

Red Hat v. BBL

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WHAT ARE WE TALKING ABOUT ?

- 18 OSS providers challenging in court the Swiss Federal Administration Procurement Office (BBL) decision to award to Microsoft an approx 30 millions Euros / 3 years renewal license, maintenance and 3rd level support contract for OS and application software running on standard desktops and notebooks used within the Swiss Government... without any bid.

WHAT ARE WE TALKING ABOUT ?

- Original bid for notebooks and PCs in 2008, with requirement that all hardware be compatible with «MS Vista and XP» and the notebooks be delivered «OEM Vista».
- «No bid» decision to renew original agreement with MS published in May 2009.

WHAT ARE WE TALKING ABOUT ?

- Injunctive relief denied in July 2009 by the Swiss Administrative Supreme Court;
- Legal challenge rejected by Swiss Administrative Supreme Court in July 2010 (4 judges to 1);
- Appeal now pending in front of Swiss Supreme Court.

Caveat :

- Not the final decision and not on the merits – Supreme Court ruling due sometime next year.
- Two rulings (2009 and 2010), mostly on procedural matters, focusing on provisional measures and legal standing, not so much on the OSS strategy.

KEY JUDICIAL ISSUES

- **Possible injunctive relief against a “no bid” decision?**
- **Legal standing to challenge a “no bid” decision by the Swiss Administration ?**

ANALYSIS

- “No bid” decision based on Art. 13.1.c of the applicable ordinance, ***“the procuring authority may grant a tender directly, without a public bidding process, if [...] one tenderer only can enter into consideration due to technical or artistic specificities of the market or due to motives grounded in intellectual property law, and no adequate alternative exists”***.
- Ruling on injunctive relief mostly based on the applicability of article 13.1.c of the Ordinance.
- Almost no analysis on the issue of legal standing in ruling on injunctive relief.

ANALYSIS (cont'd)

- Ruling of July 2010 focuses on **legal standing**.
- Simply being a competitor is not sufficient to challenge the no bid decision.
- Need to have been « **specifically affected** » by the no bid decision, and have a « **legitimate interest** » to the cancellation of the decision.
- «**Specifically affected**» implies that the challenger shall have the technical, commercial and financial capacity to win the bid and provide the tendered services.

ANALYSIS (cont'd)

- Here, legal standing denied = absence of «functional equivalence» offered by OSS providers.
- Tendering authority free to determine appropriate services and scope of the tender. **Technical limitations are possible.**
- Here, tender for renewal/extension of existing systems and software, not migration project to new software architecture/platform.
- Updates/releases not equivalent to installation of new software.

ANALYSIS (cont'd)

- Challengers are not in **a technical, commercial nor financial position** to offer services in the MS environment.
- Purpose to modify the software strategy of the Administration = necessary change of scope of tender.
- OSS solutions do not fit in the current environment, but represent a true alternative to MS products.
- What if the OSS providers had demonstrated that their products could fit in the current environment ?

WHAT NEXT?

- Careful not to infer too much from this very specific case (appeal pending).
- Administration still refers to 2005 strategy...
- No provider can take the risk of having no OSS « offer » when dealing with the administration.

Thank you for your attention

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