

Ottawa, Thursday, August 30, 2001

File No. PR-2001-008

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 the complaint is not valid.

Ellen Fry
Ellen Fry
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will follow at a later date.

Date of Determination:	August 30, 2001
Date of Reasons:	October 2, 2001
Tribunal Member:	Ellen Fry, Presiding Member
Investigation Manager:	Randolph W. Heggart
Investigation Officer:	Paule Couët
Counsel for the Tribunal:	John Dodsworth
Complainant:	Foundry Networks
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	David M. Attwater

Ottawa, Tuesday, October 2, 2001

File No. PR-2001-008

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*.

STATEMENT OF REASONS

COMPLAINT

On April 17, 2001, Foundry Networks (Foundry) of Nepean, Ontario, 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 the procurement (Solicitation No. 51019-003040/B) by the Department of Public Works and Government Services (PWGSC), on a limited tendering basis, of networking equipment for the Department of Veterans Affairs (VAC).

Foundry alleged that PWGSC violated the applicable trade agreements by using a limited tendering procedure to procure 30 items of networking equipment directly from Cisco Systems Canada Co. (Cisco). Foundry claimed that it was denied the opportunity to compete for and win this solicitation. Foundry requested, as a remedy, that the contract awarded to Cisco be cancelled and that the solicitation be retendered as an open Request for Proposal. In the alternative, if the contract to Cisco was not to be cancelled, Foundry requested compensation in the amount of the contract awarded to Cisco.

On April 24, 2001, the Tribunal informed the parties that the complaint had been accepted for inquiry pursuant to subsection 30.11(1) of the CITT Act and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² On May 28, 2001, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ On June 6, 2001, Foundry filed a request to extend the deadline for submitting comments. The Tribunal extended the deadline to June 18, 2001. On June 18, 2001, Foundry again asked for a time extension to allow settlement talks to be held with PWGSC. The deadline was extended to June 22, 2001. On July 9, 2001, Foundry filed comments with respect to the GIR.

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.

PROCUREMENT PROCESS

On February 16, 2001, a Notice of Proposed Procurement (NPP) for 30 items of Cisco networking equipment was published by PWGSC on MERX.⁴ PWGSC cancelled the NPP after Cisco advised PWGSC that it quotes directly to the federal government rather than have proposals submitted by resellers. PWGSC

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. S.O.R./93-602 [hereinafter Regulations].
3. S.O.R./91-499.
4. Canada's Electronic Tendering Service.

then published an Advance Contract Award Notice (ACAN) on February 27, 2001, indicating that the items would be procured directly from Cisco without competition. Foundry challenged the ACAN on February 27, 2001.

On March 13, 2001, PWGSC sent Foundry a detailed description of the items being procured and of the existing VAC network. It also requested that Foundry indicate, by March 16, 2001, whether its product could meet all the requirements. The date for response was extended at Foundry's request to March 21, 2001, at which time Foundry submitted that it could provide 21 of the 30 items but, with regard to the remaining 9 items, added: "the balance of the items relate to routers and other Cisco products that we do not compete with." On March 23, 2001, the contract was awarded to Cisco, and a facsimile sent to Foundry on March 27, 2001, advised that its challenge to the ACAN was not accepted. On March 29, 2001, Foundry sent an objection to PWGSC concerning the awarding of the contract to Cisco. Shortly thereafter, Foundry concluded that its requested relief would not be forthcoming.

On April 17, 2001, Foundry filed this complaint with the Tribunal.

POSITION OF PARTIES

PWGSC's Position

PWGSC submitted that Foundry's complaint was filed late. PWGSC's position is that Foundry became aware of the grounds of its complaint on March 29, 2001, but did not file its complaint with the Tribunal until April 17, 2001.

In addition, PWGSC submitted that Foundry could not satisfy VAC's requirements in this procurement. PWGSC took the position that it was entitled to procure the 30 necessary items in a single procurement and that Foundry acknowledged, on March 21, 2001, that it could not supply 9 of the items. Furthermore, PWGSC indicated that Foundry did not specify any particular equipment that could meet the enhanced performance and functionality requirements of VAC. PWGSC also submitted that it was justified in using limited tendering in order to ensure compatibility with existing VAC equipment and because, for technical reasons, there was an absence of competition to supply the necessary items.

The GIR contained a detailed response by VAC to Foundry's challenge to the ACAN, providing its point-by-point technical justification for rejecting Foundry's position.

Foundry's Position

Foundry submitted that there was no justification for requiring a specific manufacturer's product in this procurement. Foundry took the position that it and/or its resellers "could have proposed a solution that included a combination of products that would have provided an integrated 'Best of Breed' solution to Veteran's Affairs" and, hence, should be allowed to provide a competitive proposal. Foundry stated that a simple "benchmark" test would have allowed Foundry and/or its resellers to prove their capabilities.

Foundry did not respond to the extensive technical justification provided by VAC in the GIR.

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 considered whether the complaint was submitted in a timely fashion. Foundry learned of its grounds of complaint on March 29, 2001, when it received the letter from PWGSC rejecting its challenge to the ACAN. On that same day, Foundry sent an objection to PWGSC asking for the situation to be rectified. On or about April 2, 2001, Foundry decided it was not going to receive its desired relief in relation to its objection and decided to file a complaint with the Tribunal. The Tribunal considered the complaint to be filed on April 17, 2001. Based on the foregoing, the Tribunal determined that both the objection to PWGSC and the subsequent complaint to the Tribunal were filed within the time frame prescribed by subsection 6(2) of the Regulations.

The Tribunal then considered whether the complaint had merit.

Article 1001(4) of the *North American Free Trade Agreement*⁵ provides that no party may prepare, design or otherwise structure any procurement contract in order to avoid the obligations of Chapter Ten of NAFTA. There is no evidence that VAC or PWGSC specified the 30 items in the procurement with the intention of preventing potential suppliers other than Cisco from bidding on the requirement. VAC was under no obligation to compromise its legitimate operational requirements to accommodate Foundry's particular corporate circumstances, and the Tribunal accepts VAC's evidence that it was necessary to specify its requirements in this procurement as it did.

By its own admission, Foundry could not supply 9 of the 30 items required by the solicitation. Furthermore, the GIR provided a detailed technical justification for rejecting Foundry's contention that it could fulfil the requirements of the procurement. Foundry did not respond to this technical justification. Consequently, the Tribunal is satisfied that Foundry was incapable of supplying the procurement requirement as specified.

In light of the foregoing, the Tribunal finds that Foundry's complaint is not valid. In the circumstances, it is not necessary for the Tribunal to consider the more general question of whether PWGSC acted properly in using limited tendering procedures to conduct this procurement.

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the CITT Act, the Tribunal determines that the complaint is not valid.

Ellen Fry
Ellen Fry
Presiding Member

5. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].