



Ottawa, Monday, July 7, 2003

File No. PR-2003-001

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 not valid.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act* and subject to the limitations found in the statement of reasons, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in relation to responding to the complaint, which costs are to be paid by Bajai Inc.

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 7, 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: Dominique Laporte

Complainant: Bajai Inc.

Government Institution: Department of Public Works and Government Services

Counsel for the Government Institution: Ian McLeod



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

Ottawa, Thursday, July 24, 2003

File No. PR-2003-001

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

CORRIGENDUM

The second paragraph of the determination issued by the Canadian International Trade Tribunal on July 7, 2003, should read as follows: "Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in relation to responding to the complaint, which costs are to be paid by Bajai Inc."

By order of the Tribunal,

Michel P. Granger
Secretary



Ottawa, Wednesday, September 10, 2003

File No. PR-2003-001

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*.

STATEMENT OF REASONS

COMPLAINT

On April 7, 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 the procurement (Solicitation No. EN994-025243/B) by the Department of Public Works and Government Services (PWGSC) for the provision of an Internet filtering solution.

Bajai alleged that, contrary to the trade agreements, the specifications in the solicitation are biased in favour of another supplier, the evaluation methodology favours incumbent solutions, PWGSC did not ensure that bidders had all the relevant evaluation criteria in the RFP and PWGSC made use of option clauses to avoid competitive procurement obligations.

On April 14, 2003, the Tribunal informed the parties that the complaint had been accepted for inquiry pursuant to subsection 30.13(1) of the *CITT Act* and subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.² On May 9, 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 May 22, 2003. On June 3, 2003, PWGSC filed a response to Bajai's comments on the GIR. The Tribunal accepted the filing of these comments. Bajai responded to these comments on June 10, 2003. In response to a Tribunal request dated June 25, 2003, PWGSC filed a further submission on June 27, 2003. Bajai filed comments on this submission on June 30, 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.

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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.

PROCUREMENT PROCESS

The Request for Proposal (RFP) for this solicitation was posted on MERX⁴ on January 27, 2003. The RFP provided for a closing date of March 10, 2003.

Appendix “B” to the RFP contained the following mandatory requirements that are relevant to this complaint:

- 6.1.1 [as amended] The Internet Filtering Solution must have the ability to inter-operate in one of the following two manners. The first manner is the direct processing of the URL request within the environment of devices 7.2.2.2 and 7.2.2.3. The second manner is for the devices in 7.2.2.2 and 7.2.2.3 to direct the URL request to the Internet Filtering Solution.
- i) Inter-operate with Checkpoint, Netscreen, and Cisco PIX firewalls;
 - ii) Inter-operate with one of the following Cisco, Network Appliance and Nortel cache engines.
- 6.1.2 [as amended] The Internet Filtering Solution must be scalable to different sizes of organizations ranging from 25 to 15,000 end users or more. The number of devices to handle the Internet Filtering Solution for the 15,000 end users must be less than 5.
- 6.1.3 [as amended] The Bidder must describe three references where the proposed Internet Filtering Solution is installed. One of the three installations must be of 5,000 end users or more, and of similar nature and scope including support, in a national, distributed environment. The information for each of the references is detailed in Annex “1” –Internet Filtering Solution 6.1.3 – Reference Profiles.
- 6.3.2.1 [as amended] The Internet Filtering Solution must have the ability to block and categorize by URL, the Internet subject matter defined below in (6.3.2.1 i to xvii). However, the subject matter can be grouped or sub-divided into different categories as long as all the subject matter in (6.3.2.1 i to xvii) are categorized.

Examples of the categories referred to are pornography, hate and racism.

- 7.2.2.1 [as amended] The Internet Filtering Solution must run on the following operating systems:
- i) Microsoft Windows NT;
 - ii) Microsoft Windows 2000 (.NET); and
 - iii) Sun Solaris
- 7.2.2.2 [as amended] The Internet Filtering Solution must work with different network environments which include all of the following devices:
- i) Checkpoint Firewall 1 – NG;
 - ii) Cisco PIX Firewall; and
 - iii) Microsoft Proxy Server.

4. Canada’s Electronic Tendering Service.

Sections 8.2 and 8.3 of Appendix “B” to the RFP read as follows:

The Internet Filtering Solution must provide a log rolling database *capability* . . . which must be updated automatically. [Emphasis added]

Sections 9.1.1, 9.3.1, 9.3.2, 9.3.3, 9.3.4 and 9.3.5 of Appendix “B” to the RFP read as follows:

9.1.1 [as amended] The detailed reports and *database* or repository generated by the Internet Filtering Solution must not have any negative impact on Internet access going through the Internet Filtering Solution and network bandwidth consumption.

9.3.1 [as amended] The *reporting database* or repository of the Internet Filtering Solution must contain and report the following columns of information:

- i) User ID
- ii) IP Source and Destination Addresses;
- iii) URL;
- iv) URL category; and
- v) Date and Time and Duration browsing parameters.

9.3.2 [as amended] The reporting database or repository of the Internet Filtering Solution must

- i) Store;
- ii) Archive; and
- iii) Compress

the information as specified in Section 9.3.1 for the following time range:

- a) Daily;
- b) Weekly;
- c) Monthly; and
- d) Yearly.

9.3.3 [as amended] The reporting database or repository must store the information as specified in the Section 9.3.1, compressed or uncompressed format for 15,000 end users for a year.

9.3.4 [as amended] The Internet Filtering Solution must generate the reports from the reporting database or repository using one day of unarchived data for 15,000 end users.

9.3.5 [as amended] The Internet Filtering Solution must allow all the database or repository information as specified in the Section 9.3.1 to be saved in softcopy . . . and be printed in hardcopy.

[Emphasis added]

Annex 1, “Internet Filtering Solution Reference Profiles” [as amended], reads as follows:

The Bidder must provide details on three references by completing this form (3). One of these three references must be 5,000 end users or more in size, and similar in nature and scope including support in a national, distributed environment.

On April 7, 2003, Bajai filed this complaint with the Tribunal. The bid period closed on April 8, 2003. According to PWGSC, 12 proposals were received by bid closing. Bajai did not submit a proposal.

POSITIONS OF PARTIES

PWGSC's Position

PWGSC submitted that, throughout the procurement process, PWGSC's intent was to carry out a competitive process that took advantage of the level of competition that exists in the industry. PWGSC submitted that, at an early stage in the process, it initiated a Letter of Interest to invite comment and suggestions from the industry on the prospective solicitation. The result, according to PWGSC, was that the RFP was drafted with the competitive marketplace in mind.

According to PWGSC, the results of this solicitation confirm that the process, while maintaining essential technical standards, was competitive because PWGSC received 12 proposals. PWGSC further submitted that, far from being limited to resellers of Websense, as suggested by Bajai, these proposals incorporated five different technical solutions, only one of which was Websense technology.

PWGSC denied the allegation that the provisions of the RFP favour Websense and further submitted that an examination of the provisions of the RFP referenced by Bajai fails to provide any support for Bajai's allegations. PWGSC further submitted that many of Bajai's allegations are based on provisions of the RFP that were no longer in effect at the time of the filing of the complaint, having been replaced in amendment No. 11 to the RFP on March 28, 2003, by a series of new provisions. According to PWGSC, Bajai's failure to acknowledge the amendments to these provisions is particularly striking in light of the fact that these amendments were made in direct response to concerns previously submitted by Bajai to PWGSC.

With respect to Bajai's allegation that any proposed solution "inter-operate" with "Checkpoint", "Netscreen" and "Cisco", and that only Websense is capable of doing so, PWGSC submitted that Bajai seems to refer only to the provisions in the original RFP, whereas the pertinent provisions of amendment No. 11 to the RFP, issued 10 days before the filing of the complaint, made it clear that "interoperability" could mean either (1) the solution operating independently of, but not interfering with, the functioning of the devices listed or (2) the solution interacting directly with them, i.e. an "actual plug-in".

With respect to the requirement of a minimum of 5,000 users for one of the client references, PWGSC responded that, throughout this process, it had reduced this requirement as much as possible, while still being consistent with operational requirements. Although the initial RFP required three references, each with at least 15,000 users, at the urging of Bajai and one other supplier, PWGSC amended it to require that only one had to have a minimum of 15,000 users. The other two references no longer required a minimum number of users. Subsequently, in response to Bajai's continuing objections to even this reduced requirement, PWGSC once again, in amendment No. 11 to the RFP, reduced the 15,000 users minimum to 5,000 users.

With respect to the allegation that PWGSC provided insufficient description with respect to the URL categories listed in section 6.3.2.1 of Appendix "B" to the RFP, PWGSC submitted that, in response to the questions submitted by Bajai during the bid period, PWGSC amended section 6.3.2.1 twice, first, by adding "or equivalent" to each listed category and, subsequently, by adding additional descriptions to each category.

PWGSC submitted that it is satisfied that the descriptions of the target subject matters for URLs are reasonable and more than sufficient for suppliers to prepare their proposals. In this regard, PWGSC noted that only Bajai raised any concern regarding this aspect of the solicitation. PWGSC also noted that the URL category descriptions provided to suppliers in the final RFP are not dissimilar from URL category descriptions provided by Bajai to its customers on its own Web site. According to PWGSC, it reviewed this Web site material prior to issuing amendment No. 10 to the RFP.

In response to a request for information from the Tribunal, PWGSC submitted that the initial evaluation of proposals resulted in seven proposals meeting the technical requirements of the RFP, three of which proposed products other than Websense.

Regarding the use of option clauses, PWGSC submitted that the use of options is a common practice of the Government of Canada where appropriate and that Article 1010(2)(a)(i) of the *North American Free Trade Agreement*⁵ specifically provides for the use of options where proper notice is provided.

PWGSC submitted that Bajai's comments with respect to the GIR that pertained to sections 9.1.1 and 6.1.1 of the RFP were untimely and should be dismissed by the Tribunal.

Furthermore, in response to a Tribunal request for further information, PWGSC submitted the following:

- The underlying premise of the complaint, namely, that the terms of the RFP would only permit Websense solutions to be compliant, is baseless.
- It is not necessary for a company to become a Cisco partner in order for its product to be able to meet the requirements of section 6.1.1 of the RFP.
- The RFP requirement for IP source and destination addresses is reasonable since there are inappropriate Web sites that do not have mnemonic addresses.
- Sections 6.1.1, 6.3.2.1, 7.2.2.2, 9.1.1 and 9.3 of Appendix "B" to the RFP are essentially performance requirements.
- Section 6.1.3, which deals with client testimonials, seems to be neither a design nor a performance requirement. It is, however, clearly related to actual previous performance of the proposed solution.

Finally, PWGSC submitted that, in consideration of the character of this complaint and in accordance with the principles set out by the Federal Court of Appeal in *The Attorney General of Canada v. Georgian College of Applied Arts and Technology*,⁶ the Crown should be awarded its costs in this matter.

Bajai's Position

In response to PWGSC's statement that the 12 proposals received by bid closing incorporated five different technical solutions, Bajai submitted that this statistic takes on a different light when it is realized that 7 of the 12 proposals were submitted by Websense resellers. Moreover, according to Bajai, the fact that

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

6. (2 May 2003), A-505-02 (F.C.A.).

there were five different technical solutions proposed has no relevance to whether the RFP is biased toward the Websense specification, as it is entirely possible that all the other technical solutions would be deemed non-compliant with the various mandatory criteria.

Bajai submitted that, as stated in its complaint, there are certain specifications in the RFP⁷ that favour Websense. These, Bajai submitted, are expressed in terms of design criteria (which happen to dovetail exactly with Websense's design), rather than performance criteria.

Bajai submitted that it has never proposed that the mere existence of design-based specifications, alone, amounts to bias. According to Bajai, it has submitted evidence that the solution toward which it believes that the RFP had been biased, Websense, was the design selected for the RFP. Bajai further submitted that the choice of that particular product is simply not necessary. With respect to amendment No. 11 to the RFP, Bajai submitted that this amendment does nothing to address the substance of its complaint. According to Bajai, all the criteria of section 9.3, even as amended with the term "reporting database or repository", are design-specific criteria rather than functional characteristics.

According to Bajai, the GIR has provided no operational justification for specifying the design criteria. Bajai also submitted that the GIR provided no explanation as to why the specifications in the RFP have wording that is copied almost verbatim from the Websense marketing materials.

Bajai submitted that section 6.1.1 of Appendix "B" to the RFP requires that the proposed Internet filtering solutions be able to inter-operate with Cisco PIX firewalls. According to Bajai, Websense is the only software solution that could provide a plug-in for that software. Bajai further submitted that the RFP did not mention interoperability with the Cisco application and content networking software. Bajai also stated that potential bidders could not demonstrate to PWGSC that their solutions operate independently of, while at the same time not interfering with, the functioning of the devices listed unless these bidders had access to the requisite network topologies. According to Bajai, if a solution does not operate as a plug-in, the supplier will need to utilise network topologies in order to be able to meet the mandatory criteria of the RFP.

Bajai submitted that the requirement for a reference account of at least 5,000 seats found in section 6.1.3 of Appendix "B" to the RFP, when such an evaluation criterion is not reflective of the government's true operational requirements, is an unnecessary restriction of competition and prohibited by the applicable trade agreements. Bajai submitted that the method by which the government has chosen to evaluate the scalability performance characteristic has no relevance. Bajai further submitted that a similar issue is the fact that potential bidders had to describe the positive and negative effectiveness of their Internet filtering software by completing the same client profiles. Thus, Bajai submitted, in the RFP as drafted, the effectiveness of the Internet filtering software is not determined by PWGSC tests or an independent third party test but by reference to the same client references, with the same limitation that one such client have more than 5,000 users.

Bajai submitted that the GIR did not provide any substantive answer to its complaint that it was not provided sufficient information to respond to the RFP. According to Bajai, it requires further information with respect to URL categories and network topologies to ensure that it is not unfairly screened out when PWGSC is evaluating compliance with mandatory criteria. Bajai submitted that, if a mere statement that the Internet filtering solution filters the 15 categories cited is not sufficient to meet the mandatory criteria, then potential bidders need to have more information about the make-up of the categories cited in the RFP. Bajai

7. These sections were 6.1.1, 7.2.2.2, 9.1.1 and 9.3 of Appendix "B" to the RFP.

further posed the question as to how potential suppliers can illustrate that their solution has sufficient flexibility to work in a wide variety of present and future network environments, without having access to network topologies. According to Bajai, the answers to these questions are all the more pressing considering that only mandatory criteria are provided in this RFP.

Regarding the use of option clauses, Bajai submitted that it and every other Internet filtering software provider is prejudiced if PWGSC is allowed to structure the procurement as it has indicated. According to Bajai, such a procedure effectively removes a bidder's ability to supply those departments that have not yet decided to utilize Internet filtering solutions and magnifies the harm caused by the non-competitive procurement of the present solution.

Bajai submitted that, as a remedy, the RFP be drafted so that it does not unfairly discriminate against non-Websense solutions and sufficient information be available to ensure that non-Websense suppliers can prove to PWGSC that their solution complies with every one of the mandatory criteria in the RFP. In addition, Bajai sought to have the RFP cancelled and a new solicitation issued that is in accordance with PWGSC's obligations under the trade agreements. Bajai also requested that it be compensated for its complaint costs and for lost opportunity.

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, in this case the *Agreement on Internal Trade*,⁸ *NAFTA* and the *Agreement on Government Procurement*.⁹

PWGSC submitted that elements of the complaint are untimely because they were resolved by amendment No. 11 to the RFP, which was issued more than 10 working days prior to the filing of the complaint. PWGSC also submitted that certain issues raised by Bajai in response to the GIR can also not be considered to be filed in a timely fashion. The Tribunal has considered the timing of the complaint and disagrees with PWGSC that amendment No. 11 rendered the grounds no longer valid at the time of filing. Bajai included amendment No. 11 in its complaint and, while it might have improved the presentation of its complaint by referring to this amendment, there was sufficient indication by Bajai that the amendments, collectively, did not alter its opinion that the solicitation favoured a certain product. The Tribunal, therefore, finds the complaint to have been filed on time.

The grounds of complaint raised by Bajai can be summarized as follows:

- The specifications in the solicitation are biased in favour of a particular product (Websense).
- The evaluation methodology favours incumbent Internet filtering solutions.
- PWGSC did not ensure that bidders had all the relevant criteria for evaluation.
- PWGSC incorporated option clauses to avoid future competitive procurements.

8. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [AIT].

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

Bajai had initially complained about section 8.2 of Appendix “B” to the RFP, but subsequently dropped this ground of complaint. The Tribunal will therefore not address it further.

Biased Specifications

The Tribunal notes that, in most circumstances, the trade agreements prohibit entities from adopting specifications that would bias a procurement in favour of a particular product or service or in favour of a particular supplier. Furthermore, *NAFTA* and the *AGP* require that, where appropriate, technical specifications prescribed by procuring entities be in terms of performance criteria rather than design or descriptive characteristics.¹⁰ The Tribunal observes that amendment No. 11 to the RFP made a number of modifications to the RFP, including section 9.3 of Appendix “B”, which deals with database capabilities. Bajai contends that this section, even as amended, contains design-specific criteria that bias the procurement in favour of Websense. Among the changes made in amendment No. 11, PWGSC inserted the phrase “or repository” to follow the term “reporting database”. Bajai contended that the solution that it would have proposed can provide the required reports without creating a database. It complained that this requirement was based on design rather than performance. The Tribunal notes that Bajai acknowledged that other solutions might use a similar reporting database to allow reporting functions. However, even if this were considered a design criterion, the Tribunal is not convinced that it is inappropriate in the circumstances. Further, the Tribunal observes that this is not a procurement where conformity to the standards, functions and features of a particular brand name or a proprietary solution is mandatory. The fact that other technical solutions might have been able to achieve the same result does not mean that the procuring entity has an obligation to compromise its legitimate operational requirements to accommodate the supplier community.

With respect to sections 9.3.1 to 9.3.5 of Appendix “B” to the RFP, and especially the reporting and storing capability requirements of the reporting database or repository, the Tribunal finds that they are not inappropriate and are described in terms that are in accordance with the trade agreements.

Bajai complained about the requirement of section 6.1.1 of Appendix “B” to the RFP that the proposed Internet filtering solutions be able to inter-operate with the Cisco PIX firewalls and about the apparent requirement for a “plug-in” solution, which only Websense could allegedly satisfy. Section 6.1.1, as amended, reads as follows:

The Internet Filtering Solution must have the ability to inter-operate in one of the following two manners. The first manner is the direct processing of the URL request within the environment of devices 7.2.2.2 and 7.2.2.3. The second manner is for the devices in 7.2.2.2 and 7.2.2.3 to direct the URL request to the Internet Filtering solution.

- i) Inter-operate with Checkpoint, Netscreen and Cisco PIX firewalls;
- ii) Inter-operate with Cisco, Network Appliance and Nortel cache engines.

With respect to Bajai’s concern regarding “plug-in” solutions, the Tribunal accepts PWGSC’s submissions that the requirement of section 6.1.1 of Appendix “B” to the RFP is not limited to a plug-in solution, since it is clear that “interoperability” can mean either (1) the solution operating independently of, but not interfering with, the functioning of the devices listed or (2) the solution interacting directly with them, i.e. an “actual plug-in”. Accordingly, the Tribunal does not consider this specification to have been biased in favour of the Websense product.

10. Articles 1007(1) and (2) of *NAFTA*, Article 504(3)(b) of the *AIT* and Articles VI(1) and (2) of the *AGP*.

In respect of Bajai's complaint regarding the requirement that the Internet filtering solution be able to operate with Cisco PIX firewalls and its allegation that Websense has an exclusive relationship with Cisco PIX and is the only product which can meet this requirement, the Tribunal finds that this ground of complaint is not valid. In the GIR, PWGSC stated that there was no basis for the claim of Websense exclusivity. When asked by the Tribunal if it were possible for a bidder to offer a solution other than Websense which would inter-operate with Cisco PIX firewalls and which would satisfy the requirements of this solicitation, PWGSC indicated that, after the completion of the technical evaluation, three proposals using differing non-Websense technical solutions had been found to be compliant with this mandatory requirement. PWGSC supported this claim by including pertinent technical literature with its response.¹¹ Although the supporting document originally included with the GIR related to different software, rather than to Cisco PIX, the additional literature that PWGSC included with its later response supports its contention that the Cisco PIX firewall is sufficiently versatile to be compatible with a number of different types of software products. The Tribunal is also satisfied with the explanation given by PWGSC that Cisco PIX is one of the three market leaders in the field and that the Internet filtering solution is intended to deal with a broad range of network environments, both current and potential. Accordingly, the solution selected by PWGSC must be able to "inter-operate" with other software products that may be found in various government departments and agencies. Therefore, the Tribunal is satisfied that this constitutes a legitimate operational requirement rather than a biased specification.

Evaluation Methodology

Bajai submits that it is inappropriate to use testimonials to verify the effectiveness of the solutions and to assess scalability. Bajai also submitted that the requirement contained in section 6.1.3 of Appendix "B" to the RFP to describe three installations where the proposed Internet filtering solution is used, one of which must be of 5,000 end users or more, is inappropriate. In Bajai's view, this is an inappropriate test for scalability and, because it requires that one of the testimonials be from a large client, it favours the incumbent solution. Bajai was of the opinion that this requirement was not reflective of the government's operational requirements and unnecessarily restricted competition, contrary to the trade agreements. The Tribunal finds this ground of complaint not valid. The Tribunal notes that, in the course of the tendering process, PWGSC responded to the concerns of potential suppliers, reducing this requirement from three installations with at least 15,000 users each, to three installations, of which only one required 5,000 users. In *Computer Talk Technology*,¹² the Tribunal addressed a similar issue and found that a requirement for three references from customers with a 400 port or greater IVR system was a reasonable requirement in the circumstances. Similarly, given that the Internet filtering solution in the present procurement must be scalable to different sizes of organizations of up to 15,000 end users, the Tribunal finds that this requirement is not unreasonable. Further, contrary to Bajai's argument, the Tribunal is not of the view that this requirement had the effect of favouring the solution of a particular supplier.

Insufficient Information in the RFP

Bajai alleged that, contrary to Article 1013 of *NAFTA*, PWGSC did not ensure that bidders had all the relevant criteria for evaluation. This article reads, in part, as follows:

11. PWGSC's letter dated June 27, 2003, with which are enclosed an excerpt from a Gartner report dated September 25, 2002, an excerpt from the Cisco Web site titled "Find a Partner" and the Cisco data sheet titled "Cisco PIX Firewall Version 6.2".

12. *Re Complaint Filed by Computer Talk Technology, Inc.* (26 February 2001), PR-2000-037 (CITT).

1. Where an entity provides tender documentation to suppliers, the documentation shall contain all information *necessary to permit suppliers to submit responsive tenders*, . . . The documentation shall also include:

- (g) a complete description of the goods and services to be procured and any other requirements, including technical specifications, conformity certification and **necessary plans, drawings** and instructional materials. [Emphasis added]

Article 506(6) of the *AIT* reads as follows:

6. In evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.

Bajai submitted that the RFP did not comply with these requirements in two respects. First, section 6.3.2.1 of Appendix “B” to the RFP, which requires the Internet filtering solution to have the ability to block URLs based on several categories e.g. pornography, hate, racism was, even when taking into account amendment No. 10 to the RPF, still relatively vague and not sufficiently detailed to allow bidders to judge how they would be evaluated. However, the Tribunal is not convinced that the descriptions of the target subject areas for URLs were insufficient for suppliers to prepare their proposals. Amendment No. 10 provided an additional description of the URL categories in question. For example, the URL category for “Hate” was described as follows: “this category contains URLs that have information, but is not limited to sites that [elicit] hatred against individuals or groups of individuals”. The 17 other categories were described in a similar manner.

As to the second aspect of this ground of complaint, which relates to the failure of the RFP to include a network diagram for the environment in which the Internet filtering solution would be implemented, the Tribunal is of the view that PWGSC did not breach Article 1013 of *NAFTA*, nor did it breach the pertinent terms of the *AGP* or the *AIT*, by refusing to provide this information. In its answer to a potential supplier’s question on this issue, PWGSC stated the following: “There is no one standard working environment in the Government of Canada. Each Canadian government department, corporation or agency . . . will establish its own environment. The Crown does not believe a Network Diagram . . . is reasonable nor required. As long as the solution runs with Microsoft Windows and Sun Solaris Operating Environments”.¹³ The Tribunal further notes that the RFP includes a graphic representation identified as “PWGSC Technical Lab Environment”¹⁴ and that, in response to a previous question from a potential supplier, PWGSC had stated, in part, that “The lab setup is representative of a typical installation.”¹⁵

The Tribunal finds that a network diagram, while it might have been helpful to Bajai in submitting its proposal, was not, pursuant to Article 1013 of *NAFTA*, “necessary to permit suppliers to submit responsive tenders”. The Tribunal is also not persuaded that PWGSC fell short of the requirements of Article 506(6) of the *AIT*. These conclusions are supported by the fact that suppliers other than Bajai were able to submit proposals that were found to be technically compliant without the need for further information than was provided.

13. Question and answer 35, complaint, Tab 7 at 4.

14. RFP at 62.

15. Question and answer 34, complaint, Tab 5 at 4.

Option Clauses

Bajai's last ground of complaint is that option clauses are included in this procurement to avoid a future competitive procurement. Article 1015(4)(e) of *NAFTA* stipulates that "option clauses shall not be used in a manner that circumvents this Chapter."¹⁶ Bajai argued that the current RFP should be limited to the requirements of departments that will be using Internet filtering software immediately and that departments that acquire solutions in the future may have requirements not met by the current RFP and, therefore, should tender those requirements as they become necessary. The Tribunal sees no evidence in support of the allegation that the option clause in this RFP is being used or will be used in a manner that circumvents the obligations under Chapter Ten of *NAFTA* or Article XIII(5) of the *AGP*. Departments that have future requirements which would not be met by the current RFP are not obligated to acquire their solutions via the present RFP. Accordingly, the Tribunal finds that this ground of complaint is not valid.

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 not valid.

Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in relation to responding to the complaint, which costs are to be paid by Bajai.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Ellen Fry
Ellen Fry
Member

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

16. Article XIII(5) of the *AGP* contains a similar provision