



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2011-039

FreeBalance Inc.

*Decision made
Thursday, October 20, 2011*

*Decision and reasons issued
Friday, October 21, 2011*

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

BY

FREEBALANCE INC.

AGAINST

THE CANADA REVENUE AGENCY

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.

Stephen A. Leach
Stephen A. Leach
Presiding Member

Dominique Laporte
Dominique Laporte
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 relates to a procurement (Solicitation No. 1000299304) by the Canada Revenue Agency (CRA) for the provision of a commercial off-the-shelf product to modernize its revenue management regime. Specifically, the complaint relates to an Advance Contract Award Notice (ACAN), which gave notice of CRA's intention of awarding a sole source contract.

3. FreeBalance Inc. (FreeBalance) alleged that the CRA provided insufficient information for the sole source justification and for the rejection of the Statement of Capabilities that it submitted in response to the ACAN. Additionally, FreeBalance alleged that the selected solution proposed by SAP Canada Inc. (SAP) did not meet the requirements of the ACAN.

4. On August 5, 2011, the CRA posted the ACAN to MERX. The ACAN indicated that SAP was the only firm capable of meeting the requirement, but invited other suppliers that considered themselves fully qualified to meet the requirements to submit a Statement of Capabilities on or before August 19, 2011.

5. On August 12, 2011, FreeBalance submitted a Statement of Capabilities to the CRA. That same day, the CRA informed FreeBalance that the Statement of Capabilities was deficient, as it did not provide substantiation on how FreeBalance was able to meet each criterion for the sole source justification. On August 19, 2011, FreeBalance submitted a revised Statement of Capabilities.

6. On September 28, 2011, the CRA advised FreeBalance that the product proposed in its Statement of Capabilities did not meet all the requirements specified in the ACAN and that it intended to move forward in negotiating a contract with SAP. On September 30, 2011, FreeBalance sent what it characterized as an objection to the CRA. No further correspondence was included in the complaint. On October 14, 2011, FreeBalance filed its complaint with the Tribunal.

7. 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) states that "[a] potential supplier who 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" [emphasis added].

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

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

8. In other words, 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. By “actual knowledge of the denial of relief”, the *Regulations* contemplate explicit rejection of a complainant’s requested relief (for example in a written reply rejecting the complainant’s position). In past instances, the Tribunal has interpreted “constructive knowledge of the denial of relief” as other non-explicit situations, including where, after the passage of a reasonable period of time, the complainant’s position has yet to be addressed by the government institution.

9. The Tribunal finds that, as prescribed by subsection 6(2) of the *Regulations*, FreeBalance made an objection to the CRA within 10 working days from the date on which it became aware of the CRA’s decision to move forward in negotiating a sole source contract with SAP. However, as of the date on which the complaint was filed, FreeBalance’s objection of September 30, 2011, appeared to be pending before the CRA, as no “denial of relief” or copy of any response was provided to the Tribunal. Therefore, in this case, in the absence of a denial of relief as prescribed by subsection 6(2), the Tribunal does not have jurisdiction to commence an inquiry, and the complaint is determined to be premature.

10. The Tribunal’s decision does not preclude any future complaint on the grounds objected by FreeBalance once the CRA has responded to its arguments or if it fails to do so within a reasonable amount of time. In the event that FreeBalance does file a new complaint, it must do so within the time limits prescribed by subsection 6(2) of the *Regulations* and comply with subsection 30.11(2) of the *CITT Act*.

DECISION

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

Stephen A. Leach
Stephen A. Leach
Presiding Member