily on speculation and that the information submitted with the complaint did not provide any indication that the complaint concerned an aspect of the procurement process that related to a "designated contract".⁷ The Tribunal stated the following:

18. . . . 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)*, ". . . 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."

[Footnote omitted]

10. On July 10, 2009, the Tribunal issued its decision regarding the second complaint. The Tribunal determined that the complaint concerned the same alleged procurement as the first complaint and, apart from the inclusion of a letter from Microsoft to PWGSC, contained the same documentary evidence as the first complaint. Accordingly, the Tribunal was of the view that the doctrine of *res judicata* applied, which prevented it from considering the second complaint.

11. On July 28 and August 7, 2009, Microsoft Canada Co. filed notices of application with the Federal Court of Appeal (FCA) regarding the Tribunal's above determinations.

4. GIR, confidential exhibit 18.

5. *Re Complaint Filed by Microsoft Canada Co., Microsoft Corporation and Microsoft Licensing, GP* (29 June 2009), PR-2009-016 (CITT).

6. *Re Complaint Filed by Microsoft Canada Co., Microsoft Corporation and Microsoft Licensing, GP* (10 July 2009), PR-2009-021 (CITT).

7. Subsection 30.11(1) of the *CITT Act* reads as follows: "Subject to the regulations, 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 the Tribunal to conduct an inquiry into the complaint." Subsection 3(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* defines a "designated contract" as ". . . 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 NAFTA, in Article 502 of the Agreement on Internal Trade, in Article I of the Agreement on Government Procurement or in Article *Kbis-01* of Chapter *Kbis* of the CCFTA, by a government institution . . ."

12. As part of the proceedings before the FCA, on September 8, 2009, PWGSC produced documents that included an e-mail chain, which, according to M&S, indicated that PWGSC is implementing the UPSS, including e-mail, at Health Canada.

13. Between September 21 and October 16, 2009, M&S and PWGSC exchanged correspondence regarding the contents of that e-mail chain and the allegation brought before the Tribunal in the current complaint. On or about October 16, 2009, M&S received a letter, dated October 8, 2009, in which PWGSC advised M&S that, given that the issue was before the courts, it was not in a position to discuss the matter.

14. On October 29, 2009, M&S filed the current complaint with the Tribunal. The Tribunal considered that this complaint was filed within the 10 working days required by section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.⁸

15. On November 6, 2009, 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 *Regulations*.

16. On November 13, 2009, M&S filed a motion with the Tribunal requesting that it order PWGSC to produce certain documents relevant to the proceedings that M&S described as being under the control of the Government of Canada. M&S also requested that these documents be filed prior to the submission of the Government Institution Report (GIR) to provide M&S a fair and reasonable opportunity to address any issues raised in the GIR. M&S requested that, owing to the circumstances of the case (i.e. that there was no published solicitation per se and no opportunity for M&S to review the specifications and technical requirements of the solicitation) and the short period of time that M&S had to respond to the GIR, the documents be filed with the Tribunal 14 days before the deadline for the submission of the GIR.

17. On November 17, 2009, PWGSC filed a motion with the Tribunal requesting that it order M&S to provide PWGSC with copies of two single-copy exhibits filed with the complaint. PWGSC argued that M&S's filing of the single-copy exhibits for allegedly unsubstantiated "copyright reasons" violated the letter and spirit of the Tribunal's *Guideline on Designation, Protection, Use and Transmission of Confidential Information*. PWGSC argued that M&S appeared to base its allegations on the evidence contained in the two documents and that the failure to provide PWGSC, its counsel and experts with full access to the evidence represented a denial of the basic tenets of natural justice. It further argued that it has a right to the evidence relied upon by M&S in order to properly respond to that evidence. PWGSC also requested that it be granted a 14-day extension for the filing of the GIR. On November 23, 2009, PWGSC withdrew its request for the provision of copies of the two single-copy exhibits.

18. On November 27, 2009, the Tribunal issued an order, dismissing M&S's motion. The Tribunal determined that the request was premature, given that PWGSC had yet to file the GIR. The Tribunal's order also established December 11, 2009, as the new date for the filing of the GIR.

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

19. On December 11, 2009, PWGSC submitted the GIR. On December 16, 2009, M&S filed a motion requesting that the Tribunal order PWGSC to provide a number of documents relating to the deployment of Oracle Beehive at Health Canada, as well as other documents relating to the UPSS contract and PWGSC's planned deployment of Oracle Beehive. M&S argued that these documents should have been produced by PWGSC as part of the GIR, in accordance with paragraph 103(2)(b) of the *Canadian International Trade Tribunal Rules*⁹ because they were in PWGSC's possession and relevant to the issue raised in the complaint.

20. On December 23, 2009, PWGSC and Sierra submitted replies to M&S's motion. PWGSC argued that the requested documents were irrelevant and unnecessary to resolve the issue raised in the complaint. It stated that the information and evidence contained in the GIR fully addressed the complaint and provided a complete evidentiary foundation for the Tribunal's determination. Sierra supported PWGSC's submission and further asserted that M&S had failed to establish that the requested documents were relevant to the issue raised in its complaint. On December 30, 2009, M&S filed a response to the comments submitted by PWGSC and Sierra.

21. On January 6, 2010, the Tribunal ordered PWGSC to produce certain of the documents requested by M&S.

22. On January 11, 2010, PWGSC filed nine documents with the Tribunal.

23. On January 18 and 19, 2010, respectively, M&S and Sierra filed their comments on the GIR. On January 22, 2010, PWGSC submitted a reply to M&S's comments on the GIR, claiming that they contained misrepresentations and incorrect factual allegations. On January 29, 2010, M&S submitted its response to PWGSC's reply.

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

PRELIMINARY MATTERS

Reasons Relating to the Tribunal's Order of January 6, 2010

25. M&S's motion of December 16, 2009, sought an order requiring PWGSC to produce documents. It read as follows:

- (a) PWGSC's standard planning documents related to the Health Canada Distributed Computing Environment ("DCE") project including any:
 - (i) Project Business Case or Business Requirements Document;
 - (ii) Project Charter;
 - (iii) Project Plan;
 - (iv) Systems Requirement document;
 - (v) Memorandum of Understanding or Letter of Interest between PWGSC and Health Canada;
 - (vi) Service Level Agreement between PWGSC and Health Canada;
 - (vii) High Level Training Material;

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

- (viii) Detailed Design Specifications; and
- (ix) Test Plan, Procedures and Reports.
- (b) Relevant portions of the [UPSS contract] as well as all amendments or call-ups issued since March 30, 2009;
- (c) Any presentations or analysis prepared by PWGSC related to . . . Oracle Beehive;
- (d) Any analysis by PWGSC related to the functionality or capabilities of Oracle Beehive;
- (e) Any analysis comparing [OCS] and Oracle Beehive;
- (f) An accounting of all amounts paid to [Sierra] under the UPSS Contract; and
- (g) An accounting of all amounts paid to [Sierra] or its affiliates relating to the provision of professional services related to the Health Canada DCE deployment.

26. After consideration of the parties' arguments and submissions on the relevance of these documents to the Tribunal's inquiry proceedings, the Tribunal ordered PWGSC to file documents as follows:

- those portions of the [UPSS] contract (contract No. EP265-04H009/001/ET) between [PWGSC] and [Sierra], as well as any amendments or call-ups to that contract, that relate to the rights and entitlements of [Health Canada] to the software solution provided by [Sierra], including the [OCS] and future developments thereto; and
- any presentations or analyses prepared by [PWGSC] that relate to the e-mail functionality abilities of the [OCS] and Oracle Beehive.

27. The Tribunal is of the opinion that the issue in this inquiry is limited to whether the deployment of Oracle Beehive at Health Canada was within the scope of the UPSS contract. The Tribunal therefore considered certain portions of the UPSS contract, as well as amendments or call-ups thereto, relating to the rights and entitlement of Health Canada to deploy the UPSS.

28. In this context, e-mail functionality and collaborative services were relevant in view of the wording of the complaint. Accordingly, the Tribunal ordered the disclosure of presentations or analyses prepared by PWGSC that related to such functionality because it was of the view that they would likely assist the Tribunal in reaching its final decision. The Tribunal recognized that the GIR addressed e-mail functionality, but found that the capability of the OCS and Oracle Beehive, in that respect, remained germane to determining the rights and obligations of PWGSC in view of the wording of the complaint.

29. Regarding the request for the other documents listed, the Tribunal determined that they were not relevant because any breach of PWGSC's obligations could only be determined through the interpretation of Sierra's and PWGSC's obligations under the UPSS contract and not from any other internal planning documents. In addition, regarding M&S's requests for documents showing an "accounting of all amounts paid to [Sierra] under the UPSS Contract" and an "accounting of all amounts paid to [Sierra] or its affiliates relating to the provision of professional services related to the Health Canada DCE deployment", the Tribunal finds that M&S provided no support that these documents would assist the Tribunal in rendering its determination.

TRIBUNAL'S ANALYSIS

30. 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. At the conclusion of the inquiry, the Tribunal must determine the validity of the complaint 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 case, are the *North American Free Trade Agreement*,¹⁰ the *Agreement on Internal Trade*¹¹ and the *Agreement on Government Procurement*.¹² Although the Tribunal also has jurisdiction to conduct inquiries pursuant to two additional trade agreements, the *Canada-Chile Free Trade Agreement*¹³ and the *Canada-Peru Free Trade Agreement*,¹⁴ in this case, the contract at issue was awarded prior to the *CCFTA* and *CPFTA* coming into affect.

31. The issue to be determined by the Tribunal can be framed as follows: Does the deployment of Oracle Beehive at Health Canada constitute a breach, by PWGSC, of its obligations under the *AIT*, *NAFTA* and the *AGP* or is it a legitimate exercise of rights under the UPSS contract and subsequent amendments?

32. The Tribunal examined this issue in conjunction with the Government's obligations under the following provisions of the applicable trade agreements: Articles 501 and 506(2), (5) and (6) of the *AIT*; Articles 1008, 1009 and 1010 of *NAFTA*; and Articles VII and IX of the *AGP*.

M&S's Position

33. M&S submitted that a portal product is fundamentally different from an e-mail system and that the UPSS RFP and contract called for the supply of a portal solution and not an e-mail system. M&S submitted that an e-mail system has two distinct components, referred to as the "back-end" (or the server software component) and the "front-end" (or the client software component). It submitted that the heart of the system is the back-end, which accepts, forwards, delivers and stores messages on behalf of individual users. The back-end system comprises the central infrastructure of an e-mail system. M&S submitted that the front-end, on the other hand, is the software that resides on users' computers and allows them to access the back-end system on which e-mail messages are stored and transferred in order to actually view the messages. It submitted that the issue in this complaint is the acquisition of a new back-end system without competition. It argued that the UPSS RFP clearly contemplated that the Web portal solution would interoperate with the existing back-end system, not replace it, and that the UPSS RFP was therefore limited to collaborative services that precluded e-mail server software.

34. M&S submitted that PWGSC is deploying a new e-mail system for Health Canada using Oracle Beehive, which was not included as part of the 2005 UPSS contract. M&S argued that various documents on record¹⁵ demonstrate that Oracle Beehive was to be considered as the new e-mail server and that all user server accounts would be migrated from the existing server platforms to Oracle Beehive.

10. *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*].

11. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

12. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

13. *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.

14. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx>> (entered into force 1 August 2009) [*CPFTA*].

15. GIR, confidential exhibit 7, provided in accordance with the Tribunal's order dated January 6, 2010.

35. M&S submitted that the UPSS RFP contained no specific requirement for e-mail server software. M&S submitted that a “portal” product is separate and distinct from an “e-mail” product and that the UPSS RFP and contract were for a Web portal solution that was required to integrate and interoperate with existing e-mail systems. It argued that PWGSC has incorrectly characterized the UPSS RFP as being for portal *and collaborative* services as an after-the-fact attempt to justify the non-competitive acquisition of Oracle Beehive. M&S argued that the UPSS RFP was for a portal product that provided certain specifically defined collaborative services within that portal. M&S submitted that PWGSC is attempting to rely on a broad interpretation of “portal and collaborative services” which fails to interpret the meaning of the different terms of the RFP in their proper context. It argued that, if the UPSS was meant to include an e-mail system, language such as “must incorporate” or “must include” would have been used. It noted that such language was found in other mandatory requirements found in the RFP:

M-12 **Architecture Requirements**

The [UPSS] must interface, integrate and interoperate with other software, software components and software solutions, e.g. external authentication and authorization mechanisms, metadata repositories, relational and flat file databases, content management solutions, records and document information management systems, search engines, harvesting, messaging, instant messaging and calendaring, and information management systems.

The [UPSS] must deliver, enable and support a complete Application Programming Interface (API), and Software Development Kits (SDKs) or equivalent, that will allow developers to programmatically access the [UPSS] functionality including, but not limited to:

- a. Application services;
- b. Personalization and customization services;
- c. Application development;
- d. Portal specific security, e.g. authentication and authorization services, single sign-on;
- e. Data source access;
- f. Presentation services;
- g. Search;
- h. ‘Portlets’;
- i. Interfaces to external application services using Web Services (SOAP);
- j. Collaboration services.

...

M-16 **Electronic Mail Integration**

The [UPSS] must interoperate with and make use of Simple Mail Transfer Protocol (SMTP) compliant e-mail systems. The [UPSS] must enable and support e-mail functionality as in the forwarding of notifications or other workflow related events.

...

M-47 **Collaboration Services**

The [UPSS] must deliver, enable and support the functionality to enable e-mail notification based on user-defined criteria within the context of the collaborative group, e.g. notification of new content, events, and replies.

36. M&S noted that, according to amendment No. 006 to the RFP, PWGSC declined to expand the scope of the UPSS RFP to include e-mail systems when asked to do so by a supplier. M&S also noted an exchange that took place in January 2009 between PWGSC and Sierra in which, M&S claimed, PWGSC acknowledged that the UPSS RFP did not include e-mail systems and that the UPSS was not intended to replace traditional or existing e-mail functionality.¹⁶

37. M&S submitted that Oracle Beehive is a different product from the one that Sierra proposed in response to the UPSS RFP. M&S argued that this new product did not exist when the UPSS RFP was issued and was not an enhancement of the OCS. It submitted that Oracle's own product literature confirms that "Oracle Beehive is a separate product from [OCS]" and that "[t]here is no software program that will upgrade [OCS] to Oracle Beehive. Since the two products are architecturally different, Oracle Beehive will need to be installed and data to be migrated into Oracle Beehive."¹⁷

38. M&S argued that the UPSS RFP was for a portal with limited collaborative services and that Sierra is not permitted to expand the scope of the contract. M&S noted that, when the UPSS contract was awarded to Sierra in 2005, it was for \$820,845.15, but, according to "Contract Highlights" issued by PWGSC on May 25, 2005, the estimated value of the UPSS contract was listed as \$20 million.¹⁸ M&S submitted that the \$19.2 million difference between the awarded value and the total estimated value is accounted for through the purchase of additional licences and professional services associated with the UPSS contract. It submitted that Sierra, to achieve the maximum revenue under the UPSS contract, had to up-sell \$19.2 million worth of licences and associated professional services and, in order to do so, Sierra had to offer products and services that PWGSC was interested in buying over the life of the UPSS contract. M&S referenced the January 2009 exchange between PWGSC and Sierra as an indication of Sierra attempting to increase the scope of the UPSS contract to include Oracle Beehive.¹⁹

39. Furthermore, M&S relied on a report that it commissioned²⁰ to argue that rated requirements R-21 and R-22 of the UPSS RFP limited the type of e-mail system to "synchronous" services, such as audio or video conferencing (i.e. where everyone works together at the same time) as opposed to "asynchronous" services, such as paper mail, e-mail and voice mail (i.e. where people can collaborate at different times):

R-21 Collaboration Services

The [UPSS's] collaboration services component should provide the following distributed collaborative working session functionalities and these should be provided through an integrated collaborative working session function within the collaboration services component:

- a. Group messaging and communication;
- b. Support for meeting management and calendaring including shared calendar, group scheduling.

R-22 Collaboration Services

The [UPSS's] collaboration services component should provide the following distributed collaborative working session functionalities and these should be provided through an

16. GIR, confidential exhibit 16.

17. Comments on the GIR, attachment 2, "Oracle Collaborations Suite Migration to Oracle Beehive, Overview and Frequently Asked Questions" at 1.

18. GIR, exhibit 3, "Contract Highlights" issued by PWGSC on May 25, 2005.

19. GIR, confidential exhibit 16.

20. Complaint, attachment 1, Ferris Research, Inc.'s "The UPSS Request for Proposal: A Scope Analysis" dated October 28, 2009 [Ferris Report].

integrated collaborative working session function within the collaboration services component:

- a. Instant messaging (“chat”);
- b. Enterprise messaging (broadcast).

PWGSC’s Position

40. PWGSC submitted that the issue is essentially whether the UPSS RFP required or sought e-mail functionality. It argued that, in addition to mandatory requirements M-12, M-16 and M-47, and rated requirements R-21 and R-22 noted above, other mandatory criteria also required e-mail functionality:

M-15 Directory Management

The [UPSS] must use external (to the [UPSS]) directory environments where and when required in support of mail, permissions or other functions.

The [UPSS] must be able to operate in and make use of the following directory environments at a minimum:

- a. Microsoft Active Directory; AND,
- b. Lightweight Directory Access Protocol (LDAP) compliant directories.

...

M-20 Portal Application Services Framework

The [UPSS] must incorporate and integrate with an application server engine that provides the following:

- a. Independence from the underlying hardware architecture;
- b. Designed for high availability and scalability;
- c. An object-oriented runtime environment that allows applications to use services provided by the application server;
- d. Support for connectors linking into existing enterprise information systems e.g. SAP, PeopleSoft and program specific business applications;
- e. A transactional context within which business logic components can execute;
- f. A framework that allows presentation logic components to service HTTP requests;
- g. Database connection pooling;
- h. Built-in support for Web Services technologies (WSDL, SOAP, UDDI);
- i. Built-in support for XML technologies including, but not limited to XML Parsing, XSL Transformations;
- j. Built-in support for distributed computing technologies and protocols, e.g. CORBA and IIOP;
- k. Built-in support for message-oriented middleware. (e.g. MQ Series); and,
- l. Built-in support for industry-standard directories, such as LDAP.

41. PWGSC submitted that M&S makes the artificial distinction between asynchronous and synchronous communication by arguing that an “e-mail system” includes only “asynchronous” communication, while group messaging and instant messaging provided as collaborative services under R-21 and R-22 are “synchronous” messaging. PWGSC submitted that this distinction is made without support and is contradicted by the definition of “collaboration services” as provided in Appendix 2 of the Ferris Report—“[c]ollaboration is the process by which entities work together”—and its acknowledgement that collaboration services include e-mail and instant text messaging (which PWGSC submitted is also a form of e-mail). PWGSC submitted that an e-mail, being a digital message, can be delivered either synchronously or asynchronously and, when used colloquially, the term “e-mail” may refer to synchronous or asynchronous messaging; i.e. instant messaging or messaging. PWGSC submitted that the UPSS RFP sought functionality for both synchronous and asynchronous messaging, specifically noting that mandatory requirement M-12 required an architecture that supports both “messaging” and “instant messaging”.

42. PWGSC also submitted that the deployment of the UPSS at Health Canada has not replaced traditional e-mail. It noted that, in December 2008, Health Canada procured \$12 million worth of Microsoft licences, including Microsoft Office, and related services, for itself and the Public Health Agency of Canada. It submitted that Health Canada's employees have a choice between Microsoft Office, Corel WordPerfect or IBM Lotus Smart Suite.

43. PWGSC submitted that the complaint should be dismissed and that it should be awarded its costs incurred in responding to the complaint.

Sierra's Position

44. Sierra submitted that the GIR fully responded to all issues raised in the complaint and that it had nothing to add.

Tribunal's Discussion

45. The Tribunal examined the parties' positions with respect to some 25 criteria in the original UPSS RFP and their views with respect to the existing contract. The Tribunal finds that it is undeniable that the RFP sought collaborative services, as evidenced by the numerous references in the mandatory and rated requirements.²¹ The Tribunal is unable to find any clause or wording in the RFP that, as claimed by M&S, would specifically exclude any form of e-mail asynchronous messaging.

46. More importantly, the Tribunal considers that the deployment of Oracle Beehive stems from the obligations incurred by Sierra under section B.4.4 of the model contract contained in the RFP and included as section 4.4 of the UPSS contract as follows:

4.4 MAINTENANCE OF LICENSED SOFTWARE

- (a) **Maintenance Period:** The Contractor shall provide maintenance of the Licensed Software by delivering the Code Corrections (defined below) and the Maintenance Code (defined below) to Canada:
- i) during the [Initial²²] Contract Period; and
 - ii) during any year in which Canada exercises its option for additional maintenance (the "Maintenance Period").
- (b) **Maintenance Code:** The Contractor shall provide the following within ten (10) calendar days of release and availability, throughout the duration of the Contract Period, in respect of the Licensed Software as part of the maintenance of the Licensed Software:
- (i) all bug fixes, software patches, and all other enhancements;
 - (ii) all upgrades, updates, major and minor new releases, and renames;
 - (iii) all extensions and other modifications, including but not limited to drivers, service packs, and service releases;
 - (iv) all application program (APIs), plug-ins, applets and adapters;

21. Such references are found in mandatory requirements M-12, M-15, M-16, M-20 and M-47, and rated requirements R-21 and R-22.

22. This word only appears in the UPSS contract; otherwise, the wording of the draft and actual contract is identical.

- (v) all rewrites, including in other programming language(s), where the original version(s) is no longer being maintained by the Software Publisher; and
- (vi) upon request, all backgrades or downgrades; provided, however if such backgrades or downgrades are versions predating the version of the Licensed Software proposed by the Contractor in response to the Request for Proposal that resulted in this Contract, the backgrade or downgrade version shall be provided without warranty and the Contractor shall have no obligation to provide maintenance or support in respect of the backgrade or downgrade version of the License Software;

which are generally made available to licensees of the Licensed Software by the Software Publisher during the Maintenance Period (the "Maintenance Code").

- (c) License to Use Maintenance Code: In this Contract, the term "Licensed Software" includes all Maintenance Code delivered to Canada in relation to the Licensed Software; for greater certainty, the license of the Licensed Software governs the use of the Maintenance Code.
- (d) Shipments: All shipments required to deliver the Maintenance Code to Canada must be made without additional packaging charges or shipping charges to Canada. Canada may make use of electronic delivery, if available and if Canada considers electronic delivery to be appropriate in Canada's sole discretion.
- (e) Deployment of Maintenance Code: Unless otherwise provided herein, Canada shall be responsible for deploying the Maintenance Code.
- (f) Maintenance of Licensed Software: The Contractor must continue to maintain the version of the Licensed Software (i.e., the version or "build" originally licensed hereunder at the time of the contract award) as a commercial product (i.e. the Contractor or the software publisher must be continuing to develop new code in respect of the Licensed Software to maintain its functionality and deal with software errors) for at least one year from the contract award date. If, after such time period, the Contractor or the software publisher decides to discontinue or no longer to maintain the then-current version of "build" of the Licensed Software and to instead provide upgrade to the existing products included in the Software Solution, the Contractor must provide written notice to Canada at least twelve (12) months in advance of such discontinuation

47. Given this, the Tribunal considers that Sierra is obliged to provide maintenance of the licenced software during the contract period and option years. The Tribunal notes that, as the clause was included in the UPSS RFP, bidders were aware of this requirement when they submitted their bids. In accordance with the above, "Maintenance" requires the delivery of Code corrections, defined in both the model and UPSS contracts as:

- (i) all bug fixes, software patches, and all other enhancements;
- (ii) *all upgrades, updates, major and minor new releases, and renames;*
- (iii) all extensions and other modifications, including but not limited to drivers, service packs, and service releases;
- (iv) all application program (APIs), plug-ins, applets and adapters;
- (v) all rewrites, including in other programming language(s), where the original version(s) is no longer being maintained by the Software Publisher; and

- (vi) upon request, all backgrades or downgrades; provided, however if such backgrades or downgrades are versions predating the version of the Licensed Software proposed by the Contractor in response to the Request for Proposal that resulted in this Contract, the backgrade or downgrade version shall be provided without warranty and the Contractor shall have no obligation to provide maintenance or support in respect of the backgrade or downgrade version of the License Software.

[Emphasis added]

48. Therefore, in accordance with the terms of the contract, Sierra delivered, among other things, OCS. OCS provided users access to integrated e-mail, voicemail, Web conferencing and other capabilities connected with Microsoft Outlook and Web browsers.

49. In September 2008, Sierra began delivering Oracle Beehive as an upgrade to OCS at no additional cost to the Government. In an e-mail dated November 18, 2008, PWGSC sought confirmation that Oracle Beehive was an upgrade of OCS that included a name change and, therefore, was included under the existing contract.²³

50. The terms of a contract are to be interpreted according to their ordinary meaning within the context in which they are used. A careful reading of the above provisions, including the title of the section, "Maintenance of Licensed Software" and, more importantly, "all upgrades, updates, major and minor new releases, and renames" of the licenced software, supports the Tribunal's conclusion that the UPSS RFP clearly establishes PWGSC's right to such major and minor new releases and that Sierra is required to provide them. Given the replacement of OCS by Oracle Beehive in September 2008, in accordance with the UPSS RFP requirement, Sierra was required to provide this major upgraded renamed software to "Canada". Sierra's decision to replace OCS by Oracle Beehive was made independently of the existence of the UPSS contract.

51. The Tribunal considers that the deployment of Oracle Beehive at Health Canada is the direct exercise of an option contemplated in the UPSS RFP and provided for in the contract. This option not only relates to the type of product (to include upgrades) but also provides that deployment could be increased to further locations. Therefore, the Tribunal finds that PWGSC had an undeniable right to purchase additional licences under the UPSS contract and that these licences were upgrades within the scope of the contract. Fundamentally, the Tribunal finds that this matter pertains strictly to contract administration, which is beyond the Tribunal's jurisdiction, and that it is not in the presence of an uncompleted procurement. In such a context, the Tribunal is not in the presence of a violation of the trade agreements.

52. In light of the foregoing, the Tribunal determines that M&S's complaint is not valid.

Costs

53. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint. The Tribunal has considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*) and is of the view that this complaint case has a complexity level corresponding to the highest level of complexity referred to in Appendix A of the *Guideline* (Level 3). The *Guideline* contemplates classification of the level of complexity of complaint cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The complexity of the

23. GIR, confidential exhibit 20 at 3.

procurement was medium, in that it involved the provision of off-the-shelf items. The complexity of the complaint was high, in that it concerned the interpretation of complex technical criteria. Finally, the complexity of the complaint proceedings was high, as there were two motions and an intervener, and, although a public hearing was not required, the 135-day time frame was required, and submissions outside of the normal scope of the proceedings were made. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$3,000.

DETERMINATION OF THE TRIBUNAL

54. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

55. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by M&S. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for this complaint case is Level 3, and its preliminary indication of the amount of the cost award is \$3,000. 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 by the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

André F. Scott

André F. Scott
Presiding Member