CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, May 23, 2001

**File No.: PR-2000-060**

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

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

## DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends, as a remedy, that Foundry Networks be compensated one seventh of the profit that it would have made if it had submitted a proposal for a price one dollar lower than that of MTT (Halifax).

Pursuant to subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Foundry Networks its reasonable costs incurred in filing and proceeding with the complaint.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

333 Laurier Avenue West
Ottawa, Ontario K1A 0G7
(613) 990-2452 Fax (613) 990-2439

333, avenue Laurier ouest
Ottawa (Ontario) K1A 0G7
(613) 990-2452 Téléc. (613) 990-2439

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| Date of Determination and Reasons: | May 23, 2001 |
| Tribunal Member: | Richard Lafontaine, Presiding Member |
| Investigation Manager: | Randolph W. Heggart |
| Investigation Officer: | Paule Couët |
| Counsel for the Tribunal: | Dominique Laporte |
| Complainant: | Foundry Networks |
| Government Institution: | Department of Public Works and Government Services |
| Counsel for the Government Institution: | David M. Attwater |

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# STATEMENT OF REASONS

## COMPLAINT

On February 8, 2001, Foundry Networks (Foundry) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] concerning Solicitation No. W0102-00E005/A, by the Department of Public Works and Government Services (the Department), for the provision, on a no-substitute basis, of Cisco Layer 3 internetworking equipment for Canadian Forces Base (CFB) 14 Wing Greenwood, Nova Scotia, Department of National Defence (DND).

Foundry alleged that, contrary to Article 1016(2)(b) of the *North American Free Trade Agreement*[2] and Article 506(12)(b) of the *Agreement on Internal Trade*,[3] the Department improperly insisted on Cisco products, even though acceptable substitutes exist.

Foundry requested, as a remedy, that the contract awarded to MTT (Halifax) (MTT) be cancelled and that the solicitation be reissued on a competitive basis. In the alternative, Foundry requested compensation in the amount of the contract award.

On February 12, 2001, 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*.[4] On March 23, 2001, the Department filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.[5] On April 5, 2001, Foundry filed comments on the GIR with the Tribunal. On April 17, 2001, the Department filed comments in response to Foundry's comments.

Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the information on the record.

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
3. 18 July, 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.intrasec.mb.ca/eng/it.htm> [hereinafter AIT].
4. S.O.R./93-602 [hereinafter Regulations].
5. S.O.R./91-499.

333 Laurier Avenue West
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## PROCUREMENT PROCESS

On December 22, 2000, a Notice of Proposed Procurement (NPP) and a Request for Proposal (RFP) for this procurement were issued by the Department. These documents were posted on Canada's Electronic Tendering Service (MERX) on December 28, 2000. The NPP identifies the subject goods as falling into Federal Supply Classification (FSC) Code 5805 and indicates that the procurement is covered under the AIT. On January 12, 2001, Foundry objected, in writing, to this solicitation and requested that the Department keep its objection confidential and not show it to anyone outside the Department without discussing it first with Foundry.

The period for the submission of proposals closed on January 15, 2001. According to the GIR, six compliant bids were received. On January 16, 2001, the Department obtained Foundry's consent to forward its objection of January 12, 2001, to DND for consideration. That same day, DND answered the Department's query as follows:

> I have discussed the Foundry Networks challenge with DDCEI . . . and they have not done any testing with Foundry Networks equipment therefore; they do not want to make any comment on Foundry Networks equipment working within the Greenwood network other than to say in their experience there are always compatibility issues within multiple manufacturers.
>
> The staff at Greenwood feel the attached sole source justification is accurate and defendable. We have tested other manufacturers equipment within our Ciscoworks 2000 managed network and we always spent resources trying to re-configure the device to be compatible within our network and yet the device remains unmanageable.
>
> Additionally, the Wing at Greenwood has spent in excess of $100K training our staff on a Cisco platform. We do not have the staff or finances to develop the expertise required to support multiple manufacturers.

On January 26, 2001, the Department received a second response from DND with respect to Foundry's objection providing further rationale for limiting the tender to Cisco products. On January 29, 2001, the Department advised Foundry, by facsimile, that its objection had been denied. That same day, a contract in the amount of $145,850.70 was issued to MTT, the lowest compliant bidder.

On February 8, 2001, Foundry filed this complaint with the Tribunal.

## POSITION OF PARTIES

### Department's Position

The Department submitted that, with respect to the Federal Government, Article 504(2) of the AIT is limited to prohibiting discrimination based on province or region. It submitted that this article does not prohibit measures that are provincially or regionally neutral. Furthermore, the Department submitted that Article 504(3) merely illustrates measures that are inconsistent with Article 504(2). As such, measures in Article 504(3) are inconsistent with Article 504(2) only if they breach the requirement for provincial and regional neutrality.

The Department submitted that this interpretation of Article 504 of the AIT is supported by the decision of the Federal Court of Appeal (the Court) in *E.H. Industries* v. *Canada (Minister of Public Works)*,[6] wherein the Court stated:

> This appeal was argued on the basis that the alleged discrimination fell within the parameters of the AIT, and more particularly article 504, even though the alleged ground of discrimination had no interprovincial or inter-regional component.[7]

The Department submitted that Article 504(3)(b) of the AIT prohibits the biasing of technical specifications only to the extent that such bias discriminates on a provincial or regional basis. It submitted that limiting the procurement to Cisco products does not discriminate between goods and their suppliers on the basis of province or region. The Department added that the procurement of Cisco products through open tendering procedures is neutral in this regard and, therefore, does not breach Article 504.

In the alternative, the Department submitted that "the biasing of technical specifications in favour of, or against, particular goods" is prohibited by Article 504(3)(b) of the AIT only if such specifications are biased "for the purpose of avoiding the obligations of [Chapter Five of the AIT]".

The Department submitted that the rationale for limiting the procurement to Cisco products in this instance was expressed by DND in correspondence of October 2000 and included the following reasons:

- DND has an existing homogenous installation of Cisco 5500 Routers;
- Current installation of Cisco equipment is valued at approximately $685,000.00;
- Network support and management is built around the Ciscoworks Management System (Ciscoworks 2000);
- DND has limited personnel available to manage the [system];
- implementation of equipment not completely compatible with the existing infrastructure would require additional resources to manage the network, additional resources for training, and introduce the danger of network conflicts due to conflicting network management methodologies; and
- managers would require additional personnel and/or training to manage [the system, which] is unacceptable to DND.

Therefore, the Department argued, the RFP was limited to Cisco products for valid operational reasons and not for the purpose of avoiding the obligations of Chapter Five of the AIT. In fact, the Department submitted that Foundry had not made any allegation or provided any evidence to that effect.

Furthermore, the Department submitted that Article 501 of the AIT does not create rights and obligations independent of Article 504(3)(b). As a "purpose" clause, Article 501 expresses the policy and objects of Chapter Five of the AIT. The other provisions of Chapter Five, including Article 504(3)(b), contain the specific means by which the policy and objects of Chapter Five are attained.

Finally, the Department submitted that Foundry has provided no evidence of interoperability of its products with Cisco products to support its challenge and its complaint.

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6. (7 March 2000), File No. A-696-00 [hereinafter *E.H. Industries*].
7. *Ibid.* at par. 17.

In its comments of April 17, 2001, the Department submitted that Foundry had not identified the switches that it allegedly would have tendered in response to the RFP nor had it provided evidence that its products were compatible with the subject network.

The Department submitted that the evidence adduced by Foundry shows that Foundry's BigIron 4000 switch may interoperate with the Cisco Catalyst 6500 series switch. However, the Department argued, there is no evidence that the BigIron 4000 can interoperate with the Cisco Catalyst 5500 or the 2900 and 3500 series switches comprising the subject network. The Department added that there is no evidence that Foundry could have competitively offered the BigIron 4000 switch.

The Department further submitted that the fact that a Foundry BigIron 4000 may communicate with an unused Cisco switch in no way addresses DND's concerns that using non-Cisco switches will require "additional resources to manage the network, additional resources for training" and "introduce the danger of network conflicts due to conflicting network management methodologies". The Department rejected Foundry's allegation that other "RFPs that have specified CiscoWorks management have had this requirement removed" by the Department. The Department, noting that the examples submitted by Foundry do not support its case, argued that Foundry's submission indicates that DND would require "Iron View"[8] to manage and configure Foundry network devices to the necessary degree. The Department submitted that this is exactly what DND wanted to avoid, due to its limited resources.

**Foundry's Position**

Contrary to DND's assertion to the effect that its current installation is homogeneous, Foundry submitted that even networks with Cisco products only are, in reality, heterogeneous. Foundry submitted that there currently exist in the U.S. military many occurrences of well functioning "Best of Breed Solutions" that are, by definition, heterogeneous installations.

Foundry recognized that there exist very minor differences between the installed Cisco Command Line Interface and the Cisco-like interface that it would propose. However, Foundry submitted, these differences could be learned in minutes by a knowledgeable engineer. As well, Foundry argued that, although some default values differ slightly from a Cisco switch to a Foundry switch, such values even differ between different Cisco switches and, therefore, this concern is not valid. Foundry added that DND's assertions about the automatic reboot features of Foundry's equipment are outdated and completely untrue. As well, it submitted that Foundry does provide training in Canada in both official languages, contrary to the assertion made in the GIR.

Foundry submitted that for DND to insist on CiscoWorks for SNMP[9] management is restrictive and discriminatory, as alternatives exist. In fact, the Department has allowed for alternative products in other instances.

Foundry submitted that the Department has made a number of erroneous assumptions about its product, the training required and the product's maintainability. Foundry submitted that it has proven that its products interoperate with Cisco products in countless corporate and government environments, including military bases. Foundry submitted that it has offered to prove the interoperability between Cisco and Foundry products to CFB Greenwood in the form of a benchmark test, but that this offer was turned down.

8. Foundry's network management tool.
9. Simple Network Management Protocol.

## TRIBUNAL'S DECISION

Subsection 30.14(1) of the CITT Act requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Furthermore, at the conclusion of an inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the Regulations further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the requirements of the applicable trade agreements.

The Tribunal first determines that the goods in issue are properly classified in FSC Code 5805. The Tribunal notes that the goods in FSC Code 5805 are excluded from the application of NAFTA by virtue of Annex 1001.2b(1)(c). Therefore, under NAFTA, this procurement does not fall within the Tribunal's jurisdiction. However, the AIT applies to this procurement and the Tribunal will address the merits of the complaint in this context.

The Department submitted that Article 504(2)[10] of the AIT prohibits discrimination on the basis of province or region. In this context, the Department argued that the measures set out in Articles 504(3)(a) to (g) constitute examples of such discrimination. The Department also submitted that Article 501 (Purpose) does not create rights and obligations independent of those in Article 504. Furthermore and more specifically with respect to Article 504(3)(b),[11] the Department argued that this particular form of discriminatory measure must not only be based on province or region, but must also be introduced "for the purpose of avoiding the obligations" of Chapter Five of the AIT.

In this instance, the Department argued that specifying Cisco products does not discriminate on the basis of province or region. In the alternative, the Department submitted the DND's purpose in specifying such products was to best meet its operational requirements, while minimizing overall costs, training and human resources requirements, and risks to operations. Avoiding the obligations of Chapter Five of the AIT was not a consideration.

The Tribunal finds that, in specifying Cisco products on a no-substitute basis, the Department breached the provisions of Articles 504(2), 504(3)(b) and (g) of the AIT. In this regard, the Tribunal fully adopts the position that it took in File No: PR-2000-024:

> Article 504(2) of the AIT must be read in the context of Chapter Five of the AIT. Article 501 provides, in part, that, consistent with the principles set out in Article 101(3),[12] the purpose of

10. "2. With respect to the Federal Government, paragraph 1 means that, subject to Article 404 (Legitimate Objectives), it shall not discriminate:
    a. between the goods or services of a particular Province or region, including those goods and services included in construction contracts, and those of any other Province or region; or
    b. between the suppliers of such goods or services of a particular Province or region and those of any other Province or region."
11. "3. Except as otherwise provided in this Chapter, measures that are inconsistent with paragraphs 1 and 2 include, but are not limited to, the following:
    (b) the biasing of technical specifications in favour of, or against, particular goods or services, including those goods or services included in construction contracts, or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter".
12. Article 101(3) provides, in part, that in the application of the AIT, the parties shall be guided by certain principles, notably that they will not establish new barriers to internal trade and will facilitate the cross-boundary movement of persons, goods, services and investments within Canada and that they will treat persons, goods, services and investments equally, irrespective of where they originate in Canada.

> Chapter Five is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a strong economy in a context of transparency and efficiency. Article 500 indicates that Article 403 applies to Chapter Five. Article 403 provides, in turn, that each party shall ensure that any measure that it adopts or maintains does not operate to create an obstacle to internal trade.
>
> These provisions must be read together. They must also be read in a way that promotes the attainment of the objectives and purposes of the AIT and Chapter Five. Such an interpretation conforms to the principles of interpretation of domestic legislation[13] as well as to the principles of interpretation of international treaties.[14] The thrust of these provisions clearly favours an interpretation of Article 504(2) of the AIT under which measures that discriminate between goods, services or suppliers are prohibited, whether these measures are provincially or regionally neutral or not. Indeed, discrimination, even if not based on location criteria and provincially and regionally neutral, may prevent equal access from all Canadian suppliers.
>
> This interpretation of Article 504(2) of the AIT is supported by Article 504(3), which provides an illustrative list of measures that are inconsistent with Article 504(2). The examples comprised in that list clearly demonstrate that it is the measures that have discriminatory effect that are prohibited by Article 504(2). One such example is found in Article 504(3)(g), which prohibits the unjustifiable exclusion of a supplier from tendering. In the Tribunal's view, the scope of Article 504(3)(g), a broad provision, cannot be limited to exclusions based on the location of a supplier. This is demonstrated by the existence of Article 504(3)(a) that already covers such exclusions based on the location of a supplier.[15] Given the existence of Article 504(3)(a), to be meaningful, Article 504(3)(g) must cover situations where discrimination is not based on location.
>
> The broad purview of the prohibition against discrimination is also highlighted by the existence of Article 504(3)(b) of the AIT. That article prohibits the biasing of technical specifications in favour of, or against, particular goods or services, or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of Chapter Five. To limit this prohibition against technical bias to cases where such discrimination results in discrimination along provincial or regional lines would be unsupportable. This would mean that a government institution could use blatantly restrictive technical specifications in order to favour one specific supplier over all the others. Such a behaviour, if it were permissible, would render meaningless the other provisions of Chapter Five aiming at transparent and effective procurements.[16]

Furthermore, the Tribunal is of the view that, in *E.H. Industries*, the Court did not rule on the meaning of Article 504 of the AIT.

Dealing with the Department's argument that it specified Cisco products for valid operational reasons, the Tribunal first notes that, under the trade agreements, including the AIT, competition is the

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13. *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12.
14. Article 31 of the *Vienna Convention on the Law of Treaties* provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. See *Re Complaint Filed by Brookfield LePage Johnson Controls Facility Management Services* (6 September 2000), PR-2000-008 and PR-2000-021 (CITT) at 17.
15. Article 504(3)(a) of the AIT prohibits, as inconsistent with Article 504(2), the imposition of conditions on the invitation to tender, registration requirements or qualification procedures that are based on the location of a supplier's place of business or the place where the goods are produced or the services are provided or other like criteria.
16. *Re Complaint Filed by AT&T Canada* (27 November 2000), at 5-6.

norm.[17] In this context and according to well-established rules of interpretation, any limitation, exemption and/or exception must be construed narrowly and the burden of proof for justifying the limitation rests with those invoking the limitation. In this instance, the Department and DND are the entities limiting competition to the suppliers of Cisco products. In the Tribunal's opinion, the Department and DND have the onus to establish the basis for this limitation.

Having carefully reviewed all the evidence on the record, the Tribunal is not satisfied that the Department and DND have established that DND's operational requirements justify limiting competition to Cisco products. The GIR sets out various reasons for DND's limiting competition to Cisco products, e.g. overall costs, risk to operations, training and human resources requirements, system management considerations; however, in the Tribunal's opinion, none of these reasons taken individually or together establish conclusively that the products proposed by Foundry could not meet DND's operational requirements or be successful in an open competition. The Tribunal notes that, in drafting the RFP and in evaluating proposals, DND could have taken into account the advantages of certain products as compared to other products. It may be, as DND suggests, that Foundry would have difficulty competing successfully with the suppliers of Cisco products in this particular instance. However, deciding such questions is precisely the purpose of fair and open competition and, under the trade agreements, the Department is not at liberty to prejudge those questions by not conducting open competition.

In the Tribunal's opinion, the Department and DND have not successfully discharged their burden of proof in this instance. Therefore, the Tribunal finds that they limited competition to Cisco products without a proper basis to do so and, as a consequence, contrary to the provisions of Article 504 of the AIT, discriminated against non-Cisco products and their suppliers.

With respect to the Department's alternative argument that, under the provision of Article 504(3)(b) of the AIT, the biasing of technical specifications alone does not amount to a breach and that it must also be established that such bias is introduced "for the purpose of avoiding the obligations" of Chapter Five of the AIT, the Tribunal finds that, in this instance, the Department and DND biased the specifications for the purpose of avoiding competition with suppliers other than those offering Cisco products. More specifically, in the Tribunal's view, because the Department and DND did not allow for equivalent products and refused Foundry's offer to run a benchmark test, the Department failed to persuade the Tribunal that the procurement was limited to Cisco products for purposes other than avoiding the obligations of Chapter Five. In *Re Complaint Filed by Array Systems Computing*[18] and in *Re Complaint Filed by Cabletron Systems of Canada*,[19] the Tribunal concluded that there was no breach of Article 504(3)(b) of the AIT, as it found that "[t]he procedure followed in establishing the SOW contained some verifications to ensure that the requirement was not formulated in such a manner as to deliberately exclude certain suppliers"[20] and that "the Department has made every reasonable effort to keep these [performance] criteria broad so as to include as many vendors as possible without compromising its requirements."[21] This is clearly not the approach followed by the Department and DND in the present matter. In addition, the restrictive

17. In *Re Complaint Filed by Novell Canada* (17 June 1999), PR-98-047 (CITT), at 12, the Tribunal stated: "the Tribunal is of the view, as was stated in numerous previous decisions of the Tribunal and its predecessor, the Procurement Review Board of Canada, that, under the trade agreements, competition is the norm. Limited tendering procedures are exceptions, to be narrowly construed by the Tribunal, which entities have the onus to establish on the basis of whichever circumstances and conditions, set out in the trade agreements to use limited tendering procedures, apply."
18. (25 March 1996), PR-95-024 (CITT).
19. (8 March 1996), PR-95-018 (CITT).
20. *Supra* note 18 at 7.
21. *Supra* note 19 at 8.

specifications also amounted to Foundry's unjustifiable exclusion from the tendering process, which is contrary to Article 504(3)(g).

The Tribunal also finds that, by requesting Cisco products on a no-substitute basis, the Department qualified these products without conforming to the procedural requirements set out under Article 506(7) of the AIT.

With respect to Foundry's allegation that the actions of the Department and DND in conducting this solicitation breached the provisions of Article 506(12)(b) of the AIT, the Tribunal determines that this allegation has no merit. These provisions concern circumstances where only one supplier is able to meet the requirements of a procurement. However, in this instance, the Department did not invoke these provisions, as the solicitation was open to competition among all suppliers offering Cisco products.

In determining the most appropriate remedy, the Tribunal has, to the greatest extent possible, attempted to put Foundry into the position that it was before this solicitation was started. It is clear to the Tribunal that Foundry was unjustifiably denied an opportunity to compete for this requirement, to be successful, to be awarded the contract and to profit therefrom. While it is difficult to assess how many compliant proposals would have been received if proper tendering procedures had been conducted for this procurement, the Tribunal knows from the record that the Department received six compliant bids in response to this solicitation. On this basis, the Tribunal establishes Foundry's lost opportunity at 1 in 7 and will recommend that Foundry be compensated for lost profits on this basis.

**DETERMINATION OF THE TRIBUNAL**

In light of the foregoing, the Tribunal determines that the procurement was not conducted in accordance with the provisions of the AIT and that the complaint is therefore valid.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends, as a remedy, that Foundry be compensated one seventh of the profit that it would have made if it had submitted a proposal for a price one dollar lower than that of MTT (Halifax).

Pursuant to subsection 30.16(1) of the CITT Act, the Tribunal awards Foundry its reasonable costs incurred in filing and proceeding with the complaint.

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