



Ottawa, Friday, May 10, 2002

File No. PR-2001-062

IN THE MATTER OF a complaint filed by Foundry Networks Inc. under 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 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 that the Department of Public Works and Government Services re-evaluate the four lowest-priced proposals in accordance with the evaluation criteria and methodology set out in the Request for Proposal and this determination. If Foundry Networks Inc.'s proposal is determined to be the successful one, the Canadian International Trade Tribunal further recommends that it be compensated for lost profits. The price bid by Foundry Networks Inc. will be the basis for determining lost profits.

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

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

Date of Determination and Reasons: May 10, 2002

Tribunal Member: Patricia M. Close, Presiding Member

Investigation Officer: Peter Rakowski

Counsel for the Tribunal: Marie-France Dagenais

Complainant: Foundry Networks Inc.

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: David M. Attwater



Ottawa, Friday, May 10, 2002

File No. PR-2001-062

IN THE MATTER OF a complaint filed by Foundry Networks Inc. under 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 under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

STATEMENT OF REASONS

COMPLAINT

On February 13, 2002, Foundry Networks Inc. (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 The complaint concerns a procurement (Solicitation No. V4658-000198/A) by the Department of Public Works and Government Services (PWGSC) for the supply of networking/telecommunications equipment for the Department of Human Resources Development (HRDC) offices at Canada Place, Edmonton, Alberta.

Foundry alleged that PWGSC and HRDC have breached the provisions of the *North American Free Trade Agreement*,² the *Agreement on Internal Trade*³ and the *Agreement on Government Procurement*⁴ by awarding a contract for this requirement to a supplier, Ram Computer Group Inc. (Ram), that proposed products from Cisco Systems Inc. (Cisco) that were non-compliant with the mandatory requirements of the Request for Proposal (RFP). Specifically, it alleged that the Cisco products offered by Ram did not meet the wire speed capability and backplane scalability requirements of the RFP and were not 10 Gigabit Ethernet ready.

Foundry requested, as a remedy, that the Tribunal recommend that the contract awarded to Ram be cancelled and that, instead, the contract be awarded to Foundry, the lowest responsive bidder in this instance. In the alternative, if it is not possible to issue a new contract for this requirement, Foundry requested compensation for the lost opportunity and the possibility to profit therefrom. It requested its reasonable costs incurred in preparing and proceeding with the complaint.

On February 22, 2002, 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*.⁵ On February 27, 2002, PWGSC informed the Tribunal, in writing, that a contract in the amount of \$83,264.19 had been awarded to Ram. On March 19, 2002, PWGSC filed a Government Institution Report (GIR) with

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. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [hereinafter AGP].
5. S.O.R./93-602 [hereinafter Regulations].

the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁶ On April 3, 2002, Foundry filed comments on the GIR with the Tribunal.

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 January 9, 2001, PWGSC issued the RFP for this solicitation. The RFP included the following provisions relevant to this case:

EVALUATION:

Bids will be evaluated on meeting the minimum specifications.

CONTRACTOR SELECTION:

Contract will be awarded to the proposer with the lowest qualified bid.

APPENDIX "A"

SPECIFICATIONS

MINIMUM REQUIREMENT: Each Chassis shall have:

- 10/100 Mbps should be wire speed, auto-sensing and auto-negotiating ports . . .
- Capable of Wire-speed Layer 2-4 services
 - Also supply costs of upgrades to Layers 3 and 4
- Product family should be 10 [Gigabit Ethernet] ready. Explain future investments in the "Jumbo Frames"
- "Chassis One" must provide a backplane that is scalable from 40 Gigabit to over 400 Gigabit.

The period for the submission of bids ended on February 26, 2001. Seven bids were received by PWGSC. The three lowest financial proposals were received from bidders offering Cisco products. Foundry provided the fourth lowest financial proposal. The contract was awarded to Ram, the lowest qualified bidder, on March 6, 2001.

POSITION OF PARTIES

PWGSC's Position

PWGSC submitted that the Cisco products proposed by Ram (i.e. the Catalyst 4000 family of chassis) met the minimum specifications listed in Appendix "A" to the RFP. Specifically, it submitted that it was mandatory that the proposed chassis provide switching at Layer 2. While the chassis had to be capable of switching at Layers 3 and 4, there was no requirement to provide switching at these layers. It submitted that switching at Layers 3 and 4 were options under the RFP. It argued that this explains why the RFP sought the "costs of upgrades to Layers 3 and 4". It further submitted that Foundry acknowledged that fact

6. S.O.R./91-499.

in its complaint.⁷ It further submitted that making Layers 3 and 4 optional under the RFP was designed to seek assurance that the proposed chassis had future enhancement capabilities.

PWGSC further submitted that the RFP, including the specifications, did not define wire speed as a number of packets per second. Nor did it ask for “non-blocking” wire speeds or specified wire speeds in relation to software or hardware. It argued that, while Foundry may qualify the wire speeds of its chassis based on their non-blocking architecture, these speeds are not necessarily relevant to other types of equipment built on a different architecture, such as Cisco’s software architecture. It submitted that wire speed does not necessarily refer to a capacity, in packets per second, over a connection. Rather, wire speed may describe any hardware box or function that supports data transfer across a network without slowing down the transfer of data. It argued that, while the industry is divided over the definition of wire speed, it adopted a definition that provided for maximum competition. It submitted that HRDC was satisfied that the proposed Cisco switches provided Layer 2 switching at wire speeds based on product literature included with Ram’s proposal.⁸

With respect to the “10 Gigabit Ethernet ready” issue, PWGSC submitted that the RFP only required that the proposed equipment be upgradable to that level. This explains why the RFP asked bidders to “explain future investments”. Furthermore, it submitted that Foundry acknowledged its interpretation of the term “ready” in its complaint⁹ as “upgradability”. It admitted that, at bid closing, HRDC’s networks were not working at 10 Gigabit Ethernet speed. It added that, although the Institute of Electrical and Electronics Engineers (IEEE) has proposed a 10 Gigabit Ethernet standard (IEEE 802.3ae), this standard will likely not be completed before June 2002. It further submitted that, although Foundry indicated in its proposal that “the FastIron-II product family is 10-Gigabit ready”, product literature included with Foundry’s proposal shows that the FastIron II did not comply with the IEEE 802.3ae standard. For its part, Ram’s proposal clearly indicated,¹⁰ at bid closing, that the proposed Cisco products were upgradable to 10 Gigabit Ethernet speeds.

With respect to the 40/400 Gigabit scalability issue, PWGSC submitted that the RFP did not require bidders to propose a chassis that presently delivered over 400 Gigabits of throughput capacity. Rather, it submitted, the RFP required a chassis with a backplane that could be configured to provide that capacity. In this context, it submitted that the Cisco 4006 chassis would accommodate five modules or “blades” that provide throughput capacity, as well as accommodate dual Gigabit Ethernet Uplink ports. These features, it submitted,¹¹ are more than sufficient to scale the backplane to over 400 Gigabits of throughput capacity.

PWGSC requested its complaint costs. In addition, it indicated that, if the Tribunal upheld the complaint, it had to re-evaluate all proposals received in response to the RFP. It finally reserved the right to make further submissions with respect to any award of costs or compensation in the matter.

Foundry’s Position

In its comments on the GIR, Foundry reiterated its three grounds of non-compliance. It submitted that, even though, initially, the Layer 3 and 4 capabilities did not have to be provided, the capability for wire speed Layers 2 through 4 was mandatory. It submitted that the proposed Cisco Catalyst 4000 switches are

7. Foundry’s complaint, summary, point 1.

8. GIR, para. 18.

9. *Ibid.* para. 23.

10. *Ibid.* para. 28.

11. *Ibid.* para. 36.

non-compliant at all three levels. Furthermore, it argued that the definition of “wire speed” that it advanced in its complaint is valid and that there are PWGSC-approved tests¹² that support this assertion. It notes as well that, in the Cisco documentation, upon which HRDC relied, no mention is made of Layer 4.

With respect to the “10 Gigabit Ethernet ready” issue, Foundry reiterated that nowhere in the Cisco technical specifications submitted by the three bidders of Cisco products is it stated that the Cisco Catalyst 4000 switch would be 10 Gigabit Ethernet ready. It submitted that it is clear that the proposed Supervisor Engine II and the power supplies, switching fabric and modules are not capable of supporting 10 Gigabit Ethernet and that, to this day, this 10 Gigabit Ethernet is not supported. It added that there is no documentation submitted with the GIR that indicates that the products offered by Ram can meet the mandatory requirement of being 10 Gigabit Ethernet ready. Even though Cisco may manufacture 10 Gigabit modules, it does not manufacture them for the proposed Cisco Catalyst 4000. It submitted that Ram’s response to the RFP in this respect is misleading. As well, contrary to PWGSC’s assertion, it indicated that the FastIron chassis do support 10 Gigabit modules and the IEEE 802.3ae standard.

With respect to the scalability issue, Foundry reiterated that nowhere in the Cisco technical specifications submitted by the three bidders of Cisco products is it stated that the Cisco Catalyst 4000 switch is scalable to 400 Gigabits. It argued that, on the contrary, the Cisco documentation shows that each Cisco Catalyst 4006 chassis only has a backplane that is capable of 24 Gigabits, for a total of 48 Gigabits, which is not compliant.

Foundry submitted that the information provided by the three lowest-priced bidders of Cisco products was misleading to HRDC and PWGSC. As a result, it indicated that it would like these RFP responses re-evaluated in light of the concerns raised in the complaint.

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 the inquiry, it 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 it is required to determine whether the procurement was conducted in accordance with the applicable trade agreements which, in this instance, include NAFTA and the AIT. Although Foundry invoked the AGP, the Tribunal is satisfied that the estimated value of this procurement falls below the monetary threshold applicable under the AGP for the procurement of goods and, therefore, will not address the merits of the complaint under that agreement.

Foundry alleged that PWGSC and HRDC accepted for award a proposal from Ram that did not meet a number of the mandatory minimum requirements set out in the RFP.

Article 1015(4)(a) of NAFTA provides that, to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the tender documentation. Furthermore, Article 1015(4)(d) stipulates that awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation. Article 506(6) of the AIT stipulates that tender documents shall clearly identify the evaluation criteria and methodology to be used in the evaluation of bids.

12. Foundry’s comments on the GIR, section III A, “Wire Speed”.

The Tribunal will determine whether, in evaluating Ram's proposal and in awarding it the contract, PWGSC and HRDC properly applied the evaluation criteria and methodology set out in the RFP. Specifically, it will address whether the Cisco products offered by Ram were capable of wire speed Layer 2 through 4 services, were 10 Gigabit Ethernet ready and provided a backplane scalable to over 400 Gigabits ("Chassis One").

With respect to wire speed at Layers 2 through 4, the Tribunal notes that the parties agree that performance at Layers 3 and 4 is optional. Furthermore, it understands that, in the absence of a set standard to define wire speed, there can be legitimate differences between the parties as to the proper definition of that term. In this instance, apparently, there is more than one reasonable interpretation of the term "wire speed". Given that Foundry was not penalized by adopting a definition allegedly more demanding than the one used by the government in its evaluation of Ram's proposal, it will not interfere with HRDC's determination on this point.

The Tribunal also notes that bidders were required to supply, in their bids, the costs of upgrading to Layers 3 and 4. In the Tribunal's view, this is not an optional requirement. It observes from the documents available on the record¹³ that Ram's bid provided information as to Layer 3, but appears to be silent as to Layer 4. Given its findings and recommendation below, it will not pursue this matter. However, the re-evaluation should address this issue.

With respect to the readiness issue, PWGSC submitted that "ready" meant "upgradable" and that Ram's proposal clearly indicated that the Cisco products that it offered were upgradable to 10 Gigabit Ethernet speeds. Ram's proposal indicated that this could be achieved within three to six months.¹⁴ In the Tribunal's opinion, there is a significant difference between a product that is ready and one that is upgradable within a set time frame. In the absence of any express indication to the contrary set out in the RFP, the Tribunal is of the view that the minimum requirement in the RFP that "products offered be ready" means ready as of the time of bid closing.

The Tribunal, therefore, finds that PWGSC and HRDC improperly concluded that the requirement that the product family proposed be "10 Gigabit Ethernet ready" meant upgradable to 10 Gigabit Ethernet. For this reason, it finds that the evaluation of Ram's proposal was not conducted in accordance with the provisions of Article 1015(4)(a) of NAFTA and Article 506(6) of the AIT.

With respect to the scalability of the backplane of "Chassis One", the Tribunal cannot conclude from the evidence on the record whether the product proposed by Ram met this requirement. If this determination turned on that issue, the Tribunal would have requested additional information before deciding the matter. However, given the determination above and the remedy proposed, in the Tribunal's opinion, it is not necessary to pursue this matter any further.

In light of the above, the Tribunal concludes that PWGSC and HRDC improperly applied at least one mandatory evaluation criterion, namely, that the products offered be 10 Gigabit Ethernet ready. Consequently, the results of the evaluation of Ram's proposal and possibly the evaluation of all proposals of Cisco products are in doubt, and the contract awarded to Ram is in question. To remedy the situation, and considering that the contract has been substantially performed, the Tribunal recommends that the four

13. The missing information may not have been included on the record due to the confidential nature of the costing information. If the case turned on this point, the Tribunal would have requested the information.

14. Foundry's complaint at 000050.

lowest-priced proposals, that is, those of Foundry and the three bidders of Cisco products, be re-evaluated in accordance with the provisions of the RFP and this determination.

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 NAFTA and that the complaint is, therefore, valid.

Pursuant to subsections 30.15(2) and (3) of the CITT Act, the Tribunal recommends that PWGSC re-evaluate the four lowest-priced proposals in accordance with the evaluation criteria and methodology set out in the RFP and this determination. If Foundry's proposal is determined to be the successful one, the Tribunal further recommends that it be compensated for lost profits. The price bid by Foundry will be the basis for determining lost profits.

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

Patricia M. Close
Patricia M. Close
Presiding Member