



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## ORDER AND REASONS

File No. PR-2010-014

Zylog Systems (Ottawa) Ltd.

v.

Department of Public Works and  
Government Services

*Order and reasons issued  
Tuesday, June 29, 2010*

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IN THE MATTER OF a complaint filed by Zylog Systems (Ottawa) Ltd. 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**

**ZYLOG SYSTEMS (OTTAWA) LTD.**

**Complainant**

**AND**

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

**Government Institution**

**ORDER**

Pursuant to paragraph 10(a) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, the Canadian International Trade Tribunal hereby dismisses the complaint.

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 Zylog Systems (Ottawa) Ltd. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. 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 in its *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal retains jurisdiction to establish the final amount of the award.

Jason W. Downey

Jason W. Downey

Presiding Member

Dominique Laporte

Dominique Laporte

Secretary

## STATEMENT OF REASONS

### COMPLAINT

1. On May 18, 2010, Zylog Systems (Ottawa) Ltd. (Zylog Ottawa) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning a procurement (Solicitation No. EN578-055605/C) by the Department of Public Works and Government Services (PWGSC) on behalf of various government departments for the provision of task-based informatics professional services.

2. Zylog Ottawa alleged that PWGSC improperly refused to accept its purported legal entitlement to a proposal submitted by Brainhunter (Ottawa) Inc. (Brainhunter Ottawa), therefore unfairly rejecting the said proposal. Zylog Ottawa requested, as a remedy, that the Tribunal recommend that PWGSC evaluate Brainhunter Ottawa's proposal as Zylog Ottawa's proposal. In the alternative, Zylog Ottawa requested that the Tribunal recommend that PWGSC compensate it for its lost profit or its lost opportunity. Zylog Ottawa also requested the reimbursement of its reasonable costs incurred in preparing and proceeding with the complaint.

3. On May 26, 2010, 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 *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>2</sup> Also on May 26, 2010, pursuant to subsection 30.13(3) of the *CITT Act*, the Tribunal ordered PWGSC to postpone the award of any contract until the Tribunal determined the validity of the complaint.<sup>3</sup> On June 3, 2010, PWGSC requested, pursuant to subsection 30.13(4) of the *CITT Act*, that the Tribunal rescind the order of May 26, 2010, as it certified that the procurement was urgent and that a delay in awarding contracts would be contrary to the public interest. On June 7, 2010, the Tribunal issued an order rescinding the order of May 26, 2010.

4. As a preliminary matter, the Tribunal invited submissions from PWGSC and Zylog Ottawa on the issue of Zylog Ottawa's standing to file a complaint in relation to the solicitation in question, specifically on the matter of whether and how Zylog Ottawa met the definition of a "potential supplier" in relation to a designated contract as required by the *CITT Act*. The Tribunal asked for simultaneous submissions and replies on this matter in order to ensure fairness to both parties.

5. On June 4, 2010, both PWGSC and Zylog Ottawa filed their respective submissions on the issue of Zylog Ottawa's standing before the Tribunal. On June 11, 2010, they both filed their reply submissions.

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

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

3. In cases where a supply arrangement has been issued, the Tribunal's postponement of award of contract order postpones the awarding of any contract against that supply arrangement until the Tribunal determines the validity of the complaint.

6. On June 21, 2010, in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*,<sup>4</sup> PWGSC filed a Government Institution Report (GIR) with the Tribunal.<sup>5</sup> Although the Tribunal understands that PWGSC was only fulfilling its obligations under the *Rules* by filing the GIR, it is important to mention that the GIR was not put on the record due to preliminary deliberations and, therefore, was not considered in the determination of the present preliminary matter.

7. Given that there was sufficient information on the record to determine the preliminary matter, the Tribunal decided that an oral hearing was not required and disposed of the matter on the basis of the written information on the record.

## PROCUREMENT PROCESS

8. On February 1, 2008, Brainhunter Ottawa was identified by PWGSC as one of 235 qualified suppliers under an original standing offer and supply arrangement (Solicitation No. EN578-055605/B) to provide business advisory, project management and informatics services.

9. On July 24, 2009, PWGSC issued a Request for a Supply Arrangement (RFSA) for the yearly refresh of the standing offers and supply arrangements for the provision of task-based informatics professional services. Under this refresh, existing standing offer holders and supply arrangement holders were able to update their current rates and submit proposals against additional service categories.<sup>6</sup>

10. On October 30, 2009, Brainhunter Ottawa submitted a proposal in response to the RFSA. Bids closed that same day.

11. On December 2, 2009, Brainhunter Inc. and its subsidiaries, which included Brainhunter Ottawa, received an order from the Ontario Superior Court of Justice allowing for protection under the *Companies' Creditors Arrangement Act*.<sup>7</sup>

12. Following this order, a process was undertaken to sell all the assets of Brainhunter Inc. and its subsidiaries.

13. On January 18, 2010, Zylog Systems (Canada) Ltd. and Zylog Systems (India) Limited entered into an asset purchase agreement with Brainhunter Inc. and its subsidiaries.<sup>8</sup>

14. On February 1, 2010, the Ontario Superior Court of Justice issued a vesting order approving the sale and vesting title and interest in Brainhunter Inc.'s assets in Zylog Systems (Canada) Ltd. and Zylog Systems (India) Limited.<sup>9</sup>

15. This vesting order specifically addressed and ratified the January 18, 2010, asset purchase agreement. Zylog Ottawa does not appear to have been a party to this agreement.

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4. S.O.R./91-499 [*Rules*].

5. On June 24, 2010, the Tribunal informed the parties that the GIR would not be put on the official record until the Tribunal ruled on the preliminary matter respecting standing and that the Tribunal would advise the parties of any required action at that time.

6. On February 1, 2008, PWGSC issued a standing offer and supply arrangement to Brainhunter Ottawa. Confidential complaint, tab A.

7. R.S.C. 1985, c. C-36.

8. Confidential complaint, tab D. The Tribunal notes that the complaint was filed by Zylog Ottawa.

9. Confidential complaint, tab E.

16. On March 29, 2010, Zylog Ottawa requested that PWGSC confirm that the proposal originally submitted by Brainhunter Ottawa would be evaluated under Zylog Ottawa's name based on represented continuity of operations.<sup>10</sup>

17. On April 8, 2010, PWGSC advised Zylog Ottawa that it would not consider Zylog Ottawa to be Brainhunter Ottawa for the purposes of its proposal.<sup>11</sup>

18. On April 22, 2010, Zylog Ottawa filed a complaint with the Tribunal, which was not accepted for inquiry on the basis that there was no "... reasonable indication that the procurement was not conducted in accordance with the applicable trade agreements . . . ."<sup>12</sup>

19. On May 10, 2010, PWGSC advised Zylog Ottawa that it would receive no new information regarding the status of Brainhunter Ottawa's proposal and Zylog Ottawa's request for such a proposal to be treated as being from Zylog Ottawa. PWGSC specifically wrote that it had "... been considering this matter to be closed for some time."

20. On May 18, 2010, Zylog Ottawa filed the present complaint with the Tribunal in a timely manner, supported mainly by the new facts arising out of the May 10, 2010, e-mail from PWGSC.

### TRIBUNAL'S ANALYSIS

21. Pursuant to section 30.11 of the *CITT Act*, a "... potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract . . . ." Section 30.1 of the *CITT Act* defines a "potential supplier" as a "... bidder or prospective bidder on a designated contract."

#### Zylog Ottawa

22. PWGSC submitted that Zylog Ottawa did not submit a proposal in response to the RFSA and is therefore not a bidder. As the bidding period has closed, PWGSC submitted that Zylog Ottawa is not a prospective bidder. It submitted that Zylog Ottawa is not a potential supplier with standing to file the present complaint by applying literal interpretations of the relevant terms of the *CITT Act*.

23. PWGSC submitted that Zylog Ottawa has failed to distinguish between the separate legal entities that are Zylog Systems (Canada) Ltd., Zylog Systems (India) Limited and Zylog Ottawa.

24. PWGSC contended that Brainhunter Ottawa's assets were transferred to Zylog Systems (Canada) Ltd. and Zylog Systems (India) Limited and that there is no evidence in the complaint that any of Brainhunter Ottawa's assets, including its proposal for the yearly refresh and its right to complain, were transferred to Zylog Ottawa.

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10. Confidential complaint, tab F.

11. Confidential complaint, tab G at 4.

12. *Re Complaint Filed by Zylog Systems (Ottawa) Ltd.* (28 April 2010), PR-2010-002 (CITT). In that decision, the Tribunal stated the following at para. 17: "Given that PWGSC has not completed the evaluation of submitted proposals in relation to this procurement process, the Tribunal finds that, at this time, there can be no violation of the applicable trade agreements with respect to the evaluation of the proposal submitted by Brainhunter Ottawa, notwithstanding any considerations for or against purported legal entitlement put forward by Zylog."

25. In addition, PWGSC submitted that Zylog Ottawa was incorporated and came into existence after the bid closing date of October 30, 2009, and that, therefore, Zylog Ottawa could not have been a bidder or prospective bidder on the RFSA either directly or through the vesting order handed down by the Ontario Superior Court of Justice.

26. Zylog Ottawa submitted that both the asset purchase agreement and the vesting order provide support for the fact that Zylog Ottawa acquired not only the right to the proposal submitted through Brainhunter Ottawa but also the right, title and interest to prosecute any claims arising from the improper treatment of that proposal by PWGSC.

27. The Tribunal notes that Zylog Ottawa is not a party to the asset purchase agreement or the vesting order. In addition, Zylog Ottawa did not provide any evidence of its structural or legal composition, either in its submissions to the Tribunal or in any related correspondence with PWGSC that was filed in the course of these proceedings.

28. The Tribunal also notes that Zylog Ottawa appears to have come into existence only after (1) the bid closing date, (2) the date of the asset purchase agreement and (3) the date of the vesting order.<sup>13</sup>

29. Furthermore, there is no evidence on file as to how the purchase of Brainhunter Ottawa's assets by Zylog Systems (Canada) Ltd. and/or Zylog Systems (India) Limited, as more specifically described in the asset purchase agreement, could have led to the emergence and purported interests, if any, of Zylog Ottawa, which appears to be a completely separate entity, as to the subject RFSA.

30. Zylog Ottawa seems to make no distinction between itself and Zylog Systems (Canada) Ltd. and/or Zylog Systems (India) Limited, where it is clear in corporate law that a new entity has emerged. Without any evidence to support its claims, the arguments in support of the present complaint become very tenuous.

31. Zylog Ottawa is asking the Tribunal to take a leap of faith in *assuming* that an entity named "Zylog Systems (Ottawa) Ltd." is structurally and legally entitled to rights to which Zylog Systems (Canada) Ltd and/or Zylog Systems (India) Limited may have access through the vesting order, without supplying any information with regard to "Zylog Systems (Ottawa) Ltd." and how it has become so entitled. The lineage and entitlement of corporate structures cannot be presumed by simple assertions or through similar appellations.

32. The Tribunal is not ready to make such fundamental determinations in the absence of evidence.

### **PWGSC's Refusal Letter**

33. The Tribunal notes that, at the time at which this complaint was filed and accepted for inquiry, PWGSC had not completed the evaluation of the proposal submitted by Brainhunter Ottawa and Zylog Ottawa represented to the Tribunal that no such evaluation would be forthcoming.<sup>14</sup> This was an important element in weighing the merits of whether to accept the present complaint.

34. The Tribunal was first advised that Brainhunter Ottawa's proposal had in fact been evaluated when it received submissions made by PWGSC on June 4, 2010.

35. Zylog Ottawa's June 4, 2010, submissions made no mention of such an evaluation.

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13. Complaint, para. 16.

14. Complaint, para. 24 and e-mail from PWGSC to a representative from Brainhunter Ottawa dated May 10, 2010.

36. It was only by way of an attachment to its reply submissions dated June 11, 2010, that Zylog Ottawa filed a letter from PWGSC, dated May 19, 2010, advising it of the results of the evaluation of Brainhunter Ottawa's proposal.

37. Accordingly, the Tribunal notes that this evaluation was only communicated *after* the commencement of the present inquiry and was not immediately brought to the Tribunal's attention.

38. Even though the results of the evaluation have been submitted to the Tribunal *through* the present complaint, it is clear that these results cannot generate any rights or obligations herein, as the present complaint was initiated on the basis of the May 10, 2010, e-mail from PWGSC and its contents, as opposed to facts occurring after initiation.

39. The Tribunal further remarks that another attachment to Zylog Ottawa's submissions dated June 11, 2010, is a letter from Zylog Ottawa to PWGSC dated June 3, 2010, by which Zylog Ottawa objects to the results of the evaluation of Brainhunter Ottawa's proposal.<sup>15</sup>

40. The Tribunal is of the view that the basis of any complaint emerging from the May 19, 2010, refusal letter may potentially lie within Zylog Ottawa's letter of objection dated June 3, 2010, but that any such basis is, for now, outside the scope of the present complaint. Since Zylog Ottawa has yet to receive a reply to that objection, a complaint addressing the specific issues has yet to vest with the Tribunal.

41. The Tribunal also notes that the May 19, 2010, letter was not addressed to Zylog Ottawa.

42. In light of the foregoing, and on the basis of the information before it, the Tribunal finds that Zylog Ottawa has failed to demonstrate that it is a potential supplier within the meaning of the *CITT Act*.

43. Irrespective of that issue, since the proposal submitted by Brainhunter Ottawa has now been evaluated and that the said evaluation is now the subject of an objection that has yet to be addressed by PWGSC, the Tribunal determines, in accordance with paragraph 10(a) of the *Regulations*, after taking into consideration the *CITT Act*, the *Regulations* and the applicable trade agreements, that the present complaint has no valid basis.<sup>16</sup>

44. Therefore, pursuant to paragraph 10(a) of the *Regulations*, the complaint is dismissed.

## **COSTS**

45. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint.

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15. Confidential reply submissions dated June 11, 2010, tabs A and B.

16. The *Agreement on Internal Trade*, 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)>, the *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), the *Agreement on Government Procurement*, 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> and the *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, apply to the procurement. The *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), does not apply, as it came into effect on August 1, 2009, which was after the date of issuance of the RFSA.

46. In determining the amount of the cost award for this complaint case, the Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), which contemplates classification of the level of complexity of cases on the basis of three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings.

47. The Tribunal's preliminary indication is that this complaint case has a complexity level corresponding to the lowest level of complexity referred to in Annex A of the *Guideline* (Level 1).

48. The complexity of the procurement was moderate, as it involved multiple standing offer holders and bidders for various categories of personnel and technical requirements relating to informatics professional services.

49. Even though this matter required submissions on a preliminary issue and PWGSC filed a GIR, the Tribunal finds that the complexity of the matter was low, as it dealt with a very circumscribed preliminary issue on the basis of the evidence on file.

50. Finally, the complexity of the proceedings was low, as there were no motions or interveners and a public hearing was not required. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

#### **DETERMINATION OF THE TRIBUNAL**

51. Pursuant to paragraph 10(a) of the *Regulations*, the Tribunal hereby dismisses the complaint.

52. 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 Zylog Ottawa. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, and its preliminary indication of the amount of the cost award is \$1,000. 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 in its *Guideline*. The Tribunal retains jurisdiction to establish the final amount of the award.

Jason W. Downey  
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Presiding Member