



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2009-021

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

*Decision made
Monday, July 6, 2009*

*Decision and reasons issued
Friday, July 10, 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

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 has decided not to conduct an inquiry into the complaint.

Ellen Fry
Ellen Fry
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 or future 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 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 or will use 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 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) and, on May 27, 2005, the UPSS contract was awarded to Sierra Systems, which proposed a software solution comprised of Oracle applications.
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. On June 9, 2009, Microsoft sent a letter to PWGSC advising that, as it had not received any response, it intended to file a complaint with the Tribunal on June 12, 2009.
6. On June 12, 2009, Microsoft filed a complaint (the first complaint) with the Tribunal (File No. PR-2009-016). In the first complaint, Microsoft stated that it had been forced to interpret PWGSC’s failure to respond to its questions as a constructive denial of its objection.

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. On June 19, 2009, the Tribunal decided, on the basis of the information on file, including the June 12, 2009, letter from PWGSC to Microsoft, that it would not conduct an inquiry into the first complaint. This decision, and its accompanying reasons, were issued to Microsoft on June 29, 2009.³

9. On June 26, 2009, prior to the issuance of the Tribunal's decision and reasons in respect of the first complaint, Microsoft filed the current complaint with the Tribunal. Microsoft noted that the current complaint was being filed within 10 working days of June 12, 2009, which was the date on which PWGSC last communicated with Microsoft.

10. The current complaint concerns the same alleged procurement by PWGSC, raises the same grounds of complaint and, apart from the inclusion of a letter dated June 26, 2009, from Microsoft to PWGSC,⁴ contains the same documentary evidence as the first complaint.

11. Therefore, the Tribunal is of the view that the doctrine of *res judicata* applies to prevent it from considering the current complaint.⁵

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

DECISION

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

Ellen Fry
Ellen Fry
Presiding Member

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

4. In this letter, Microsoft requested responses to questions previously asked, posed questions arising from PWGSC's June 12, 2009, letter, sought clarification of PWGSC's position and requested a copy of the UPSS contract.

5. Pursuant to that doctrine, where a final judicial decision has been rendered, a party is estopped from disputing the merits of the decision in a re-litigation before the same court (see *Wavel Venture Corp. v. Constantini*, [1997] 4 W.W.R. 194).