



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2012-001

Secure Computing LLC

*Decision made
Wednesday, April 11, 2012*

*Decision issued
Thursday, April 12, 2012*

*Reasons issued
Monday, April 23, 2012*

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

SECURE COMPUTING LLC

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 has decided not to conduct an inquiry into the complaint.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

The statement of reasons will be issued at a later date.

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. W8474-126119/B) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of networking equipment.

3. Secure Computing LLC (Secure Computing) alleged that the contract was improperly awarded to a bidder that offered products that did not comply with the mandatory requirements of the solicitation. As a remedy, Secure Computing requested that PWGSC cancel the contract and award it to the next lowest compliant bidder.

4. This is the second complaint filed with the Tribunal by Secure Computing concerning this allegation. Secure Computing also made an objection to PWGSC regarding this matter before filing its initial complaint with the Tribunal. Its initial complaint was not accepted for inquiry, since the Tribunal found that it had been filed prematurely, before Secure Computing had received a denial of relief from PWGSC in response to its objection with respect to its ground of complaint, as contemplated by subsection 6(2) of the *Regulations*.³ However, the Tribunal noted, in its statement of reasons, that its decision did not preclude Secure Computing from filing a new complaint when PWGSC actually responded to its objection and denied relief, or failed to do so within a reasonable amount of time. Secure Computing subsequently received a denial of relief from PWGSC and filed the present complaint within the time limits specified in the *Regulations*.

5. The chronology of events that led to the filing of the present complaint is summarized in the following paragraphs.

6. On March 5, 2012, the solicitation was posted on MERX.⁴ The solicitation superseded a previous procurement (Solicitation No. W8474-126119/A) dated February 23, 2012, for the provision of the same equipment, which was cancelled. The deadline for the receipt of bids was March 15, 2012.

7. On March 14, 2012, Secure Technologies International Inc. submitted a proposal in response to the solicitation on behalf of Secure Computing.⁵ On March 22, 2012, PWGSC advised Secure Computing that its agent was not the winning bidder and that a contract had been awarded to another bidder, Conexsys Communications Ltd. (Conexsys).

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

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

3. *Re Complaint Filed by Secure Computing LLC* (29 March 2012), PR-2011-062 (CITT).

4. Canada's electronic tendering service.

5. The solicitation is a Request for Volume Discount (RVD) for the supply of networking equipment by PWGSC under Networking Equipment Support Services (NESS) National Master Standing Offer (NMSO) No. EN578-030742/000/EW. Under this procurement process, NMSO holders (offerors) can have bids submitted on their behalf by authorized agents. According to the information provided with the complaint, Secure Computing is a NMSO holder and Secure Technologies International Inc. is its authorized agent.

8. On March 26, 2012, Secure Computing made a formal objection regarding the results of the evaluation of the proposals in an e-mail to PWGSC. Secure Computing alleged that the solution proposed by the winning bidder did not meet the mandatory technical requirements of the solicitation and requested that a contract not be awarded until a full investigation into the matter was completed.

9. Secure Computing's specific concerns were that the solution proposed by the winning bidder did not meet the requirements that the requested equipment (SSL Proxy Configuration) (i) not exceed 2U and (ii) include six 300 GB SAS hard drives. According to Secure Computing, using information from the Internet, the manufacturer of the equipment allegedly proposed by the winning bidder is not capable of supplying a solution that is compliant with these mandatory technical requirements.

10. This objection followed an earlier e-mail to PWGSC in which the same allegation was raised; this e-mail was purportedly sent on behalf of Secure Computing, on March 22, 2012, by a representative of McAfee Inc. (McAfee), a manufacturer of networking equipment. However, according to the documents provided by Secure Computing as part of its complaint, while PWGSC indicated that it would consider the questions that had been raised by McAfee in its March 22, 2012, e-mail, it could not respond to it because it had not been sent by Secure Computing's authorized representative.

11. The Tribunal notes that, in its March 26, 2012, e-mail to PWGSC, Secure Computing's authorized representative corrected this deficiency by reiterating the objection, inquiring about the status of the matter that was originally raised with PWGSC on March 22, 2012, and requesting an update as soon as possible. In this way, on March 26, 2012, Secure Computing properly made its objection and sought relief from PWGSC.

12. On March 29, 2012, PWGSC responded to the objection in a letter that was sent to Secure Technologies International Inc., which, as noted above, was Secure Computing's duly authorized agent for the purposes of this solicitation and the company that submitted a proposal on its behalf. In that letter, PWGSC advised that the technical evaluation team had reviewed Secure Computing's concerns and confirmed the following:

- the technical documentation submitted with the winning bidder's RVD response clearly demonstrated that the device proposed did not exceed 2U;
- the technical documentation submitted by the winning bidder also clearly demonstrated that the device proposed included a total of six 300 GB SAS hard drives, as required by Annex B of the RVD; and
- all the products proposed by the winning bidder were identical to the ones that appeared on the approved published price list for this offeror, as required by the NESS NMSO.

13. Given that the technical evaluation team confirmed that the equipment proposed by the winning bidder complied in all respects with the relevant technical requirements, PWGSC also indicated that it was maintaining its decision to award the contract to Conexsys.

14. In order to conduct an inquiry into the complaint, paragraph 7(1)(c) of the *Regulations* requires that the Tribunal determine whether the information provided by the complainant discloses a reasonable indication that the procurement has not been conducted in accordance with whichever of the *North*

American Free Trade Agreement,⁶ the *Agreement on Internal Trade*,⁷ the *Agreement on Government Procurement*,⁸ the *Canada-Chile Free Trade Agreement*,⁹ the *Canada-Peru Free Trade Agreement*¹⁰ or the *Canada-Colombia Free Trade Agreement*¹¹ applies. In this case, the complaint was made under the *AIT* and the *AGP*, which both apply.

15. The issue before the Tribunal is whether Secure Computing provided sufficient evidence for the Tribunal to conclude that there is a reasonable indication that PWGSC erred in its assessment of the information contained in the winning bidder's proposal and, as a result, breached the provisions of the applicable trade agreements in finding that the equipment proposed complied with the technical requirements of the RVD. In this regard, the Tribunal notes that the basis of Secure Computing's allegation is information concerning its competitor's line of products, which is publicly available on the Internet and allegedly demonstrates their shortcomings.

16. However, the products that were proposed may in fact differ from the items that Secure Computing identified on the basis of information that it found on the Internet. Secure Computing has not provided evidence that indicates which specific products were in fact proposed by the winning bidder or that describes their actual technical specifications. Consequently, the Tribunal is of the view that there is insufficient information in the documents provided by Secure Computing to reasonably indicate that the decision to award the contract to its competitor was not in accordance with the criteria and essential requirements set out in the tender documentation. In other words, Secure Computing has not provided the Tribunal with a reasonable indication that Conexsys was unable to propose a solution that was compliant with the technical requirements of the RVD.

17. The Tribunal further notes that there is an onus on complainants to substantiate the allegations that they make. Where it is alleged that products proposed by the winning bidder in a procurement process fail to meet the essential requirements specified in the solicitation documents, the Tribunal will not conduct an inquiry unless there is sufficient evidence indicating that the procuring entity could have erred in its assessment of the information contained in the proposals.¹²

6. *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).

7. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [AIT].

8. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [AGP].

9. *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). Chapter *Kbis*, entitled "Government Procurement", came into effect on September 5, 2008.

10. *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).

11. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/anc-colombia-toc-tdm-can-colombie.aspx>> (entered into force 15 August 2011).

12. *Re Complaint Filed by Papp Plastics & Distribution Limited* (30 July 2007), PR-2007-028 (CITT); *Re Complaint Filed by Solartech Inc.* (16 October 2007), PR-2007-058 (CITT); *Re Complaint Filed by Airsolid Inc.* (18 February 2010), PR-2009-089 (CITT).

18. In this case, there is no evidence that the evaluators did not properly apply themselves in evaluating the winning bidder's proposal or that they otherwise erred in concluding that the solution that it proposed complied in all respects with the essential technical requirements. To the contrary, PWGSC's response to Secure Computing's objection indicates that the decision to award the contract to Conexsys was made on the basis of a thorough review of the information that was before the evaluators at the time of the evaluation of the proposals.

19. As such, the Tribunal concludes that the information on the record does not disclose a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.

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

DECISION

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

Serge Fréchette
Serge Fréchette
Presiding Member