



Ottawa, Wednesday, July 16, 2003

File No. PR-2003-010

IN THE MATTER OF a complaint filed by Bajai 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 subsection 30.16(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards Bajai Inc. its reasonable costs incurred in preparing and proceeding with the complaint.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Ellen Fry
Ellen Fry
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will follow at a later date.

Date of Determination: July 16, 2003
Date of Reasons: September 10, 2003

Tribunal Members: James A. Ogilvy, Presiding Member
Ellen Fry, Member
Meriel V.M. Bradford, Member

Senior Investigation Officer: Peter Rakowski

Counsel for the Tribunal: Eric Wildhaber

Complainant: Bajai Inc.

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 April 17, 2003, Bajai Inc. (Bajai) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of *Canadian International Trade Tribunal Act*¹ concerning a procurement (Solicitation No. EN994-004552/B) by the Department of Public Works and Government Services (PWGSC). The complaint relates to the use of two amendments to a contract awarded under this solicitation to obtain enterprise licences for Websense Internet filtering software.

Bajai alleged that PWGSC improperly relied on the contract that was awarded under the solicitation as the authority to procure Websense licences. The basis of Bajai's allegation is that a reading of the original Request for Proposal (RFP) relating to the solicitation does not contemplate the purchase of Universal Resource Locator (URL) or Internet filtering software, either implicitly or explicitly. Thus, according to Bajai, PWGSC clearly violated its obligation under the trade agreements to procure the Websense licences in a competitive manner and to conduct the procurement in a transparent and fair manner.

On April 29, 2003, the Tribunal informed the parties that the complaint had been accepted for inquiry pursuant to 30.13(1) of the *CITT Act* and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² On May 26, 2003, PWGSC filed a Government Institution Report (GIR) with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.³ Bajai filed its comments on the GIR on June 5, 2003.

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

The original RFP for this solicitation was issued on March 2, 2001, with a closing date of April 23, 2001, which was subsequently extended to May 14, 2001. The solicitation was to provide the

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
 2. S.O.R./93-602 [*Regulations*].
 3. S.O.R./91-499.

Government Telecommunications and Informatics Services (GTIS), on an as required basis, with the ability to upgrade, replace and augment the existing network infrastructures of Government Enterprise Network Management Service (GENMS) clients with internetwork equipment and to provide support services for the installation of internetwork equipment. A total of 11 amendments were issued, 42 bid packages requested, and 5 proposals received. Three proposals were found compliant, and contracts were issued to GE Capital Information Technology Solutions Inc. (GE Capital) (Contract No. EN994-004552/001-EY) as the main contractor, Bell Nexxia as the first back-up contractor and IBM Canada Ltd. as the second back-up contractor. Websense was purchased through the GE Capital contract. According to PWGSC, the aforementioned contract is for a one-year period, with the Government of Canada having the irrevocable option to extend the term of the contract for up to four additional periods under the same terms and conditions. The value is estimated at a maximum of \$4 million for each year. At the time of the GIR, PWGSC had issued a total of 28 amendments to the three contracts. According to PWGSC, amendment Nos. 8 and 9 to the GE Capital contract were for the purposes of contract administration. Websense was purchased by way of four routine service orders placed directly by PWGSC with GE Capital.

Amendment No. 8, dated October 11, 2002, concerned the following Websense products:

- 15,000 Websense enterprise licences on behalf of the Canada Customs and Revenue Agency (CCRA)
- 15,000 redundancy feature licences on behalf of the CCRA
- 4,500 Websense enterprise licences on behalf of the Department of Indian Affairs and Northern Development (DIAND)
- 250 Websense enterprise licences on behalf of the Canadian Forces Grievance Board (CFGB).

The total value of purchases resulting from amendment No. 8 was \$238,861.45 (including GST). The products were acquired and delivered to the PWGSC client departments by January 1, 2002, some nine months before the amendment.

Amendment No. 9, dated December 20, 2002, concerned 11,000 Websense enterprise licences for the Department of Agriculture and Agri-food. The value of purchases resulting from amendment No. 9 was \$332,973.00 (including GST). The products were acquired and delivered to the PWGSC client department by April 1, 2002, some eight months before the amendment.

In a letter dated June 14, 2002, the Department of Fisheries and Oceans (DFO) advised Bajai that DFO and PWGSC would review and develop the appropriate requirements and issue an RFP with the objective of selecting and implementing the departmental standard for blocking (i.e. Internet filtering) technology during the current fiscal year. According to PWGSC, it considered that this type of technology would be sufficiently developed to warrant a separate procurement to establish a government-wide standard for Internet filtering software.

According to PWGSC, it initiated discussions with GE Capital to reduce the three-year term of some Websense licences to one year to allow for a quick transition to the winning solution under an open competition. PWGSC stated that, on October 1, 2002, it requested that GE Capital submit a revised price for a reduced number of Websense licences for the CCRA and for a reduced licence period of one year. PWGSC indicated that, as a result of this request, the cost increased significantly. According to PWGSC, it attempted to negotiate a reduction in the three-year term of the Websense licences held by the Department

of Agriculture and Agri-food. However, the termination fees were prohibitively expensive, and the term of the licences was not reduced. The licences purchased for the DIAND and the CFGF had a one-year term.⁴ According to PWGSC, it intends to replace the expiring licences held by the DIAND, the CFGF and the Department of Agriculture and Agri-food with licences procured through the competitive process. The licences held by the CCRA are to be replaced through its own competitive process.

On April 8, 2003, in response to previous requests for information, PWGSC informed Bajai by e-mail that it had procured more than \$570,000 worth of software.⁵ It also informed Bajai that these purchases related to amendment Nos. 8 and 9.

On April 17, 2003, Bajai filed its complaint with the Tribunal.

POSITIONS OF THE PARTIES

PWGSC's Position

PWGSC submitted that the RFP expressly covers the purchase of content scanning software from the successful contractor, GE Capital. PWGSC further submitted that the RFP covers Internet filtering software and that section 1.1 of the Statement of Work (SOW) states:

It is the intention of the Crown to procure Internetwork Equipment and Support Services (IESS) for the Government Telecommunications and Informatics Services (GTIS) through the issuance of this Request for Proposal (RFP).

PWGSC submitted that the scope of the RFP, as outlined in section 4.1 of the SOW, makes it clear that clients could use the GE Capital contract to augment their network equipment to satisfy new requirements. PWGSC quoted the following part of section 4.1:

The IESS will include:

- i) The supply of new network equipment for GENMS clients to replace, upgrade or augment existing network equipment where:
...
- c) augment is defined as the requirement to provide Internetwork Equipment to expand the existing network infrastructure to satisfy new requirements.

PWGSC submitted that the term "Internetwork Equipment" is defined in section 5.2 of the SOW to include software products:

The term "Internetwork Equipment" is used in this RFP and is defined as a hardware or software product, differentiated by a product number, supplied by the IESS Contractor to replace, upgrade or augment the existing network infrastructure of a GENMS client.

4. GIR, paras. 21-24.

5. Complaint, Tab 1.

PWGSC submitted that section 5.2.2 of the SOW provides that internetwork equipment is categorized into three classes: (i) router, (ii) switch/hub; and (iii) gateway. PWGSC further submitted that the “Gateway” class is defined in section 5.2.5 as follows:

The Gateway class of Internetwork Equipment consists of hardware and software products that support security applications that operate at layer 7 of the OSI [Open Systems Interconnection] model (Application Layer). These products include but are not limited to: secure gateways, firewalls, network address translation gateways, content scanners, intrusion detection gateways, virus scanners, and network management workstations.

PWGSC submitted that its position that the RFP encompassed web-blocking software is supported by the features that the proposed firewall software was required to have. PWGSC quoted section 4.5.1.1 of Annex A-2 to the RFP, titled “Specification for Product Features”, which states, in part:

The Gateway Internetwork Equipment product Firewall-1 of the Checkpoint OEM Product Set or equivalent must be able to support all of the following features:

- v) Selective web-blocking services;
- xi) Filtering process performed at IP session-state of full proxy for any port.

According to PWGSC, both when the RFP was posted and now, some firewall software has Internet filtering capacity.

PWGSC submitted that the RFP clearly contemplated that its clients, including the CCRA, the DIAND, the CFGB and the Department of Agriculture and Agri-food, would augment their existing network equipment through the purchase of “selective web-blocking software” and “content scanners” from GE Capital.

PWGSC submitted that Websense is “content scanning” software and that it qualifies as internetwork equipment because:

- (i) it is software;
- (ii) it is differentiated by a product number;
- (iii) it was supplied by the IESS Contractor, G.E. Capital, to augment the existing infrastructure of a GENMS client; and
- (iv) it is part of the Gateway Class of Internet Equipment described in the SOW, which specifically lists “content scanners” as a software product that “support[s] security applications”.

PWGSC submitted that, contrary to Bajai’s allegations, the RFP expressly provides for the purchase of content scanners and that Websense is a content scanning software that complies with all the requirements of the “Gateway class of Internetwork Equipment” to be procured through the RFP.

According to PWGSC, the software products in the “Gateway” class of internetwork equipment “that support security applications . . . include but are not limited to: secure gateways, firewalls, network address translation gateways, content scanners, intrusion detection gateways, virus scanners, and network management workstations”. PWGSC submitted, in the alternative, that Websense, as “Internet filtering software” or “content filtering software,” otherwise falls within the “Gateway Class of Internetwork Equipment”.

PWGSC submitted that the complaint ought to be dismissed and requested its costs.

Bajai's Position

Bajai submitted that the RFP does not allow for the separate purchasing of "content scanners". According to Bajai, the RFP sought to purchase internetwork equipment (routers, switches, hubs and other gateway equipment) and some gateway software (firewall software and gateway-based anti-virus software) together with network support services. Bajai submitted that the RFP specified the exact criteria for the internetwork equipment and support services that PWGSC wished to purchase. Bajai submitted that, according to the SOW, there are only two types of software that can be considered in the gateway internetwork equipment class: firewall software and anti-virus software. Furthermore, Bajai submitted that the purchase of content scanners was not contemplated under the RFP.

Bajai contended that, despite the fact that Websense software is not firewall software, PWGSC still attempted to categorize it as such, on the basis that firewall software has a minor functional overlap with Internet filtering software. Bajai submitted that this is absurd and is analogous to comparing Microsoft Word, a word processing program, to Excel, a spreadsheet program, on the basis that there is a minor overlap of functions. Bajai also submitted that Websense is not anti-virus software.

Bajai also submitted that Websense software is not a "content scanner" and does not otherwise fall within the "Gateway Class of Internetwork Equipment", as defined by the RFP. Bajai submitted that, since the original RFP did not encompass the supply of URL or Internet filtering software, either explicitly or implicitly, PWGSC improperly relied on the existing contract to procure Websense licences.

According to Bajai, the fact that PWGSC has recently conducted a solicitation to replace the Websense licences that were improperly procured does not mitigate the damage that was done by the initial improper procurement.

Bajai submitted that it should be compensated for its efforts in bringing the complaint forward and for the lost opportunities with respect to the non-competitive procurement of Websense licences. According to Bajai, its losses due to the non-competitive procurement are far greater than mere lost profits. Bajai submitted that it is being denied the opportunity to compete for a large reference account and that this denial has prejudiced its opportunity to compete in the ongoing competitive procurement for Internet filtering software that is referenced in the GIR. Bajai submitted that it would like any compensation order granted by the Tribunal to reflect this fact.

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, 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 applicable trade agreements.

The issue before the Tribunal is whether the original RFP legitimately allowed for the procurement of Internet filtering software, such as Websense, or whether that procurement contravened the applicable trade agreements.

The original RFP is for the procurement of internetwork equipment. Section D.5 of the RFP states:

The following goods and services may be requested:

- a) for the supply of new internetwork equipment to replace, upgrade or augment existing network for the following product sets:
 - 1) Router Internetwork Equipment class;
 - 2) Switch and HUB Internetwork Equipment class; and
 - 3) Gateway Internetwork Equipment class.

Accordingly, the question that the Tribunal must resolve is whether the term “Internetwork Equipment”, as defined and specified in the RFP, includes the technology purchased under the subject contract.

Section D.5 of the RFP further specifies that “[t]he term ‘Internet Equipment’ is defined in article 5.2.1 of Annex ‘A’ [to the SOW]”. Section D.5 also states that “[a]ll the goods and services required under this contract shall be provided in accordance with the Statement of Work (SOW) attached hereto as Annex ‘A’.”

Section 1.1 of the SOW states that the intent of the RFP is “to procure Internetwork Equipment and Support Services (IESS) for . . . GTIS”. Section 3.1 states that the purpose of the RFP is “to provide GTIS, on an as-needed basis, the ability to upgrade, replace and augment the existing network infrastructures of GENMS Clients with Internetwork Equipment and to provide support services for the installation of Internetwork Equipment.”

Section 4.1 of the SOW states, among other things:

The IESS will include:

- i) The supply of new network equipment for GENMS clients to replace, upgrade or augment existing network equipment where:
...
- c) augment is defined as the requirement to provide Internetwork Equipment to expand the existing network infrastructure to satisfy new requirements.

Accordingly, the Tribunal is satisfied that the IESS contemplated under the RFP includes IESS purchased to satisfy new requirements. The issue is whether Internet filtering software is IESS, as contemplated by the RFP.

Section 5.2.1 of the SOW states that internetwork equipment “is defined as a hardware or software product . . . supplied by the IESS Contractor to replace, upgrade or augment the existing network infrastructure of a GENMS client.”

Section 5.2.2 of the SOW reads: “Internetwork Equipment is categorized into the following classes: i) Router; ii) Switch/Hub; and iii) Gateway (*M*)”. PWGSC submitted that Internet filtering software falls into the “gateway” class. Section 5.2.5 states that “[t]he Gateway class of Internetwork Equipment consists of hardware and software products that support security applications that operate at layer 7 of the OSI model (Application Layer). These products include but are not limited to: secure gateways, firewalls, network

address translation gateways, content scanners, intrusion detection gateways, virus scanners, and network management workstations.” The Tribunal notes that this list, which includes content scanners, is not exhaustive.

In support of its argument, PWGSC quoted section 4.5.1.1 of Annex A-2 to the RFP, which states that “[t]he Gateway Internetwork Equipment product Firewall-1 of the Checkpoint OEM Product Set or equivalent must be able to support all of the following features: . . . v) Selective web-blocking services; . . . xi) Filtering process performed at IP session-state of full proxy for any port”. However, the Tribunal notes that Annex A-2 does not say that gateway equipment must include these web-blocking services and filtering process, but rather that it must support them. Consequently, this mandatory requirement does not confer on PWGSC any authority to contemplate the purchase of Internet filtering software under this procurement.

The Tribunal also notes PWGSC’s argument that Websense is a content scanner and, hence, specifically included in the “Gateway Class of Internetwork Equipment”. In the Tribunal’s view, the evidence supports Bajai’s position that Websense is not a content scanner, in that information being retrieved from the Internet is not examined or “scanned”, and therefore the inclusion of Websense in the “Gateway Class of Internetwork Equipment”, by virtue of its being a content scanner, is unjustified.

Furthermore, in the Tribunal’s opinion, the evidence does not indicate that Websense software is software “that support(s) security applications”, as contemplated in the definition of the “Gateway class of Internetwork Equipment” in article 5.2.5 of the SOW, but rather, as stated in the Websense product literature, it is Internet filtering software that can “analyze, manage and report on employee Internet activity”.⁶ On the basis of the same product literature, the Tribunal is of the view that Websense software assists organizations in enforcing Internet access policies rather than supporting network security applications. In fact, the Websense literature further states that Websense software is “a natural complement to FireWall-1 [a network security mechanism]” and “is a major advantage to users who can now have network security and Internet filtering in one joint solution.” Thus, it is clear to the Tribunal that even Websense itself views its product as software that is distinct from software installed for the purpose of ensuring an organization’s network security.

Accordingly, the Tribunal is not convinced that the RFP, as drafted, allowed for the purchase of an Internet filtering product.

Since the Tribunal finds that the original RFP did not contemplate or permit the procurement of Internet filtering software, the Tribunal now turns to the question of whether its purchase was allowable under the trade agreements, since the procurement was not authorized by the RFP, but still obtained without competition. The Tribunal finds that the procurement of Websense enterprise licences by means of amendment Nos. 8 and 9 amounted to a limited tender or sole sourcing. The Tribunal further finds no adequate justification for this limited tendering and thus finds these procurements of Websense licences in violation of Article 506 of the *Agreement on Internal Trade*,⁷ Article 1016 of the *North American Free Trade Agreement*⁸ and Article XV of the *Agreement on Government Procurement*.⁹ Accordingly, the Tribunal finds that this complaint is valid.

6. Bajai’s submission to the Tribunal dated June 5, 2003, Tab 4 at 1.

7. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>>.

8. 32 I.L.M. 289 (entered into force 1 January 1994).

9. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

In determining an appropriate remedy, the Tribunal considered all the circumstances relevant to this procurement, including those outlined in subsection 30.15(3) of the *CITT Act*. In the Tribunal's view, it was a serious deficiency in the procurement process to use the original RFP to procure goods that it did not cover. Furthermore, this type of deficiency, if repeated, could prejudice the integrity and efficiency of the competitive procurement system as a whole. It is also possible that Bajai and other potential bidders were prejudiced, although the extent of any such prejudice is difficult, if not impossible, to assess. However, any damage caused by PWGSC is mitigated by the actions already taken by PWGSC to initiate a new competitive procurement to replace the licences for Internet filtering software obtained under the subject procurement and to terminate these licences as soon as reasonably possible. Moreover, the evidence does not indicate that PWGSC was not acting in good faith. Consequently, the Tribunal recommends that PWGSC replace the licences by competitive procurement, as planned.

DETERMINATION OF THE TRIBUNAL

In light of the foregoing, and pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid.

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

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