



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File No. PR-2009-057

CommVault Systems Canada Inc.

*Decision made  
Thursday, November 5, 2009*

*Decision and reasons issued  
Wednesday, November 18, 2009*

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**

**COMMVAULT SYSTEMS CANADA INC.**

**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

Dominique Laporte

Dominique Laporte  
Secretary

## STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,<sup>2</sup> a potential supplier may file a complaint with the Canadian International Trade Tribunal (the Tribunal) concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

2. The complaint relates to a procurement (Solicitation No. W8474-07Q643/C) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the provision of an enterprise backup and recovery software solution.

3. CommVault Systems Canada Inc. (CommVault) alleged that PWGSC compromised the integrity of the procurement in the following manner:

- (1) it opened CommVault's financial proposal prior to conducting the technical evaluation in contravention of the evaluation process set out in the solicitation document;
- (2) it was biased against CommVault in the evaluation of its bid by way of the numerous clarifications requested; and
- (3) it changed the financial bid evaluation spreadsheet, which had the effect of altering CommVault's final evaluation score.

4. 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."

5. In other words, 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. If a complainant objects to the government institution within the designated time, the complainant may file a complaint with the Tribunal within 10 working days after it has actual or constructive knowledge of the denial of relief by the government institution.

6. According to CommVault, it made an objection on October 2, 2009. However, the only evidence in the complaint was an e-mail written on behalf of Dell Canada Inc. and not on behalf of CommVault. The complaint included a similar e-mail from CommVault that was dated October 14, 2009.

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

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

**GROUND 1**

7. On April 9, 2009, PWGSC issued a Request for Proposal for the provision of an enterprise backup and recovery software solution. On July 10, 2009, bids closed. On July 15, 2009, PWGSC requested a clarification with regard to CommVault's financial proposal. According to CommVault, this clarification request indicated that its financial bid had been opened and reviewed prior to the completion of the technical evaluation. On October 8, 2009, CommVault raised its concern at a debriefing. On October 14, 2009, CommVault made an objection on this matter to PWGSC. On October 30, 2009, CommVault filed its complaint with the Tribunal.

8. The Tribunal considers that CommVault became aware, or reasonably should have become aware, of the basis of this ground of complaint on July 15, 2009. CommVault made its objection to PWGSC on October 14, 2009, which was beyond the prescribed time limit for making the objection. Consequently, the Tribunal considers that the complaint, on this ground, was filed in an untimely manner.

**GROUND 2**

9. On August 10, 28 and September 3, 2009, PWGSC requested clarifications with regard to CommVault's technical proposal. On September 28, 2009, PWGSC advised CommVault that a contract had been awarded to EMC Corporation of Canada.

10. According to CommVault, the clarification requests constitute an attempt to make its proposal non-compliant or non-responsive. On October 14, 2009, CommVault made an objection to PWGSC on the basis that the diligence applied by the technical evaluation team was evidence of bias and that another vendor was likely favoured for unclear reasons. On October 30, 2009, CommVault filed its complaint with the Tribunal.

11. The Tribunal considers that CommVault became aware, or reasonably should have become aware, of the basis of this ground of complaint on September 3, 2009, when it received its last request for clarification. CommVault made its objection to PWGSC on October 14, 2009, which was beyond the prescribed time limit for making the objection. Consequently, the Tribunal considers that the complaint, on this ground, was filed in an untimely manner.

**GROUND 3**

12. On September 25, 2009, PWGSC advised CommVault of an error in the financial evaluation spreadsheet and requested CommVault to confirm its total price for evaluation purposes. CommVault provided that confirmation.<sup>3</sup> On October 8, 2009, a debriefing was held at which CommVault enquired as to why it had not been given the option to amend its price. On October 14, 2009, CommVault made an objection to PWGSC on this matter. On October 30, 2009, CommVault filed its complaint with the Tribunal.

13. The Tribunal considers that CommVault became aware, or reasonably should have become aware, of the basis of this ground of complaint on September 25, 2009. CommVault made its objection to PWGSC on October 14, 2009, which was beyond the prescribed time limit for making the objection. Consequently, the Tribunal considers that the complaint, on this ground, was filed in an untimely manner.

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3. While there is no date in the complaint associated with the confirmation, the Tribunal notes that PWGSC requested a confirmation before September 28, 2009, at 2:00 p.m.

14. In light of the above, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

#### **DECISION**

15. 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